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Code of Federal Regulations

49

Parts 600 to 999

Revised as of October 1, 2004

Transportation

Containing a codification of documents of general applicability and future effect

As of October 1, 2004

With Ancillaries

Published by
Office of the Federal Register
National Archives and Records
Administration

A Special Edition of the Federal Register

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 2004

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 49 CFR 601.1 *refers to title 49, part 601, section 1.*

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Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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RAYMOND A. MOSLEY,
Director,
Office of the Federal Register.

October 1, 2004.

THIS TITLE

Title 49—TRANSPORTATION is composed of eight volumes. The parts in these volumes are arranged in the following order: Parts 1–99, parts 100–185, parts 186–199, parts 200–399, parts 400–599, parts 600–999, parts 1000–1199, part 1200 to End. The first volume (parts 1–99) contains current regulations issued under subtitle A—Office of the Secretary of Transportation; the second volume (parts 100–185) and the third volume (parts 186–199) contain the current regulations issued under chapter I—Research and Special Programs Administration (DOT); the fourth volume (parts 200–399) contains the current regulations issued under chapter II—Federal Railroad Administration (DOT) and chapter III—Federal Motor Carrier Safety Administration (DOT); the fifth volume (parts 400–599) contains the current regulations issued under chapter IV—Coast Guard (DHS) and chapter V—National Highway Traffic Safety Administration (DOT); the sixth volume (parts 600–999) contains the current regulations issued under chapter VI—Federal Transit Administration (DOT), chapter VII—National Railroad Passenger Corporation (AMTRAK), and chapter VIII—National Transportation Safety Board; the seventh volume (parts 1000–1199) contains the current regulations issued under chapter X—Surface Transportation Board (DOT); and the eighth volume (part 1200 to End) contains the current regulations issued under chapter X—Surface Transportation Board, chapter XI—Bureau of Transportation Statistics, and chapter XII—Transportation Security Administration, Department of Homeland Security. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 2004.

In the volume containing parts 100–185, see §172.101 for the Hazardous Materials Table. The Federal Motor Vehicle Safety Standards appear in part 571.

For this volume, Ruth Green was Chief Editor. The Code of Federal Regulations publication program is under the direction of Frances D. McDonald, assisted by Alomha S. Morris.

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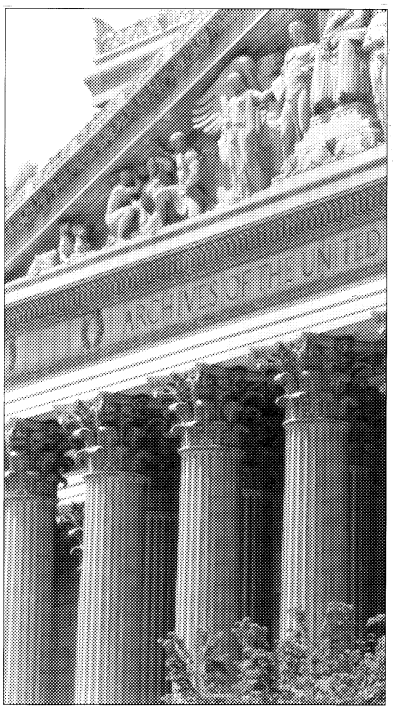

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Title 49—Transportation

(This book contains parts 600 to 999)

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PART 601—ORGANIZATION, FUNCTIONS, AND PROCEDURES

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AUTHORITY: 49 U.S.C. 1657, 1659; Reorganization Plan No. 2 of 1968 (82 Stat. 1369); 49 CFR 1.51.

Subpart A—General

SOURCE: 41 FR 56808, Dec. 30, 1976, unless otherwise noted.

§ 601.1 Purpose.

This part describes the organization or the Federal Transit Administration (''FTA'') an operating administration within the Department of Transportation. This part also describes the general responsibilities and authority of the officials directing the various offices of which FTA is composed. In addition, this part describes the sources and locations of available FTA program information.

§ 601.2 Organization of the Administration.

(a) The headquarters organization of FTA is composed of 10 principal offices which function under the overall direction of the Federal Transit Administrator (''the Administrator'') and Deputy Administrator. These offices are:

(1) Office of the Administrator.

(2) Office of the Associate Administrator for Administration.

(3) Office of Chief Counsel.

(4) Office of Civil Rights.

(5) Office of Public Affairs.

(6) Office of the Associate Administrator for Transit Assistance.

(7) Office of the Associate Administrator for Policy and Program Development.

(8) Office of the Associate Administrator for Transportation Planning.

(9) Office of the Associate Administrator for Transportation Management and Demonstrations.

(10) Office of the Associate Administrator for Technology Development and Deployment.

The Administrator receives staff support from the Executive Secretariat which coordinates internal document dissemination and project assignments and ensures policy compliance.

(b) The Office of the Administrator and the Offices of Chief Counsel, Public Affairs, the Associate Administrator for Administration, the Associate Administrator for Transit Assistance, the Associate Administrator for Policy and Program Development, and the Associate Administrator for Transportation Planning are located in the Department of Transportation Building, 400 7th Street, SW., Washington, DC 20590. The Offices of Civil Rights, the Associate Administrator for Technology Development and Deployment, and the Associate Administrator for Transportation Management and Demonstrations are located in the Transpoint Building, 2100 2nd Street, SW., Washington, DC 20590.

Region/States	Office/address	Telephone No.
I—Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.	FTA Representative, c/o Transportation Systems Center, Kendall Square, Room 277, 55 Broadway, Cambridge, Mass. 02142.	617–494–2055
II—New York, New Jersey, Puerto Rico, and Virgin Islands.	FTA Representative, 26 Federal Plaza, Suite 507, New York, N.Y. 10007.	212–264–8162
III—Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia.	FTA Representative, 434 Walnut St., Suite 1010, Philadelphia, Pa. 19106.	215–597–8098
IV—Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.	FTA Representative, 1720 Peachtree Rd. NW., Suite 400, Atlanta, Ga. 30309.	404–526–3948
V—Illinois, Indiana, Minnesota, Michigan, Ohio, and Wisconsin.	FTA Representative, 300 South Wacker Dr., Suite 1740, Chicago, Ill. 60606.	312–353–0100
VI—Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.	FTA Representative, 819 Taylor St., Suite 3A32, Fort Worth, Tex. 76102.	817–334–3787

Region/States	Office/address	Telephone No.
VII—Iowa, Kansas, Missouri, and Nebraska	FTA Representative, 6301 Pork Hill Rd., Room 303, Kansas City, Mo. 64131.	816–926–5053
VIII—Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.	FTA Representative, Prudential Plaza, Suite 1822, 1050 17th St., Denver, Colo. 80202.	303–837–3242
IX—Arizona, California, Hawaii, Nevada, Guam, and American Samoa.	FTA Representative, Two Embarcadero Center, Suite 620, San Francisco, Calif. 94111.	415–556–2884
X—Alaska, Idaho, Oregon, and Washington	FTA Representative, Federal Bldg., Suite 3106, 915 2d Ave., Seattle, Wash. 98174.	206–442–4210

§ 601.3 General responsibilities.

The general responsibilities of each of the offices which comprise the headquarters organization of FTA are:

(a) *Office of the Associate Administrator for Administration.* Directed by an Associate Administrator for Administration, this office provides general administrative support services for FTA, including financial management, personnel administration, audit, procurement, logistical and management information systems.

(b) *Office of Chief Counsel.* Directed by a Chief Counsel, this office provides legal advice and services to the Administrator and other FTA officials; coordinates with and provides support to the General Counsel of DOT on matters involving urban mass transportation; and, provides liaison between FTA and the Department of Labor regarding the administration of section 13(c) of Federal Mass Transit Act of 1964, as amended (''the Act'').

(c) *Office of Public Affairs.* Directed by a Director of Public Affairs, this office advises and assists the Administrator in the area of public relations and in the dissemination to the public and the news media of information about FTA programs, projects and activities.

(d) *Office of the Associate Administrator for Policy and Program Development.* Directed by an Associate Administrator for Policy and Development, this office advises and assists the Administrator in the development and evaluation of policies and plans for implementing the functions and programs authorized by the Act; coordinates FTA activities with those of other agencies; and manages and administers the University Research Program under section 11 of the Act (49 U.S.C. 1607(c)). This office has three organizational components: The Office of Policy Development; the Office of Program Evaluation; and the Office of Policy Research.

(e) *Office of the Associate Administrator for Transit Assistance.* Directed by an Associate Administrator for Transit Assistance, this office reviews and processes all applications for urban mass transportation capital and operating assistance grants and loans under sections 3, 4, 5, 16 and 17 of the Act (49 U.S.C. 1602, 1603, 1604, 1612 and 1613); reviews and processes applications for Federal assistance to the Washington Metropolitan Area Transit Authority (WMATA) under the Transportation Act of 1972 and the National Capital Area Transit Act of 1972; directs the evaluation and analysis of proposed annual programs and individual programs and individual projects; and approves and recommends for approval annual programs and individual projects. This office has three operating components which direct and coordinate post-approval grant activities: the Office of Grant Assistance, the Office of Program Support, and the Office of Program Analysis.

(f) *Office of the Associate Administrator for Transportation Planning.* Directed by an Associate Administrator for Transportation Planning, this office assists the Administrator in directing, coordinating and controlling FTA's transportation planning assistance and reviews planning activities both in relation to FTA-supported State and local actions and planning policy interaction within the Department of Transportation and with other Federal agencies; and administers grants to States and local public bodies under section 9 of the Act (49 U.S.C. 1607a). This office has two organizational components: the Office of Planning Assistance and the Office of Planning Methodology and Technical Support.

(g) *Office of the Associate Administrator for Transportation Management and*

Demonstrations. Directed by an Associate Administrator for Transportation Management and Demonstrations, this office assists the Administrator in directing, conducting and controlling research and demonstration activities, including information dissemination, to foster the development of methods for improving transit management and operations from the perspectives of the operator and the user; administers grant and procurement contracts to demonstrate facilities, methods and techniques under section 6(a) of the Act (49 U.S.C. 1605), and managerial training fellowship grants under section 10 of the Act (49 U.S.C. 1607b). This office has two organizational components: the Office of Transit Management and the Office of Service and Methods Demonstrations.

(h) *Office of the Associate Administrator for Technology Development and Deployment.* Directed by an Associate Administrator for Technology Development and Deployment, this office is responsible for developing and administering a program of research, development, testing, evaluation, operational demonstration, product qualification, standardization, analysis, and information exchange concerning new products intended for use in transportation systems assisted by FTA. The office is also responsible for FTA's safety and system assurance function and for advising the Administrator on matters relating to technology. This office administers research, development and demonstration projects under section 6(a) of the Act (49 U.S.C. 1605).

(i) *Office of Civil Rights.* Directed by a Director of Civil Rights, this office advises and assists the Administrator and other FTA officials in implementing compliance with applicable laws and directives pertaining to civil rights and equal employment opportunity, both within FTA and in the conduct of urban mass transportation projects and programs.

§ 601.4 Responsibilities of the Administrator.

The Administrator is responsible for the planning, direction, and control of the activities of FTA and has authority to approve urban mass transportation grants, loans, and contracts. The Deputy Administrator is the ''first assistant'' for purposes of the Federal Vacancies Reform Act of 1998 (Pub. L. 105–277) and shall, in the event of the absence or disability of the Administrator, serve as the Acting Administrator, subject to the limitations in that Act. In the event of the absence or disability of both the Administrator and the Deputy Administrator, officials designated by the agency's internal order on succession shall serve as Acting Deputy Administrator and shall perform the duties of the Administrator, except for any non-delegable statutory and/or regulatory duties.

[64 FR 61033, Nov. 9, 1999]

Subpart B—Delegations

§ 601.10 Delegations of authority.

(a) Pursuant to authority delegated to the Administrator by 49 CFR 1.45(b) and 1.51 of the regulations of the Office of the Secretary of Transportation, the following powers and duties of the Administrator are redelegated to the officials indicated—

(1) The Associate Administrator for Transit Assistance is delegated authority to execute grant contracts, loan agreements, and amendments thereto with respect to approved capital and operating grants, loans and advanced land acquisition loan projects under sections 3, 4, 5, 16 and 17 of the Act (49 U.S.C. 1602, 1603, 1604, 1612 and 1613); under limited circumstances review and approve applications for grants and grant amendments under the FT Act and section 110 of the Federal-Aid Highway Act of 1976 and 121(a) of the Federal-Aid Highway Act of 1973, as amended (23 U.S.C. 103 (e) (4) and 142). The Associate Administrator is further authorized, in connection with the administration of those projects, to approve requisitions for funds, third-

party contracts, and project budget amendments within previously authorized limits.

(2) The Associate Administrator for Policy and Program Development is delegated authority to execute and amend grant contracts and amendments for university research and training projects under section 11 of the Act (49 U.S.C. 1607c). The Associate

Administrator is further authorized in connection with the administration of those projects to approve requisitions for funds, third-party contracts and project budget amendments within previously authorized limits.

(3) The Associate Administrator for Technology Development and Deployment is delegated authority to execute and amend grant contracts and procurement requests for approved projects under section 6(a) of the Act (49 U.S.C. 1605); The Associate Administrator is further authorized, in connection with the administration of grant contracts, procurement contracts, interagency reimbursable agreements and purchase orders, to approve requisitions for funds, third-party contracts, and project budget amendments within previously authorized limits.

(4) The Associate Administrator for Transportation Planning is delegated authority to execute and amend grant contracts and interagency agreements for planning, engineering, architectural feasibility and operational improvement study projects under section 9 of the Act (48 U.S.C. 1607a); review and approve grant applications and grant amendments requested pursuant to section 9 of the Act by urbanized areas of less than 500,000 population. The Associate Administrator is further authorized in connection with the administration of such contracts to approve requisitions for funds, third-party contracts and project budget amendments within previously authorized limits.

(5) The Associate Administrator for Transportation Management and Demonstrations is delegated authority to execute and amend grant contracts for projects designed to demonstrate facilities, methods and techniques of transit management and operations under section 6(a) of the Act (49 U.S.C. 1605) and for approved managerial training fellowship projects under section 10 of the Act (49 U.S.C. 1607b). The Associate Administrator is further authorized, in connection with the administration of such projects to approve requisitions for project funds, third-party contracts and project budget amendments within previously authorized limits.

(b) All authority delegated to an official listed in paragraph (a) of this section may be redelegated by that official to one or more employees under his jurisdiction.

[41 FR 56809, Dec. 30, 1976]

Subpart C—Public Availability of Information

§ 601.20 Sources of information.

(a) The Federal Transit Administration has published a series of internal and external directives which contain the history, organization, policy, procedures, criteria, guidelines, interpretations and general regulations formulated and adopted by FTA as guidance for grant recipients, and the general public. All directives are listed in FTA Notice N 0000.17 ''Directives Checklist.''

(b) Single copies of the checklist or any directive may be obtained without charge upon written request either to the Director, Office of Public Affairs, Federal Transit Administration, Room 9314, 400 Seventh Street, SW., Washington, DC 20590, or any Federal Transit Administration regional office listed in § 601.2.

(c) The Federal Transit Administration maintains, under the supervision of the Director of Public Affairs, a document inspection facility in Room 9314 at the headquarters of the Department of Transportation Building (Nassif Building), 400 Seventh Street, SW., Washington, DC 20590, through which the following FTA documents may be obtained:

(1) An index to, and copies of, the internal and external directives of the Federal Transit Administration.

(2) Any proposed or final regulation issued by the Federal Transit Administration, and any background information for these regulations.

(d) Any person desiring to inspect any of these records, or obtain a copy thereof, must submit a request in writing, specifying the record to be inspected or copied to the Director, Office of Public Affairs, Federal Transit Administration, Room 9314, 400 Seventh Street, SW., Washington, DC 20590, accompanied by the appropriate

fee for copies prescribed in 49 CFR part 7, subpart I.

(Authority: 5 U.S.C. 552; 49 U.S.C. 1657; 49 CFR 7.1(d))

[47 FR 55684, Dec. 13, 1982]

PART 604—CHARTER SERVICE

Subpart A—General

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604.3 Applicability.
604.5 Definitions.
604.7 Charter agreement.
604.9 Charter service.
604.11 Procedures for determining if there are any willing and able private charter operators.
604.13 Reviewing evidence submitted by private charter operators.

Subpart B—Complaint Process

604.15 Filing a complaint.
604.17 Remedies.
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APPENDIX A TO PART 604

AUTHORITY: 49 U.S.C. 5323(d); 23 U.S.C. 103(e)(4); 142(a); and 142(c); and 49 CFR 1.51.

SOURCE: 52 FR 11933, Apr. 13, 1987, unless otherwise noted.

Subpart A—General

§ 604.1 Purpose.

The purpose of this part is to implement section 3(f) and section 12(c)(6) of the FT Act.

§ 604.3 Applicability.

This part applies to all applicants and recipients of Federal financial assistance under:

(a) Sections 3 (excluding section 16(b)(2)), 5, 9A, 9 or 18 of the FT Act; or

(b) Sections 103(e)(4), 142(a), or 142(c) of Title 23 United States Code which permit the use of Federal-Aid Highway funds to purchase buses.

§ 604.5 Definitions.

(a) All definitions in the FT Act (at 49 U.S.C. 1608) are applicable to this part, except as may otherwise be provided in this section.

(b) *The Acts* means the FT Act and those parts of Title 23 United States Code, 23 U.S.C. 103(e)(4), 142(a) and 142(c), that provide for assistance to public bodies for purchasing buses.

(c) *Administrator* means the Administrator of FTA or his or her designee.

(d) *Categories of Revenue Vehicle* means bus or van.

(e) *Charter Service* means transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment.

(f) *Chief Counsel* means the Chief Counsel of FTA.

(g) *Days* means calendar days in subpart A and Federal working days in subpart B.

(h) *Designated Official* means the applicant's and recipient's employee authorized to file applications on behalf of the applicant or to enter into agreements on behalf of the recipient.

(i) *Incidental Charter Service* means charter service which does not: (1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities.

(j) *Interested Party* means an individual, partnership, corporation, association, or public or private organization that has a financial interest which is adversely affected by the act or acts of a recipient regarding charter service.

(k) *Non-urbanized area* means an area with a population of less than 50,000 people.

(l) *Recipient* means one that has received or is receiving Federal financial assistance under the Acts. The term includes subrecipients of a recipient, subrecipients in FTA's State administered programs, public bodies that receive assistance that will be passed on to another public or quasi-public body, any

operator for a recipient, whether publicly or privately owned, and may include lessees of federally assisted buses and other equipment. For any FTA State administered program, the State is the recipient.

(m) *State Administered Program* means any FTA grant program in which the State is the recipient of funds, passes the funds to subrecipients, and administers the program for FTA.

(n) *FT Act* means the Federal Mass Transit Act of 1964, as amended, 49 U.S.C. 1601 *et seq.*

(o) *FTA* means the Federal Transit Administration.

(p) *Willing and able* means having the desire, having the physical capability of providing the categories of revenue vehicles requested, and possessing the legal authority, including the necessary safety certifications, licenses and other legal prerequisites, to provide charter service in the area in which it is proposed to be provided.

§ 604.7 Charter agreement.

(a) Every applicant for financial assistance under sections 3 (excluding section 16(b)(2)), 5, 9A, 9 or 18 of the FT Act, or under 23 U.S.C. 103(e)(4), 142(a) or 142(c), must include two copies of a charter bus agreement signed by the applicant's designated official with each grant application submitted to FTA after May 13, 1987. For FTA's State administered programs, the State is the applicant.

(b) The text of the agreement must be as follows:

I, (name), (title), agree that (name of applicant) and all recipients through (name of applicant) will provide charter service that uses equipment or facilities provided under the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1601 *et seq.*) or under 23 U.S.C. 103(e)(4), 142(a) or 142(c) (the Acts) only to the extent that there are no private charter service operators willing and able to provide the charter service that (name of applicant) and all recipients through (name of applicant) desire to provide unless one or more of the exceptions in 49 CFR 604.9 applies.

I further agree that (name of applicant) and all recipients through (name of applicant) will comply with the provisions in 49 CFR part 604 before they provide any charter service using equipment or facilities provided under the Acts, that the requirements of 49 CFR part 604 will apply to any such charter service that is provided, and that the definitions in 49 CFR part 604 apply to this agreement.

Applicant

_____

Name

_____

Title

_____

Date

Federal Transit Administration

_____

Name

_____

Title

_____

Date

(c) If FTA approves the grant application, the approving official shall sign the agreement when the grant application is approved. One copy of the signed agreement will be retained by FTA and the other copy will be returned to the recipient, formerly the applicant.

(d) Once the applicant and FTA enter into a charter agreement, the applicant may incorporate that agreement by reference into any subsequent grant application instead of submitting an agreement under 49 CFR 604.7(a).

(e) Each State in FTA's State administered programs must:

(1) Obtain a certification of compliance with this part from each of its current subrecipients within 60 days of May 13, 1987. The certification shall state: ''(Name of subrecipient) certifies that it shall comply with 49 CFR part 604 in the provision of any charter service provided with FTA funded equipment or facilities.'';

(2) Retain this certification as long as the subrecipient is a subrecipient; and

(3) Assure in each application submitted to FTA after May 13, 1987, that all subrecipients have submitted the certification.

(f) If any recipient does not anticipate submitting a grant application to FTA during Federal fiscal year 1987, the recipient must submit two copies

of the agreement set forth in §604.7(b) of this part within 60 days of May 13, 1987, to the appropriate FTA regional office. FTA will sign the agreement, retain one copy of the agreement and return the other to the recipient.

(Approved by the Office of Management and Budget under Control No. 2132–0543)

§604.9 Charter service.

(a) If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service which the recipient desires to provide. To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in §604.9(b) applies.

(b) *Exceptions.* (1) A recipient may provide any and all charter service with FTA funded equipment and facilities to the extent that there are no willing and able private charter operators.

(2) A recipient may enter into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if:

(i) The private charter operator is requested to provide charter service that exceeds its capacity; or

(ii) The private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself.

(3) A recipient in a non-urbanized area may petition FTA for an exception to provide charter service directly to the customer if the charter service provided by the willing and able private charter operator or operators would create a hardship on the customer because:

(i) The willing and able private charter operator or operators impose minimum durations pursuant to State regulation and the desired trip length is shorter than the mandatory trip length; or

(ii) The willing and able private operator or operators are located too far from the origin of the charter service.

(4) Any recipient may petition the Administrator for an exception to provide charter service directly to the customer for special events to the extent that private charter operators are not capable of providing the service.

(5) A recipient may execute a contract with a government entity or a private, non-profit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

(i) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; there will be a significant number of handicapped persons as passengers on this charter trip; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, section 19 of the Federal Mass Transit Act of 1964, as amended, and 49 CFR part 27; or, 45 CFR part 80; or,

(ii) [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; [the entity/organization] is a qualified social service agency under appendix A of 49 CFR part 604, as a recipient of funds, either directly or indirectly, under one or more of the Federal programs listed in appendix A; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Federal Mass Transit Act of 1964, as amended, and 49 CFR part 27; or, 45 CFR part 80.

(iii) [the entity/organization] certifies that it is a government entity or organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal

Revenue Code; [the entity/organization] either receives or is eligible to receive directly or indirectly, from a State or local governmental body public welfare assistance funds for purposes whose implementation may require the transportation of a group of transit-advantaged or transit-dependent persons; following a petition presented by the State in which the entity or organization resides, FTA has determined in writing that an FTA recipient may contract directly with the entity or organization for charter services; the requested charter trip is consistent with the functions and purposes of the entity or organization; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and section 19 of the Federal Mass Transit Act of 1964, as amended, and 49 CFR part 27; or, 45 CFR part 80.

(6) A recipient in a non-urbanized area may execute a contract with a government entity or a private, nonprofit organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code to provide charter service upon obtaining a certification from that entity or organization which states that:

> [the entity/organization] certifies that it is a government entity or an organization exempt from taxation under subsection 501(c)(1), 501(c)(3), 501(c)(4), or 501(c)(19) of the Internal Revenue Code; more than 50% of the passengers on this charter trip will be elderly; the requested charter trip is consistent with the function and purpose of [the entity/organization]; and the charter trip will be organized and operated in compliance with Title VI of the Civil Rights Act of 1964, as amended; and, Section 19 of the Federal Mass Transit Act of 1964, as amended, and 49 CFR part 27; or, 45 CFR part 80.

(7) A recipient may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all private charter operators it has determined to be willing and able in accordance with this part, provided that:

(i) The agreement specifically allows the recipient to provide the particular type of charter trip;

(ii) The recipient has provided for such an agreement in its annual public charter notice published pursuant to this part before undertaking any charter service pursuant to this exception; and

(iii) If a recipient has received several responses to its annual public charter notice but ceased its review process after determining that one private operator was willing and able, it must, before concluding a formal charter agreement under this section, complete the review process to ensure that all the willing and able private operators are valid parties to the agreement.

(8) During the demonstration period described in paragraph (b)(8)(iv) of this section, recipients in the FTA-selected sites may submit applications to provide charter service to an advisory panel equally representative of public transit providers or local business organizations and local private operators, and which has either been created for such purpose by the grantee, the State Department of Transportation (State DOT), or metropolitan planning organization (MPO), or which is part of the recipient's existing private sector consultation process.

(i) The advisory panel will forward these applications to the State DOT or MPO, which will grant those recommended by unanimous vote of the advisory panel.

(ii) If the advisory panel does not unanimously endorse an application, the State DOT or MPO will make a decision to grant or deny the application based on the following criteria:

(A) *Cost evaluation.* A recipient may provide charter service when it can do so at a significantly lower cost than can private charter operators. Cost differences may be considered significant when there is approximately a twenty percent difference between the average charge for service by private operators and the recipient's fully allocated cost of providing the service, or when the advisory panel determines them to be significant.

(B) *Equipment uniqueness.* A recipient may provide charter service using equipment that is not available from a private source, when such equipment is essential to the purpose of the charter trip.

(C) *Service nature.* A recipient may provide unscheduled or demand responsive service that could not be provided

by a private operator without advance notice or at a substantial surcharge to the customer.

(D) *Specific local factors.* A recipient may provide service which responds to a clear need that cannot be met by the local private sector, and which is important to the economic or social health and vitality of the local area.

(iii) The State DOT or MPO may not grant applications to provide service that would jeopardize the economic vitality of individual private charter operators or would seriously detract from private charter business.

(iv) The service described in this subsection may be provided only during the demonstration program to be conducted through October 31, 1995, in the following sites:

(A) Monterey, California;

(B) Oklahoma City, Oklahoma;

(C) St. Louis, Missouri;

(D) Yolo County, California;

(E) Four sites within the State of Michigan.

(c) The process for requesting and granting an exception under 49 CFR 604.9(b)(3):

(1) The recipient must provide the private charter operators that it has determined are willing and able in accordance with this part with a written notice explaining why it is seeking an exception and state that they have at least 30 days to submit written comments to the recipient on the request;

(2) The recipient must send a copy of the notice, all comments received, and any further information it desires in support of its request to the Chief Counsel.

(3) The Chief Counsel shall review the materials submitted and issue a written decision denying or granting in whole or in part the request. In making this decision, the Chief Counsel may seek such additional information as the Chief Counsel determines is needed.

(4) Any exception that the Chief Counsel grants under 49 CFR 604.9(b)(3) shall be effective for not longer than 12 months from the date that the Chief Counsel grants it.

(d) The process for requesting and granting and exception under 49 CFR 604.9(b)(4):

(1) The recipient must submit its petition for an exception to the Administrator at least 90 days prior to the day or days on which it desires to provide charter service.

(2) The petition must describe the event, explain how it is special, and explain the amount of charter service which private charter operators are not capable of providing.

(3) The Administrator will review the materials and issue a written decision denying or granting in whole or in part the request. In making this decision, the Administrator may seek such additional information as the Administrator determines is needed.

(4) Any exception granted by the Administrator under 49 CFR 604.9(b)(4) shall be effective solely for the event for which the recipient requests an exception.

(e) Any charter service that a recipient provides under any of the exceptions in this part must be incidental charter service.

[52 FR 11933, Apr. 13, 1987, as amended at 53 FR 53355, Dec. 30, 1988; 58 FR 36899, July 9, 1993; 58 FR 52685, Oct. 12, 1993; 59 FR 51134, Oct. 7, 1994]

§ 604.11 Procedures for determining if there are any willing and able private charter operators.

(a) To determine if there is at least one private charter operator willing and able to provide the charter service that the recipient desires to provide, the recipient must complete a public participation process:

(1) At least 60 days before it desires to begin to provide charter service if it is not doing so on May 13, 1987; or

(2) Not more than 90 days after May 13, 1987 if the recipient is providing charter service on May 13, 1987 and desires to continue to provide charter service.

(b) The public participation process must at a minimum include:

(1) Placing a notice in a newspaper, or newspapers, of general circulation within the proposed geographic charter service area;

(2) Sending a copy of the notice to all private charter service operators in the proposed geographic charter service area and to any private charter service operator that requests notice;

(3) Sending a copy of the notice to the United Bus Owners of America ,

1300 L Street, NW., suite 1050, Washington, DC 20005, and the American Bus Association, 1100 New York Avenue, NW, Suite 1050, Washington, DC 20005–3934.

(c) The notice must:

(1) State the recipient's name;

(2) Describe the charter service that the recipient proposes to provide limited to the days, times of day, geographic area, and categories of revenue vehicle, but not the capacity or the duration of the charter service.

(3) Include a statement providing any private charter operator desiring to be considered willing and able with at least 30 days from the date of the notice to submit written evidence to prove that it is willing and able;

(4) State the address to which the evidence must be sent.

(5) Include a statement that the evidence necessary for the recipient to determine if a private charter operator is willing and able includes only the following:

(i) A statement that the private operator has the desire and the physical capability to actually provide the categories of revenue vehicle specified; and

(ii) A copy of the documents to show that the private charter operator has the requisite legal authority to provide the proposed charter service and that it meets all necessary safety certification, licensing and other legal requirements to provide the proposed charter service.

(6) Include a statement that the recipient shall review only that evidence submitted by the deadline, shall complete its review within 30 days of the deadline, and within 60 days of the deadline shall inform each private operator that submitted evidence what the results of the review are.

(7) Include a statement that the recipient shall not provide any charter service using equipment or facilities funded under the Acts to the extent that there is at least one willing and able private charter operator unless the recipient qualifies for one or more of the exceptions in 49 CFR 604.9(b).

(d) Any recipient that desires to continue to provide charter service using FTA funded equipment or facilities shall follow the procedures in 49 CFR 604.11 (b) and (c) annually during the month in which it published its first newspaper notice to redetermine the extent to which there is at least one willing and able private charter operator.

(e) Any recipient, including the State in State administered programs, may elect to comply with this procedure for all of its subrecipients, or delegate this responsibility to the subrecipients, or delegate this responsibility to only some of its subrecipients.

(Approved by the Office of Management and Budget under Control No. 2132–0543)

[52 FR 11933, Apr. 13, 1987, as amended at 55 FR 34932, Aug. 27, 1990; 59 FR 43778, Aug. 25, 1994]

§ 604.13 Reviewing evidence submitted by private charter operators.

(a) The recipient shall review the evidence submitted in response to the notice given under 49 CFR 604.11 within 30 days of the deadline for the submission of evidence.

(b) Within 60 days of the deadline for the submission of evidence, the recipient shall notify each private charter operator that submitted evidence of the recipient's decision.

(c) The recipient must review the evidence submitted to determine if the evidence proves that the private charter operator has:

(1) The desire and the physical capability to actually provide charter service using the categories of revenue vehicles; and

(2) The required legal authority and the necessary safety certifications, licenses and other legal requirements to provide charter service.

(d) The recipient must determine that a private charter operator which meets the requirements in 49 CFR 604.13(c) is willing and able.

(e) A recipient may look behind the evidence submitted by a private charter operator only if the recipient has reasonable cause to believe that some or all of the evidence has been falsified.

(f) A recipient may, within its discretion, stop reviewing the evidence submitted by private charter operators when the recipient has determined that there is one or more private charter operators willing and able to provide all

of the charter service that the recipient proposed to provide in its notice. A recipient may, however, review the evidence submitted by all private charter operators and create a roster of willing and able private charter operators.

(g) The entity that complies with the public participation process under 49 CFR 604.11(e) shall be responsible for complying with the requirements in 49 CFR 604.13.

(Approved by the Office of Management and Budget under Control No. 2132–0543)

Subpart B—Complaint Process

§ 604.15 Filing a complaint.

(a) An interested party (''complainant'') who believes that a recipient is in violation of the requirements of this part may submit a written complaint to the FTA Regional Administrator. The complainant shall also send a copy of the complaint to the recipient (''respondent'').

(b) If the Regional Administrator determines that the complaint is not without obvious merit and that it states grounds on which relief may be granted, the Regional Administrator shall advise the complainant and respondent to attempt to conciliate the dispute. The period for informal conciliation shall last for up to 30 days from the date of receipt of the Regional Administrator's order unless an extension is mutually agreed upon by the parties.

(c) If the parties are unable to conciliate the dispute, either party may so notify the Regional Administrator in writing. The Regional Administrator shall send a copy of the complaint to the respondent and provide it with 30 days from the receipt of the notice to provide written evidence to show that no violation has occurred. The respondent shall provide a copy of this information to the complainant.

(d) After the Regional Administrator receives that respondent's evidence, the Regional Administrator shall inform the complainant that it has 30 days from the receipt of the notice to rebut the respondent's evidence. The complainant shall provide a copy of its rebuttal to the respondent.

(e) The Regional Administrator shall review the evidence submitted and prepare a written decision. The Regional Administrator shall attempt to transmit the written decision to the parties within 30 days of receiving all of the evidence.

(f) If the Regional Administrator determines that further investigation is necessary, including the submission of additional information or the holding of an informal evidentiary hearing, the Regional Administrator shall so inform the parties in writing.

(g) Either party may request an informal evidentiary hearing prior to the transmission of the Regional Administrator's decision. The Regional Administrator may grant or deny the request.

(h) If an informal evidentiary hearing is held, the date and location shall be arranged by the Regional Administrator in consultation with the parties. Any new evidence introduced by the parties at the informal evidentiary hearing shall be submitted to the Regional Administrator within 10 days after the hearing.

(i) The Regional Administrator may extend the deadlines imposed in this part for administrative convenience by notifying all parties in writing of the extensions.

[52 FR 11933, Apr. 13, 1987, as amended at 58 FR 52685, Oct. 12, 1993]

§ 604.17 Remedies.

(a) If the Regional Administrator determines that a violation of this part has occurred, the Regional Administrator may order such remedies as the Regional Administrator determines are appropriate.

(b) If the Regional Administrator determines that there has been a continuing pattern of violation of this part, the Regional Administrator may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equipment.

[52 FR 11933, Apr. 13, 1987, as amended at 58 FR 52685, Oct. 12, 1993]

§ 604.19 Appeals.

(a) The losing party may appeal the Regional Administrator's decision to the Administrator within 10 days of receipt of the decision. The losing party

(''appellant'') shall include in its appeal the basis for the appeal and evidence to support the position. The appellant shall send a copy of the appeal to the prevailing party (''appellee'').

(b) The Administrator will only take action on an appeal if the appellant presents evidence that there are new matters of fact or points of law that were not available or not known during the investigation of the complaint.

(c) If the Administrator takes action on an appeal, the Administrator shall provide the appellee with 10 days from the receipt of the notice to respond to the evidence contained in the appeal.

(d) The Administrator shall send a copy of the appellee's response to the appellant and provide it with 10 days from the receipt of the notice to rebut the appellee's response.

(e) The Administrator shall endeavor to make a final determination on the appeal within 10 days of the receipt of the appellant's rebuttal.

[52 FR 11933, Apr. 13, 1987, as amended at 58 FR 52685, Oct. 12, 1993]

§ 604.21 Judicial review.

The Regional Administrator's decision, or the Administrator's decision on appeal, shall be final and conclusive on all parties, but it is subject to judicial review pursuant to sections 701–706 of Title 5 of the United States Code.

[52 FR 11933, Apr. 13, 1987, as amended at 58 FR 52685, Oct. 12, 1993]

APPENDIX A TO PART 604

The following is a list of Federal assistance programs administered under the United States Department of Health and Human Services (HHS). The financial assistance under each of these HHS programs includes funding for the transportation needs of the program beneficiaries.

Program title	Agency
Project Grant and Cooperative Agreements for Tuberculosis Control Programs.	Public Health Service, HHS.
Mental Health Service for Cuban Entrants.	Public Health Service, HHS.
Mental Health Planning and Demonstration Projects.	Public Health Service, HHS.
Alcohol, Drug Abuse Treatment and Rehabilitation Block Grant.	Public Health Service, HHS.
Family Planning-Services	Public Health Service, HHS.
Community Health Centers ...	Public Health Service, HHS.
Indian Health Services—Health Management Development Program.	Public Health Service, HHS.
Migrant Health Centers Grants.	Public Health Service, HHS.
Childhood Immunization Grants.	Public Health Service, HHS.
Administration for Children, Youth and Families (ACYF)—Head Start.	Office of Human Development Services, HHS.
ACYF Child Welfare Research and Demonstration Program.	Office of Human Development Services, HHS.
ACYF Runaway and Homeless Youth.	Office of Human Development Services, HHS.
ACYF Adoption Opportunities	Office of Human Development Services, HHS.
ACYF Child Abuse and Neglect (State Grants).	Office of Human Development Services, HHS.
ACYF Child Abuse and Neglect Discretionary.	Office of Human Development Services, HHS.
Administration for Native Americans (ANA) Native American Programs—Financial Assistance Grants.	Office of Human Development Services, HHS.
ANA Research, Demonstration and Evaluation.	Office of Human Development Services, HHS.
ANA Training and Technical Assistance.	Office of Human Development Services, HHS.
Administration of Developmental Disabilities (ADD)—Basic Support and Advocacy Grants.	Office of Human Development Services, HHS.
ADD Special Projects	Office of Human Development Services, HHS.
ADD University Affiliated Facilities.	Office of Human Development Services, HHS.
Administration on Aging (ADA) Special Programs for the Aging—Grants for Supportive Services and Senior Centers.	Office of Human Development Services, HHS Title III, Part B—
ADA Title III, Part C, Nutrition Services.	Office of Human Development Services, HHS.
ADA Grants to Indian Tribes	Office of Human Development Services, HHS.
ADA Training, Research and Discretionary Projects and Programs.	Office of Human Development Services, HHS.
Social Service Block Grant ...	Office of Human Development Services, HHS.
Medical Assistance Program Title XIX.	Health Care Financing Medicaid; Administration, HHS.
Medicare—Supplemental Medical Insurance.	Health Care Financing Administration, HHS.0
Aid to Families with Dependent Children (AFDC)—Maintenance Assistance.	Family Support Administration, HHS.
Work Incentive Program	Family Support Administration, HHS.
Community Service Block Grant (CSBG).	Family Support Administration, HHS.
CSBG Discretionary Awards	Family Support Administration, HHS.
CSBG Discretionary Awards—Community Food and Nutrition.	Family Support Administration, HHS.
Social Security—Disability Insurance.	Social Security Administration, HHS.
Supplemental Security Income.	Social Security Administration, HHS.
Home Health Services and Training.	Public Health Service, HHS.

Program title	Agency
Coal Miners Respiratory Impairment Treatment Clinics and Services.	Public Health Service, HHS.
Preventive Health Services—Sexually Transmitted Diseases Control Grants.	Public Health Service, HHS.
Health Programs for Refugees.	Public Health Service, HHS.

[53 FR 53355, Dec. 30, 1988]

PART 605—SCHOOL BUS OPERATIONS

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APPENDIX A TO PART 605

AUTHORITY: Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1601 *et seq.*); 23 U.S.C. 103(e)(4); 23 U.S.C. 142 (a) and (c); and 49 CFR 1.51.

SOURCE: 41 FR 14128, Apr. 1, 1976, unless otherwise noted.

Subpart A—General

§ 605.1 Purpose.

(a) The purpose of this part is to prescribe policies and procedures to implement section 109(a) of the National Mass Transportation Assistance Act of 1974 (Pub. L. 93–503; November 26, 1974; 88 Stat. 1565). Section 109(a) adds a new section 3(g) to the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(g)) and differs from section 164(b) of the Federal-Aid Highway Act of 1973 (49 U.S.C. 1602a(b)) in that section 3(g) applies to all grants for the construction or operation of mass transportation facilities and equipment under the Federal Mass Transit Act, and is not limited to grants for the purchase of buses as is section 164(b).

(b) By the terms of section 3(g) no Federal financial assistance may be provided for the construction or operation of facilities and equipment for use in providing public mass transportation service to an applicant unless the applicant and the Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel, in competition with private school bus operators.

§ 605.2 Scope.

These regulations apply to all recipients of financial assistance for the construction or operation of facilities and equipment for use in providing mass transportation under: (a) The Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1601 *et seq.*); (b) 23 U.S.C. 142 (a) and (c); and 23 U.S.C. 103 (e)(4).

§ 605.3 Definitions.

(a) Except as otherwise provided, terms defined in the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1604, 1608) are used in this part as so defined.

(b) For purposes of this part—

The Acts means the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1601 *et seq.*); 23 U.S.C. 142 (a) and (c); and 23 U.S.C. 103(e)(4).

Administrator means the Federal Mass Transit Administrator or his designee.

Adequate transportation means transportation for students and school personnel which the Administrator determines conforms to applicable safety laws; is on time; poses a minimum of discipline problems; is not subject to fluctuating rates; and is operated efficiently and in harmony with state educational goals and programs.

Agreement means a contractual agreement required under section 3(g) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(g)).

Applicant means applicant for assistance under the Acts.

Assistance means Federal financial assistance for the purchase of buses and the construction or operation of facilities and equipment for use in providing mass transportation services under the Acts, but does not include research, development and demonstration projects funded under the Acts.

Grant contract means the contract between the Government and the grantee which states the terms and conditions for assistance under the Acts.

Government means the Government of the United States of America.

Grantee means a recipient of assistance under the Acts.

Incidental means the transportation of school students, personnel and equipment in charter bus operations during off peak hours which does not interfere with regularly scheduled service to the public (as defined in the Opinion of the Comptroller General of the United States, B160204, December 7, 1966, which is attached as appendix A of this part).

Interested party means an individual, partnership, corporation, association or public or private organization that has a financial interest which is adversely affected by the act or acts of a grantee with respect to school bus operations.

Reasonable Rates means rates found by the Administration to be fair and equitable taking into consideration the local conditions which surround the area where the rate is in question.

School bus operations means transportation by bus exclusively for school students, personnel and equipment in Type I and Type II school vehicles as defined in Highway Safety Program Standard No. 17.

Tripper service means regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems. Buses used in tripper service must be clearly marked as open to the public and may not carry designations such as ''school bus'' or ''school special''. These buses may stop only at a grantee or operator's regular service stop. All routes traveled by tripper buses must be within a grantee's or operator's regular route service as indicated in their published route schedules.

Urban area means the entire area in which a local public body is authorized by appropriate local, State and Federal law to provide regularly scheduled mass transportation service. This includes all areas which are either: (a) Within an ''urbanized area'' as defined and fixed in accordance with 23 CFR part 470, subpart B; or (b) within an ''urban area'' or other built-up place as determined by the Secretary under section 12(c)(4) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1608(c)(4)).

§ 605.4 Public hearing requirement.

Each applicant who engages or wishes to engage in school bus operations shall afford an adequate opportunity for the public to consider such operations at the time the applicant conducts public hearings to consider the economic, social or environmental effects of its requested Federal financial assistance under section 3(d) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(d)).

Subpart B—School Bus Agreements

§ 605.10 Purpose.

The purpose of this subpart is to formulate procedures for the development of an agreement concerning school bus operations.

§ 605.11 Exemptions.

A grantee or applicant may not engage in school bus operations in competition with private school bus operators unless it demonstrates to the satisfaction of the Administrator as follows:

(a) That it operates a school system in its urban area and also operates a separate and exclusive school bus program for that school system; or

(b) That private school bus operators in the urban area are unable to provide adequate transportation, at a reasonable rate, and in conformance with applicable safety standards; or

(c) That it is a state or local public body or agency thereof (or a direct predecessor in interest which has acquired the function of so transporting schoolchildren and personnel along with facilities to be used therefor) who was so engaged in school bus operations:

(1) In the case of a grant involving the purchase of buses—anytime during the 12-month period immediately prior to August 13, 1973.

(2) In the case of a grant for construction or operating of facilities and equipment made pursuant to the FT Act as amended (49 U.S.C. 1601 *et seq.*), anytime during the 12-month period immediately prior to November 26, 1974.

§ 605.12 Use of project equipment.

No grantee or operator of project equipment shall engage in school bus operations using buses, facilities or equipment funded under the Acts. A grantee or operator may, however, use such buses, facilities and equipment for the transportation of school students, personnel and equipment in incidental charter bus operations. Such use of project equipment is subject to part 604 of Federal Mass Transit Regulations.

§ 605.13 Tripper service.

The prohibition against the use of buses, facilities and equipment funded under the Acts shall not apply to tripper service.

§ 605.14 Agreement.

Except as provided in § 605.11 no assistance shall be provided under the Acts unless the applicant and the Administrator shall have first entered into a written agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators.

§ 605.15 Content of agreement.

(a) Every grantee who is not authorized by the Administrator under § 605.11 of this part to engage in school bus operations shall, as a condition of assistance, enter into a written agreement required by § 605.14 which shall contain the following provisions:

(1) The grantee and any operator of project equipment agrees that it will not engage in school bus operations in competition with private school bus operators.

(2) The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement, part 605 of the Federal Mass Transit Regulations, or section 164(b) of the Federal-Aid Highway Act of 1973 (49 U.S.C. 1602a(b)).

(b) Every grantee who obtains authorization from the Administrator to engage in school bus operations under § 605.11 of this part shall, as a condition of assistance, enter into a written agreement required by § 605.14 of this part which contains the following provisions:

(1) The grantee agrees that neither it nor any operator of project equipment will engage in school bus operations in competition with private school bus operators except as provided herein.

(2) The grantee, or any operator of project equipment, agrees to promptly notify the Administrator of any changes in its operations which might jeopardize the continuation of an exemption under § 605.11.

(3) The grantee agrees that it will not engage in any practice which constitutes a means of avoiding the requirements of this agreement, part 605 of the Federal Transit Administration regulations or section 164(b) of the Federal-Aid Highway Act of 1973 (49 U.S.C. 1602a(b)).

(4) The grantee agrees that the project facilities and equipment shall

be used for the provision of mass transportation services within its urban area and that any other use of project facilities and equipment will be incidental to and shall not interfere with the use of such facilities and equipment in mass transportation service to the public.

§ 605.16 Notice.

(a) Each applicant who engages or wishes to engage in school bus operations shall include the following in its application:

(1) A statement that it has provided written notice to all private school bus operators operating in the urban area of its application for assistance and its proposed or existing school bus operations;

(2) A statement that it has published in a newspaper of general circulation in its urban area a notice of its application and its proposed or existing school bus operations;

(b) The notice required by paragraphs (a) (1) and (2) of this section shall include the following information:

(1) A description of the area to be served by the applicant.

(2) An estimation of the number of each type of bus which will be employed on the proposed school bus operations, and the number of weekdays those buses will be available for school bus operations.

(3) A statement of the time, date, and place of public hearings required under section 3(d) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(d)), to be held on the application for assistance.

(4) A statement setting forth reasons the applicant feels it should be allowed to engage in school bus operations under § 605.11 of this part.

(c) Copies of the application for assistance and notice required by paragraph (a) of this shall be available for inspection during the regular business hours at the office of the applicant.

§ 605.17 Certification in lieu of notice.

If there are no private school bus operators operating in the applicant's urban area, the applicant may so certify in its application in lieu of meeting the requirements of § 605.16. This certification shall be accompanied by a statement that the applicant has published, in a newspaper of general circulation in its urban area, a notice stating that it has applied for assistance as provided under § 605.16(b) and that it has certified that there are no private school bus operators operating in its urban area. A copy of the notice as published shall be included.

§ 605.18 Comments by private school bus operators.

Private school bus operators may file written comments on an applicant's proposed or existing school bus operations at the time of the public hearing held pursuant to section 3(d) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(d)). The comments of private school bus operators must be submitted by the applicant to the Administrator together with the transcript of this public hearing.

§ 605.19 Approval of school bus operations.

(a) The Administrator will consider the comments filed by private school bus operators prior to making any findings regarding the applicant's proposed or existing school bus operations.

(b) After a showing by the applicant that it has complied with the requirements of 49 U.S.C. 1602(d) and this subpart, the Administrator may approve its school bus operations.

(c) If the Administrator finds that the applicant has not complied with the notice requirement of this part or otherwise finds that the applicant's proposed or existing school bus operations are unacceptable, he will so notify the applicant in writing, stating the reasons for his findings.

(d) Within 20 days after receiving notice of adverse findings from the Administrator, an applicant may file written objections to the Administrator's findings or submit a revised proposal for its school bus operations. If an applicant revises its proposed or existing school bus operations, it shall mail a copy of these revisions along with the findings of the administrator to private school bus operators required to be notified under § 605.16.

(e) Private school bus operators who receive notice under paragraph (d) of this section may within 20 days after

receipt of notice file written comments on the proposed revisions with the Administrator. The Administrator will consider these comments prior to his approval of a proposed revision by the applicant.

(f) Upon receipt of notice of approval of its school bus operations, the applicant may enter into an agreement with the Administrator under § 605.14.

Subpart C—Modification of Prior Agreements and Amendment of Application for Assistance

§ 605.20 Modification of prior agreements.

(a) Any grantee which, prior to the adoption of this part, entered into an agreement required by section 164(b) of the Federal-Aid Highway Act of 1973 (49 U.S.C. 1602(a)(b)), or section 3(g) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(g)), who engages or wishes to engage in school bus operations in competition with private school bus operators, shall seek modification of that agreement in accordance with paragraphs (b) through (d) of this section.

(b) The grantee shall develop a statement setting forth in detail the reasons it feels it should be allowed to engage in school bus operations under § 605.11 of this part. A copy of the statement should be provided private school bus operators who provide service in the grantee's urban area.

(c) The grantee shall allow 30 days for persons receiving notice under this section to respond with written comments concerning its proposed or existing school bus operations.

(d) After receiving written comments, the grantee shall send his proposal with written comments thereon to the Administrator for his review under § 605.17.

§ 605.21 Amendment of applications for assistance.

Pending applications for assistance upon which public hearings have been held pursuant to section 3(d) of the Federal Mass Transit Act of 1964, as amended (49 U.S.C. 1602(d)), and applications which have been approved by the Administrator but for which no grant contract has been executed, shall be amended by the applicant to conform to this part by following the procedures of § 605.20(b) through (d).

Subpart D—Complaint Procedures and Remedies

§ 605.30 Filing a complaint.

Any interested party may file a complaint with the Administrator alleging a violation or violations of terms of an agreement entered into pursuant to § 605.14. A complaint must be in writing, must specify in detail the action claimed to violate the agreement, and must be accompanied by evidence sufficient to enable the Administrator to make a preliminary determination as to whether probable cause exists to believe that a violation of the agreement has taken place.

§ 605.31 Notification to the respondent.

On receipt of any complaint under § 605.30, or on his own motion if at any time he shall have reason to believe that a violation may have occurred, the Administrator will provide written notification to the grantee concerned (hereinafter called ''the respondent'') that a violation has probably occurred. The Administrator will inform the respondent of the conduct which constitutes a probable violation of the agreement.

§ 605.32 Accumulation of evidentiary material.

The Administrator will allow the respondent not more than 30 days to show cause, by submission of evidence, why no violation should be deemed to have occurred. A like period shall be allowed to the complainant, if any, during which he may submit evidence to rebut the evidence offered by the respondent. The Administrator may undertake such further investigation, as he may deem necessary, including, in his discretion, the holding of an evidentiary hearing or hearings.

§ 605.33 Adjudication.

(a) After reviewing the results of such investigation, including hearing transcripts, if any, and all evidence submitted by the parties, the Administrator will make a written determination as to whether the respondent has

engaged in school bus operations in violation of the terms of the agreement.

(b) If the Administrator determines that there has been a violation of the agreement, he will order such remedial measures as he may deem appropriate.

(c) The determination by the Administrator will include an analysis and explanation of his findings.

§ 605.34 Remedy where there has been a violation of the agreement.

If the Administrator determines, pursuant to this subpart, that there has been a violation of the terms of the agreement, he may bar a grantee or operator from the receipt of further financial assistance for mass transportation facilities and equipment.

§ 605.35 Judicial review.

The determination of the Administrator pursuant to this subpart shall be final and conclusive on all parties, but shall be subject to judicial review pursuant to title 5 U.S.C. 701–706.

Subpart E—Reporting and Records

§ 605.40 Reports and information.

The Administrator may order any grantee or operator for the grantee, to file special or separate reports setting forth information relating to any transportation service rendered by such grantee or operator, in addition to any other reports required by this part.

APPENDIX A TO PART 605

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, DC, December 7, 1966.

DEAR MR. WILSON: The enclosure with your letter of October 4, 1966, concerns the legality of providing a grant under the Federal Mass Transit Act of 1964 to the City of San Diego, (City), California. The problem involved arises in connection with the definition in subsection 9(d)(5) of the Act, 49 U.S.C. 1608(d)(5), excluding charter or sightseeing service from the term ''mass transportation.''

It appears from the enclosure with your letter that the City originally included in its grant application a request for funds to purchase 8 buses designed for charter service. Subsequently the City amended its application by deleting a request for a portion of the funds attributable to the charter bus coaches. However, in addition to the 8 specially designed charter buses initially applied for, the City allegedly uses about 40 of its transit type buses to a substantial extent for charter-type services. In light of these factors surrounding the application by the City, the enclosure requests our opinion with regard to the legality of grants under the Act as it applies to certain matters (in effect questions), which are numbered and quoted below and answered in the order presented.

Number one:

''The grant of funds to a City to purchase buses and equipment which are intended for substantial use in the general charter bus business as well as in the Mass Transportation type business.''

The Federal Mass Transit Act of 1964 does not authorize grants to assist in the purchase of buses or other equipment for any service other than urban mass transportation service. Section 3(a) of the Act limits the range of eligible facilities and equipment to ''* * * buses and other rolling stock, and other real or personal property needed for an efficient and coordinated mass transportation system.'' In turn, ''mass transportation'' is defined, in section 9(d)(5) of the Act, specifically to exclude charter service. We are advised by the Department of Housing and Urban Development (HUD) that under these provisions, the Department has limited its grants to the purchase of buses of types suitable to meet the needs of the particular kind of urban mass transportation proposed to be furnished by the applicant.''

HUD further advises that:

''One of the basic facts of urban mass transportation operations is that the need for rolling stock is far greater during the morning and evening rush hours on weekdays than at any other time. For that reason, any system which has sufficient rolling stock to meet the weekday rush-hour needs of its customers must have a substantial amount of equipment standing idle at other times, as well as drivers and other personnel being paid when there is little for them to do. To relieve this inefficient and uneconomical situation, quite a number of cities have offered incidental charter service using this idle equipment and personnel during the hours when the same are not needed for regularly scheduled runs. Among the cities so doing are Cleveland, Pittsburgh, Alameda, Tacoma, Detroit and Dallas.

''Such service contributes to the success of urban mass transportation operations by bringing in additional revenues and providing full employment to drivers and other employees. It may in some cases even reduce the need for Federal capital grant assistance.

''We do not consider that there is any violation of either the letter or the spirit of the Act as a result of such incidental use f buses in charter service. To guard against abuses, every capital facilities grant contract made

by this Department contains the following provisions:

''Sec. 4. *Use of Project Facilities and Equipment*—The Public Body agrees that the Project facilities and equipment will be used for the provision of mass transportation service within its urban area for the period of the useful life of such facilities and equipment. . . . The Public Body further agrees that during the useful life of the Project facilities and equipment it will submit to HUD such financial statements and other data as may be deemed necessary to assure compliance with this Section.' ''

It is our view that grants may be made to a city under section 3(a) of the Act to purchase buses needed by the city for an efficient and coordinated mass transportation system, even though the city may intend to use such buses for charter use when the buses are not needed on regularly scheduled runs (i.e. for mass transportation purposes) and would otherwise be idle.

Number two:

''Whether a grant of such funds is proper if charter bus use is incidental to mass public transportation operations. If so, what is the definition of *incidental use.*''

We are advised by HUD that under its legislative authority, it cannot and does not take charter service requirements into consideration in any way in evaluating the needs of a local mass transportation system for buses or other equipment.

HUD further advises that:

''However, as indicated above, we are of the opinion that any lawful use of project equipment which does not detract from or interfere with the urban mass transportation service for which the equipment is needed would be deemed an incidental use of such equipment, and that such use of project equipment is entirely permissible under our legislation. What uses are in fact incidental, under this test, can be determined only on a case-by-case basis.''

In view of what we stated above in answer to the first question, the first part of question two is answered in the affirmative.

As to the second part of the question, in *Security National Insurance Co.* v. *Secuoyah Marina,* 246F.2d 830, ''incident'' is defined as meaning ''that which appertains to something else which is primary.'' Thus, we cannot say HUD's definition of *incidental use* as set forth above is unreasonable. Under the Act involved grants may be made to purchase buses only if the buses are needed for an efficient and coordinated mass transportation system. It would appear that if buses are purchased in order to meet this need, and are, in fact, used to meet such need, the use of such buses for charter service when not needed for mass transportation services would, in effect, be an ''incidental use,'' insofar as pertinent here. In our opinion such incidental use would not violate the provisions of the 1964 Act.

Number three:

''The grant of funds for mass public transportation purposes to a City which has expressed an intent to engage in the general charter bus business when such funds would in effect constitute a subsidy to the City of its intended charter bus operations; i.e. freeing Municipal funds with which to purchase charter bus equipment.''

Section 4(a) of the 1954 Act (49 U.S.C. 1603(a)) provides, in part, as follows:

''* * * The Administrator (now Secretary), on the basis of engineering studies, studies of economic feasibility, and data showing the nature and extent of expected utilization of the facilities and equipment, shall estimate what portion of the cost of a project to be assisted under section 1602 of this title cannot be reasonably financed from revenues—which portion shall hereinafter be called 'net project cost'. The Federal grant for such a project shall not exceed two-thirds of the net project cost. The remainder of the net project cost shall be provided, in cash, from sources other than Federal funds * * *.''

It is clear from the legislative history of the Act involved that the ''revenues'' to be considered are mass transportation system revenues including any revenues from incidental charter operations. There is nothing in the language of the Act which requires HUD to take into account the status of the general funds of an applicant city in determining how much capital grant assistance to extend to that city.

It should be noted that in a sense nearly every capital grant to a city constitutes a partial subsidy of every activity of the city which is supported by tax revenues, since it frees tax revenues for such other uses.

Number four:

''With specific reference to the application of the City of San Diego for funds under its application to the Department of Housing and Urban Development dated June 2, 1966, whether the Act permits a grant to purchase equipment wherein 25 percent of such equipment will be used either exclusively or substantially in the operation of charter bus services.''

As to the City of San Diego's grant application, we have been advised by HUD as follows:

''As explained above, the Act authorizes assistance only for facilities to be used in mass transportation service. We could not, therefore, assist San Diego in purchasing any equipment to be used 'exclusively' in the operation of charter bus service. Furthermore, as also explained above, assisted mass transportation equipment can be used only incidentally for such charter services.

''Whether equipment used 'substantially' in such service qualifies under this rule can be answered only in the light of the specifics

of the San Diego situation. * * * we have already, during our preliminary review of the City's application, disallowed about $150,000 of the proposed project cost which was allocated to the purchase of eight charter-type buses.

''The final application of the City of San Diego is presently under active consideration by this Department. In particular, we have requested the City to furnish additional information as to the nature and extent of the proposed use, if any, of project facilities and equipment in charter service, so that we can further evaluate the application under the criteria above set forth. We have also requested similar information from Mr. Fredrick J. Ruane, who has filed a taxpayers' suit (Superior Court for San Diego County Civil #297329) against the City, contesting its authority to engage in charter bus operations.''

As indicated above, it is clear that under the Act in question grants may not legally be made to purchase buses to be used ''exclusively'' in the operation of charter bus service. However, in view of the purposes of the Act involved it is our opinion that a city which has purchased with grant funds buses needed for an efficient mass transportation system, is not precluded by the act from using such buses for charter service during idle or off-peak periods when the buses are not needed for regularly scheduled runs. As indicated above, such a use would appear to be an incidental use.

The fourth question is answered accordingly.

As requested, the correspondence enclosed with your letter is returned herewith.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

Enclosures:
The Honorable Bob Wilson, House of Representatives.

MARCH 29, 1976.

INFLATIONARY IMPACT STATEMENT

FINAL REGULATIONS ON SCHOOL BUS OPERATIONS

I certify that, in accordance with Executive Order 11821, dated November 27, 1974, and Departmental implementing instructions, an Inflationary Impact Statement is not required for final regulations on School Bus Operations.

ROBERT E. PATRICELLI,
Federal Mass Transit Administrator.

PART 609—TRANSPORTATION FOR ELDERLY AND HANDICAPPED PERSONS

Sec.
609.1 Purpose.
609.3 Definitions.
609.5 Applicability.
609.23 Reduced fare.
APPENDIX A TO PART 609—ELDERLY AND HANDICAPPED

AUTHORITY: 49 U.S.C. 5307(d) and 5308(b); 23 U.S.C. 134, 135 and 142; 29 U.S.C. 794; 49 CFR 1.51.

SOURCE: 41 FR 18239, Apr. 30, 1976, unless otherwise noted.

§ 609.1 Purpose.

The purpose of this part is to establish formally the requirements of the Federal Transit Administration (FTA) on transportation for elderly and handicapped persons.

§ 609.3 Definitions.

As used herein:

Elderly and handicapped persons means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

§ 609.5 Applicability.

This part, which applies to projects approved by the Federal Transit Administrator on or after May 31, 1976, applies to all planning, capital, and operating assistance projects receiving Federal financial assistance under sections 5307 or 5308 of the Federal transit laws (49 U.S.C. Chapter 53), and non-highway public mass transportation projects receiving Federal financial assistance under: (1) Subsection (a) or (c) of section 142 of title 23, United States Code; and (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code. However, under certain circumstances evident in

§§609.13 through 609.21, the latter sections apply to fixed facilities and vehicles included in projects approved before May 31, 1976. Sections in this part on capital assistance applications, fixed facilities, and vehicles apply expressly to capital assistance projects receiving Federal financial assistance under any of the above statutes.

[41 FR 18239, Apr. 30, 1976, as amended at 61 FR 19562, May 2, 1996]

§609.23 Reduced fare.

Applicants for financial assistance under section 5307 of the Federal transit laws (49 U.S.C. Chapter 53), must, as a condition to receiving such assistance, give satisfactory assurances, in such manner and form as may be required by the Federal Transit Administrator and in accordance with such terms and conditions as the Federal Transit Administrator may prescribe, that the rates charged elderly and handicapped persons during non-peak hours for transportation utilizing or involving the facilities and equipment of the project financed with assistance under this section will not exceed one-half of the rates generally applicable to other persons at peak hours, whether the operation of such facilities and equipment is by the applicant or is by another entity under lease or otherwise.

[41 FR 18239, Apr. 30, 1976, as amended at 61 FR 19562, May 2, 1996]

APPENDIX A TO PART 609—ELDERLY AND HANDICAPPED

The definitions of the term *elderly and handicapped* as applied under FTA's elderly and handicapped half-fare program (49 CFR part 609) shall apply to this rule. This permits a broader class of handicapped persons to take advantage of the exception than would be permitted under the more restrictive definition applied to the non-discrimination provisions of the Department's section 504 program (49 CFR 27.5), which includes only handicapped persons otherwise unable to use the recipient's bus service for the general public.

Accordingly, for the purposes of this part, the definition of *elderly persons* may be determined by the FTA recipient but must, at a minimum, include all persons 65 years of age or over.

Similarly, the definition of *handicapped persons* is derived from the existing regulations at 49 CFR 609.3 which provide that *Handicapped persons* means those individuals who, by reason of illness, injury, age, congenital malfunction, or other permanent or temporary incapacity or disability, including those who are nonambulatory wheelchair-bound and those with semi-ambulatory capabilities, are unable without special facilities or special planning or design to utilize mass transportation facilities and services as effectively as persons who are not so affected.

To assist in understanding how the definitions might be applied to administration of the charter rule, the following questions and answers previously published by FTA for the half-fare program in FTA C 9060.1, April 20, 1978, are reproduced:

1. *Question:* Can the definition of *elderly* or *handicapped* be restricted on the basis of residency, citizenship, income, employment status, or the ability to operate an automobile?

Answer: No. Section 5(m) is applicable to *elderly and handicapped persons.* It is FTA's policy that such categorical exceptions are not permitted under the Act.

2. *Question:* Can the eligibility of *temporary handicaps* be restricted on the basis of their duration?

Answer: Handicaps of less than 90 days duration may be excluded. Handicaps of more than 90 days duration must be included.

3. *Question:* Can the definition of *handicap* be limited in any way?

Answer: FTA has allowed applicants to exclude some conditions which appear to meet the functional definition of *handicap* provided in section 5302(a)(5) of the Federal transit laws (49 U.S.C. Chapter 53). These include pregnancy, obesity, drug or alcohol addiction, and certain conditions which do not fall under the statutory definition (e.g., loss of a finger, some chronic heart or lung conditions, controlled epilepsy, etc.). Individuals may also be excluded whose handicap involves a contagious disease or poses a danger to the individual or other passengers. Other exceptions should be reviewed on a case-by-case basis.

4. *Question:* Is blindness considered a handicap under Section 5(m)?

Answer: Yes.

5. *Question:* Is deafness considered a handicap under section 5(m)?

Answer: As a rule, no, because deafness, especially on buses, is not considered a disability which requires special planning, facilities, or design. However, deafness is recognized as a handicap in the Department of Transportation's ADA regulation, and applicants for Section 5 assistance are encouraged to include the deaf as eligible for off-peak half-fares.

6. *Question:* Is mental illness considered a handicap under section 5(m)?

Answer: As a rule, no, because of the difficulty in establishing criteria or guidelines for defining eligibility. However, FTA encourages applicants to provide the broadest possible coverage in defining eligible handicaps, including mental illness.

7. *Question:* Can operators delegate the responsibility for certifying individuals as eligible to other agencies?

Answer: Yes, provided that such agencies administer the certification of individuals in an acceptable manner and are reasonably accessible to the elderly and handicapped. Many operators currently make extensive use of social service agencies (both public and private) to identify and certify eligible individuals.

8. *Question:* Can operators require elderly and handicapped individuals to be recognized by any existing agency (e.g., require that handicapped persons be receiving Social Service or Veterans' Administration benefits)?

Answer: Recognition by such agencies is commonly used to certify eligible individuals. However, such recognition should not be a mandatory prerequisite for eligibility. For example, many persons with eligible temporary handicaps may not be recognized as handicapped by social service agencies.

9. *Question:* Can the operator require that elderly and handicapped persons come to a central office to register for an off-peak half-fare program?

Answer: FTA strongly encourages operators to develop procedures which maximize the availability of off-peak half-fares to eligible individuals. Requiring individuals to travel to a single office which may be inconveniently located is not consistent with this policy, although it is not strictly prohibited. FTA reserves the right to review such local requirements on a case-by-case basis.

10. *Question:* Must ID cards issued by one operator be transferable to another?

Answer: No. However, FTA encourages consistency among off-peak procedures and the maximizing of availability to eligible individuals, especially among operators within a single urban area. Nevertheless, each operator is permitted to require its own certification of individuals using its service.

11. *Question:* Can an operator require an elderly or handicapped person to submit to a procedure certifying their eligibility before they can receive half-fare? For example, if an operator requires eligible individuals to have a special ID card, can the half-fare be denied to an individual who can otherwise give proof of age, etc, but does not have an ID card?

Answer: Yes, although FTA does not endorse this practice.

[53 FR 53356, Dec. 30, 1988. Redesignated and amended at 61 FR 19562, May 2, 1996]

PART 611—MAJOR CAPITAL INVESTMENT PROJECTS

Sec.

611.1 Purpose and contents.
611.3 Applicability.
611.5 Definitions.
611.7 Relation to planning and project development processes.
611.9 Project justification criteria for grants and loans for fixed guideway systems.
611.11 Local financial commitment criteria.
611.13 Overall project ratings.
APPENDIX A TO PART 611—DESCRIPTION OF MEASURES FOR PROJECT EVALUATION.

AUTHORITY: 49 U.S.C. 5309; 49 CFR 1.51

SOURCE: 65 FR 76880, Dec. 7, 2000, unless otherwise noted.

§ 611.1 Purpose and contents.

(a) This part prescribes the process that applicants must follow to be considered eligible for capital investment grants and loans for new fixed guideway systems or extensions to existing systems (''new starts''). Also, this part prescribes the procedures used by FTA to evaluate proposed new starts projects as required by 49 U.S.C. 5309(e), and the scheduling of project reviews required by 49 U.S.C. 5328(a).

(b) This part defines how the results of the evaluation described in paragraph (a) of this section will be used to:

(1) Approve entry into preliminary engineering and final design, as required by 49 U.S.C. 309(e)(6);

(2) Rate projects as ''highly recommended,'' ''recommended,'' or ''not recommended,'' as required by 49 U.S.C. 5309(e)(6);

(3) Assign individual ratings for each of the project justification criteria specified in 49 U.S.C. 5309(e)(1)(B) and (C);

(4) Determine project eligibility for Federal funding commitments, in the form of Full Funding Grant Agreements;

(5) Support funding recommendations for this program for the Administration's annual budget request; and

(6) Fulfill the reporting requirements under 49 U.S.C. 5309(o)(1), Funding Levels and Allocations of Funds, Annual Report, and 5309(o)(2), Supplemental Report on New Starts.

(c) The information collected and ratings developed under this part will form the basis for the annual reports to Congress, required by 49 U.S.C. 5309(o)(1) and (2).

§611.3 Applicability.

(a) This part applies to all proposals for Federal capital investment funds under 49 U.S.C. 5309 for new transit fixed guideway systems and extensions to existing systems.

(b) Projects described in paragraph (a) of this section are not subject to evaluation under this part if the total amount of funding from 49 U.S.C. 5309 will be less than $25 million, or if such projects are otherwise exempt from evaluation by statute.

(1) Exempt projects must still be rated by FTA for purposes of entering into a Federal funding commitment as required by 49 U.S.C. 5309(e)(7). Sponsors who believe their projects to be exempt are nonetheless strongly encouraged to submit data for project evaluation as described in this part.

(2) Such projects are still subject to the requirements of 23 CFR part 450 and 23 CFR part 771.

(3) This part does not apply to projects for which a Full Funding Grant Agreement (FFGA) has already been executed.

(c) Consistent with 49 U.S.C. 5309(e)(8)(B), FTA will make project approval decisions on proposed projects using expedited procedures as appropriate, for proposed projects that are:

(1) Located in a nonattainment area;

(2) Transportation control measures as defined by the Clean Air Act (42 U.S.C. 7401 *et seq.*); and

(3) Required to carry out a State Implementation Plan.

§611.5 Definitions.

The definitions established by Titles 12 and 49 of the United States Code, the Council on Environmental Quality's regulation at 40 CFR parts 1500–1508, and FHWA–FTA regulations at 23 CFR parts 450 and 771 are applicable. In addition, the following definitions apply:

Alternatives analysis is a corridor level analysis which evaluates all reasonable mode and alignment alternatives for addressing a transportation problem, and results in the adoption of a locally preferred alternative by the appropriate State and local agencies and official boards through a public process.

Baseline alternative is the alternative against which the proposed new starts project is compared to develop project justification measures. Relative to the no build alternative, it should include transit improvements lower in cost than the new start which result in a better ratio of measures of transit mobility compared to cost than the no build alternative.

BRT means bus rapid transit.

Bus Rapid Transit refers to coordinated improvements in a transit system's infrastructure, equipment, operations, and technology that give preferential treatment to buses on fixed guideways and urban roadways. The intention of Bus Rapid Transit is to reduce bus travel time, improve service reliability, increase the convenience of users, and ultimately, increase bus ridership.

Extension to existing fixed-guideway system means a project to extend an existing fixed guideway system.

FFGA means a Full Funding Grant Agreement.

Final Design is the final phase of project development, and includes (but is not limited to) the preparation of final construction plans (including construction management plans), detailed specifications, construction cost estimates, and bid documents.

Fixed guideway system means a mass transportation facility which utilizes and occupies a separate right-of-way, or rail line, for the exclusive use of mass transportation and other high occupancy vehicles, or uses a fixed catenary system and a right of way usable by other forms of transportation. This includes, but is not limited to, rapid rail, light rail, commuter rail, automated guideway transit, people movers, ferry boat service, and fixed-guideway facilities for buses (such as bus rapid transit) and other high occupancy vehicles. A *new fixed guideway system* means a newly-constructed fixed guideway system in a corridor or alignment where no such system exists.

FTA means the Federal Transit Administration.

Full Funding Grant Agreement means an instrument that defines the scope of a project, the Federal financial contribution, and other terms and conditions.

Major transit investment means any project that involves the construction of a new fixed guideway system or extension of an existing fixed guideway system for use by mass transit vehicles.

NEPA process means those procedures necessary to meet the requirements of the National Environmental Policy Act of 1969, as amended (NEPA), at 23 CFR part 771; the NEPA process is completed when a Record of Decision (ROD) or Finding of No Significant Impact (FONSI) is issued.

New start means a new fixed guideway system, or an extension to an existing fixed guideway system.

Preliminary Engineering is the process by which the scope of the proposed project is finalized, estimates of project costs, benefits and impacts are refined, NEPA requirements are completed, project management plans and fleet management plans are further developed, and local funding commitments are put in place.

Secretary means the Secretary of Transportation.

TEA–21 means the Transportation Equity Act for the 21st Century.

§ 611.7 Relation to planning and project development processes.

All new start projects proposed for funding assistance under 49 USC 5309 must emerge from the metropolitan and Statewide planning process, consistent with 23 CFR part 450. To be eligible for FTA capital investment funding, a proposed project must be based on the results of alternatives analysis and preliminary engineering.

(a) *Alternatives Analysis.* (1) To be eligible for FTA capital investment funding for a major fixed guideway transit project, local project sponsors must perform an alternatives analysis.

(2) The alternatives analysis develops information on the benefits, costs, and impacts of alternative strategies to address a transportation problem in a given corridor, leading to the adoption of a locally preferred alternative.

(3) The alternative strategies evaluated in an alternatives analysis must include a no-build alternative, a baseline alternative, and an appropriate number of build alternatives. Where project sponsors believe the no-build alternative fulfills the requirements for a baseline alternative, FTA will determine whether to require a separate baseline alternative on a case-by-case basis.

(4) The locally preferred alternative must be selected from among the evaluated alternative strategies and formally adopted and included in the metropolitan planning organization's financially-constrained long-range regional transportation plan.

(b) *Preliminary Engineering.* Consistent with 49 USC 5309(e)(6) and 5328(a)(2), FTA will approve/disapprove entry of a proposed project into preliminary engineering within 30 days of receipt of a formal request from the project sponsor(s).

(1) A proposed project can be considered for advancement into preliminary engineering only if:

(i) Alternatives analysis has been completed

(ii) The proposed project is adopted as the locally preferred alternative by the Metropolitan Planning Organization into its financially constrained metropolitan transportation plan;

(iii) Project sponsors have demonstrated adequate technical capability to carry out preliminary engineering for the proposed project; and

(iv) All other applicable Federal and FTA program requirements have been met.

(2) FTA's approval will be based on the results of its evaluation as described in §§ 611.9–611.13.

(3) At a minimum, a proposed project must receive an overall rating of ''recommended'' to be approved for entry into preliminary engineering.

(4) This part does not in any way revoke prior FTA approvals to enter preliminary engineering made prior to February 5, 2001.

(5) Projects approved to advance into preliminary engineering receive blanket pre-award authority to incur project costs for preliminary engineering activities prior to grant approval.

(i) This pre-award authority does not constitute a commitment by FTA that future Federal funds will be approved for this project.

(ii) All Federal requirements must be met prior to incurring costs in order to retain eligibility of the costs for future FTA grant assistance.

(c) *Final Design.* Consistent with 49 USC 5309(e)(6) and 5328(a)(3), FTA will approve/disapprove entry of a proposed project into final design within 120 days of receipt of a formal request from the project sponsor(s).

(1) A proposed project can be considered for advancement into final design only if:

(i) The NEPA process has been completed;

(ii) Project sponsors have demonstrated adequate technical capability to carry out final design for the proposed project; and

(iii) All other applicable Federal and FTA program requirements have been met.

(2) FTA's approval will be based on the results of its evaluation as described in Parts §§611.9–611.13 of this Rule.

(3) At a minimum, a proposed project must receive an overall rating of ''recommended'' to be approved for entry into final design.

(4) Consistent with the Government Performance and Results Act of 1993, project sponsors seeking FFGAs shall submit a complete plan for collection and analysis of information to identify the impacts of the new start project and the accuracy of the forecasts prepared during development of the project.

(i) The plan shall provide for: Collection of ''before'' data on the current transit system; documentation of the ''predicted'' scope, service levels, capital costs, operating costs, and ridership of the project; collection of ''after'' data on the transit system two years after opening of the new start project; and analysis of the consistency of ''predicted'' project characteristics with the ''after'' data.

(ii) The ''before'' data collection shall obtain information on transit service levels and ridership patterns, including origins and destinations, access modes, trip purposes, and rider characteristics. The ''after'' data collection shall obtain analogous information on transit service levels and ridership patterns, plus information on the as-built scope and capital costs of the new start project.

(iii) The analysis of this information shall describe the impacts of the new start project on transit services and transit ridership, evaluate the consistency of ''predicted'' and actual project characteristics and performance, and identify sources of differences between ''predicted'' and actual outcomes.

(iv) For funding purposes, preparation of the plan for collection and analysis of data is an eligible part of the proposed project.

(5) Project sponsors shall collect data on the current system, according to the plan required under §611.7(c)(4) as approved by FTA, prior to the beginning of construction of the proposed new start. Collection of this data is an eligible part of the proposed project for funding purposes.

(6) This part does not in any way revoke prior FTA approvals to enter final design that were made prior to February 5, 2001.

(7) Projects approved to advance into final design receive blanket pre-award authority to incur project costs for final design activities prior to grant approval.

(i) This pre-award authority does not extend to right of way acquisition or construction, nor does it constitute a commitment by FTA that future Federal funds will be approved for this project.

(ii) All Federal requirements must be met prior to incurring costs in order to retain eligibility of the costs for future FTA grant assistance.

(d) *Full funding grant agreements.* (1) FTA will determine whether to execute an FFGA based on:

(i) The evaluations and ratings established by this rule;

(ii) The technical capability of project sponsors to complete the proposed new starts project; and

(iii) A determination by FTA that no outstanding issues exist that could interfere with successful implementation of the proposed new starts project.

(2) An FFGA shall not be executed for a project that is not authorized for

final design and construction by Federal law.

(3) FFGAs will be executed only for those projects which:

(i) Are rated as ''recommended'' or ''highly recommended;''

(ii) Have completed the appropriate steps in the project development process;

(iii) Meet all applicable Federal and FTA program requirements; and

(iv) Are ready to utilize Federal new starts funds, consistent with available program authorization.

(4) In any instance in which FTA decides to provide financial assistance under section 5309 for construction of a new start project, FTA will negotiate an FFGA with the grantee during final design of that project. Pursuant to the terms and conditions of the FFGA:

(i) A maximum level of Federal financial contribution under the section 5309 new starts program will be fixed;

(ii) The grantee will be required to complete construction of the project, as defined, to the point of initiation of revenue operations, and to absorb any additional costs incurred or necessitated;

(iii) FTA and the grantee will establish a schedule for anticipating Federal contributions during the final design and construction period; and

(iv) Specific annual contributions under the FFGA will be subject to the availability of budget authority and the ability of the grantee to use the funds effectively.

(5) The total amount of Federal obligations under Full Funding Grant Agreements and potential obligations under Letters of Intent will not exceed the amount authorized for new starts under 49 U.S.C. § 5309.

(6) FTA may also make a ''contingent commitment,'' which is subject to future congressional authorizations and appropriations, pursuant to 49 U.S.C. 5309(g), 5338(b), and 5338(h).

(7) Consistent with the Government Performance and Results Act of 1993 (GPRA), the FFGA will require implementation of the data collection plan prepared in accordance with § 611.7(c)(4):

(i) Prior to the beginning of construction activities the grantee shall collect the ''before'' data on the existing system, if such data has not already been collected as part of final design, and document the predicted characteristics and performance of the project.

(ii) Two years after the project opens for revenue service, the grantee shall collect the ''after'' data on the transit system and the new start project, determine the impacts of the project, analyze the consistency of the ''predicted'' performance of the project with the ''after'' data, and report the findings and supporting data to FTA.

(iii) For funding purposes, collection of the ''before'' data, collection of the ''after'' data, and the development and reporting of findings are eligible parts of the proposed project.

(8) This part does not in any way alter, revoke, or require re-evaluation of existing FFGAs that were issued prior to February 5, 2001.

§ 611.9 Project justification criteria for grants and loans for fixed guideway systems.

In order to approve a grant or loan for a proposed new starts project under 49 U.S.C. 5309, and to approve entry into preliminary engineering and final design as required by section 5309(e)(6), FTA must find that the proposed project is justified as described in section 5309(e)(1)(B).

(a) To make the statutory evaluations and assign ratings for project justification, FTA will evaluate information developed locally through alternatives analyses and refined through preliminary engineering and final design.

(1) The method used to make this determination will be a multiple measure approach in which the merits of candidate projects will be evaluated in terms of each of the criteria specified by this section.

(2) The measures for these criteria are specified in Appendix A to this rule.

(3) The measures will be applied to the project as it has been proposed to FTA for new starts funding under 49 U.S.C. 5309.

(4) The ratings for each of the criteria will be expressed in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''low-medium,'' or ''low.''

(b) The criteria are as follows:

(1) Mobility Improvements.

(2) Environmental Benefits.

(3) Operating Efficiencies.

(4) Transportation System User Benefits (Cost-Effectiveness).

(5) Existing land use, transit supportive land use policies, and future patterns.

(6) Other factors. Additional factors, including but not limited to:

(i) The degree to which the programs and policies (e.g., parking policies, etc.) are in place as assumed in the forecasts,

(ii) Project management capability, including the technical capability of the grant recipient to construct the project, and

(iii) Additional factors relevant to local and national priorities and relevant to the success of the project.

(c) In evaluating proposed new starts projects under these criteria:

(1) As a candidate project proceeds through preliminary engineering and final design, a greater degree of certainty is expected with respect to the scope of the project and a greater level of commitment is expected with respect to land use.

(2) For the criteria under §611.9(b)(1)–(4), the proposed new start will be compared to the baseline alternative.

(d) In evaluating proposed new starts projects under these criteria, the following factors shall be considered:

(1) The direct and indirect costs of relevant alternatives;

(2) Factors such as congestion relief, improved mobility, air pollution, noise pollution, energy consumption, and all associated ancillary and mitigation costs necessary to carry out each alternative analyzed, and recognize reductions in local infrastructure costs achieved through compact land use development;

(3) Existing land use, mass transportation supportive land use policies, and future patterns;

(4) The degree to which the project increases the mobility of the mass transportation dependent population or promotes economic development;

(5) Population density and current transit ridership in the corridor;

(6) The technical capability of the grant recipient to construct the project;

(7) Differences in local land, construction, and operating costs; and

(8) Other factors as appropriate.

(e) FTA may amend the measures for these criteria, pending the results of ongoing studies regarding transit benefit evaluation methods.

(f) The individual ratings for each of the criteria described in this section will be combined into a summary rating of ''high,'' ''medium-high,'' ''medium,'' ''low-medium,'' or ''low'' for project justification. ''Other factors'' will be considered as appropriate.

§611.11 Local financial commitment criteria.

In order to approve a grant or loan under 49 U.S.C. 5309, FTA must find that the proposed project is supported by an acceptable degree of local financial commitment, as required by section 5309(e)(1)(C). The local financial commitment to a proposed project will be evaluated according to the following measures:

(a) The proposed share of project capital costs to be met using funds from sources other than the section 5309 new starts program, including both the non-Federal match required by Federal law and any additional capital funding (''overmatch''), and the degree to which planning and preliminary engineering activities have been carried out without funding from the section 5309 new starts program;

(b) The stability and reliability of the proposed capital financing plan for the new starts project; and

(c) The stability and reliability of the proposed operating financing plan to fund operation of the entire transit system as planned over a 20-year planning horizon.

(d) For each proposed project, ratings for paragraphs (b) and (c) of this section will be reported in terms of descriptive indicators, as follows: ''high,'' ''medium-high,'' ''medium,'' ''low-medium,'' or ''low.'' For paragraph (a) of this section, the percentage of Federal funding sought from 49 U.S.C. §5309 will be reported.

(e) The summary ratings for each measure described in this section will

be combined into a summary rating of ''high,'' ''medium-high,'' ''medium,'' ''low-medium,'' or ''low'' for local financial commitment.

§ 611.13 Overall project ratings.

(a) The summary ratings developed for project justification local financial commitment (§§ 611.9 and 611.11) will form the basis for the overall rating for each project.

(b) FTA will assign overall ratings of ''highly recommended,'' ''recommended,'' and ''not recommended,'' as required by 49 U.S.C. 5309(e)(6), to each proposed project.

(1) These ratings will indicate the overall merit of a proposed new starts project at the time of evaluation.

(2) Ratings for individual projects will be updated annually for purposes of the annual report on funding levels and allocations of funds required by section 5309(o)(1), and as required for FTA approvals to enter into preliminary engineering, final design, or FFGAs.

(c) These ratings will be used to:

(1) approve advancement of a proposed project into preliminary engineering and final design;

(2) Approve projects for FFGAs;

(3) Support annual funding recommendations to Congress in the annual report on funding levels and allocations of funds required by 49 U.S.C. 5309(o)(1); and

(4) For purposes of the supplemental report on new starts, as required under section 5309(o)(2).

(d) FTA will assign overall ratings for proposed new starts projects based on the following conditions:

(1) Projects will be rated as ''recommended'' if they receive a summary rating of at least ''medium'' for both project justification (§ 611.9) and local financial commitment (§ 611.11);

(2) Projects will be rated as ''highly recommended'' if they receive a summary rating higher than ''medium'' for both local financial commitment and project justification.

(3) Projects will be rated as ''not recommended'' if they do not receive a summary rating of at least ''medium'' for both project justification and local financial commitment.

APPENDIX A TO PART 611—DESCRIPTION OF MEASURES USED FOR PROJECT EVALUATION.

PROJECT JUSTIFICATION

FTA will use several measures to evaluate candidate new starts projects according to the criteria established by 49 U.S.C. 5309(e)(1)(B). These measures have been developed according to the considerations identified at 49 U.S.C. 5309(e)(3) (''Project Justification''), consistent with Executive Order 12893. From time to time, FTA has published technical guidance on the application of these measures, and the agency expects it will continue to do so. Moreover, FTA may well choose to amend these measures, pending the results of ongoing studies regarding transit benefit evaluation methods. The first four criteria listed below assess the benefits of a proposed new start project by comparing the project to the baseline alternative. Therefore, the baseline alternative must be defined so that comparisons with the new start project isolate the costs and benefits of the major transit investment. At a minimum, the baseline alternative must include in the project corridor all reasonable cost-effective transit improvements short of investment in the new start project. Depending on the circumstances and through prior agreement with FTA, the baseline alternative can be defined appropriately in one of three ways. First, where the adopted financially constrained regional transportation plan includes within the corridor all reasonable cost-effective transit improvements short of the new start project, a no-build alternative that includes those improvements may serve as the baseline. Second, where additional cost-effective transit improvements can be made beyond those provided by the adopted plan, the baseline will add those cost-effective transit improvements. Third, where the proposed new start project is part of a multimodal alternative that includes major highway components, the baseline alternative will be the preferred multimodal alternative without the new start project and associated transit services. Prior to submittal of a request to enter preliminary engineering for the new start project, grantees must obtain FTA approval of the definition of the baseline alternative. Consistent with the requirement that differences between the new start project and the baseline alternative measure only the benefits and costs of the project itself, planning factors external to the new start project and its supporting bus service must be the same for both the baseline and new start project alternatives. Consequently, the highway and transit networks defined for the analysis must be the same outside the corridor for which the new start project is proposed. Further, policies affecting travel demand and travel costs,

such as land use, transit fares and parking costs, must be applied consistently to both the baseline alternative and the new start project alternative. The fifth criterion, ''existing land use, transit supportive land use policies, and future patterns,'' reflects the importance of transit-supportive local land use and related conditions and policies as an indicator of ultimate project success.

(a) Mobility Improvements.

(1) The aggregate travel time savings in the forecast year anticipated from the new start project compared to the baseline alternative. This measure sums the travel time savings accruing to travelers projected to use transit in the baseline alternative, travelers projected to shift to transit because of the new start project, and non-transit users in the new start project who would benefit from reduced traffic congestion.

(i) After September 1, 2001, FTA will employ a revised measure of travel benefits accruing to travelers.

(ii) The revised measure will be based on a multi-modal measure of perceived travel times faced by all users of the transportation system.

(2) The absolute number of existing low income households located within ½-mile of boarding points associated with the proposed system increment.

(3) The absolute number of existing jobs within ½-mile of boarding points associated with the proposed system increment.

(b) Environmental Benefits.

(1) The forecast change in criteria pollutant emissions and in greenhouse gas emissions, ascribable to the proposed new investment, calculated in terms of annual tons for each criteria pollutant or gas (forecast year), compared to the baseline alternative;

(2) The forecast net change per year (forecast year) in the regional consumption of energy, ascribable to the proposed new investment, expressed in British Thermal Units (BTU), compared to the baseline alternative; and

(3) Current Environmental Protection Agency designations for the region's compliance with National Ambient Air Quality Standards.

(c) Operating Efficiencies. The forecast change in operating cost per passenger-mile (forecast year), for the entire transit system. The new start will be compared to the baseline alternative.

(d) Transportation System User Benefits (Cost-Effectiveness).

(1) The cost effectiveness of a proposed project shall be evaluated according to a measure of transportation system user benefits, based on a multimodal measure of perceived travel times faced by all users of the transportation system, for the forecast year, divided by the incremental cost of the proposed project. Incremental costs and benefits will be calculated as the differences between the proposed new start and the baseline alternative.

(2) Until the effective date of the transportation system user benefits measure of cost effectiveness, cost effectiveness will be computed as the incremental costs of the proposed project divided by its incremental transit ridership, as compared to the baseline alternative.

(i) Costs include the forecast annualized capital and annual operating costs of the entire transit system.

(ii) Ridership includes forecast total annual ridership on the entire transit system, excluding transfers.

(e) Existing land use, transit supportive land use policies, and future patterns. Existing land use, transit-supportive land use policies, and future patterns shall be rated by evaluating existing conditions in the corridor and the degree to which local land use policies are likely to foster transit supportive land use, measured in terms of the kinds of policies in place, and the commitment to these policies. The following factors will form the basis for this evaluation:

(1) Existing land use;

(2) Impact of proposed new starts project on land use;

(3) Growth-management policies;

(4) Transit-supportive corridor policies;

(5) Supportive zoning regulations near transit stations;

(6) Tools to implement land use policies;

(7) The performance of land use policies; and

(8) Existing and planned pedestrian facilities, including access for persons with disabilities.

(f) Other factors. Other factors that will be considered when evaluating projects for funding commitments include, but are not limited to:

(1) Multimodal emphasis of the locally preferred investment strategy, including the proposed new start as one element;

(2) Environmental justice considerations and equity issues,

(3) Opportunities for increased access to employment for low income persons, and Welfare-to-Work initiatives;

(4) Livable Communities initiatives and local economic activities;

(5) Consideration of alternative land use development scenarios in local evaluation and decision making for the locally preferred transit investment decision;

(6) Consideration of innovative financing, procurement, and construction techniques, including design-build turnkey applications; and

(7) Additional factors relevant to local and national priorities and to the success of the project, such as Empowerment Zones, Brownfields, and FTA's Bus Rapid Transit Demonstration Program.

LOCAL FINANCIAL COMMITMENT

FTA will use the following measures to evaluate the local financial commitment to a proposed project:

(a) The proposed share of project capital costs to be met using funds from sources other than the 49 U.S.C. 5309 new starts program, including both the local match required by Federal law and any additional capital funding (''overmatch''). Consideration will be given to:

(i) The use of innovative financing techniques, as described in the May 9, 1995, FEDERAL REGISTER notice on *FTA's Innovative Financing Initiative* (60 FR 24682);

(ii) The use of ''flexible funds'' as provided under the CMAQ and STP programs;

(iii) The degree to which alternatives analysis and preliminary engineering activities were carried out without funding from the §5309 new starts program; and

(iv) The actual percentage of the cost of recently-completed or simultaneously undertaken fixed guideway systems and extensions that are related to the proposed project under review, from sources other than the section 5309 new starts program (FTA's intent is to recognize that a region's local financial commitment to fixed guideway systems and extensions may not be limited to a single project).

(b) The stability and reliability of the proposed capital financing plan, according to:

(i) The stability, reliability, and level of commitment of each proposed source of local match, including inter-governmental grants, tax sources, and debt obligations, with an emphasis on availability within the project development timetable;

(ii) Whether adequate provisions have been made to cover unanticipated cost overruns and funding shortfalls; and

(iii) Whether adequate provisions have been made to fund the capital needs of the entire transit system as planned, including key station plans as required under 49 CFR 37.47 and 37.51, over a 20-year planning horizon period.

(c) The stability and reliability of the proposed operating financing plan to fund operation of the entire transit system as planned over a 20-year planning horizon.

PART 613—PLANNING ASSISTANCE AND STANDARDS

Subpart A—Metropolitan Transportation Planning and Programming

Sec.

613.100 Metropolitan transportation planning and programming.

Subpart B—Statewide Transportation Planning and Programming

613.200 Statewide transportation planning and programming.

Subpart C—Coordination of Federal and Federally Assisted Programs and Projects

613.300 Coordination of Federal and federally assisted programs and projects.

AUTHORITY: 23 U.S.C. 134, 135, and 217(g); 42 U.S.C. 3334, 4233, 4332, 7410 et seq; 49 U.S.C. 5303–5306, 5323(k); and 49 CFR 1.48(b), 1.51(f) and 21.7(a).

Subpart A—Metropolitan Transportation Planning and Programming

§613.100 Metropolitan transportation planning and programming.

The regulations in 23 CFR part 450, subpart C, shall be followed in complying with the requirements of this subpart. 23 CFR part 450, subpart C, requires a metropolitan planning organization (MPO) be designated for each urbanized area and that the metropolitan area have a continuing, cooperative, and comprehensive transportation planning process that results in plans and programs that consider all transportation modes. These plans and programs shall lead to the development of an integrated, intermodal metropolitan transportation system that facilitates the efficient, economic movement of people and goods.

[58 FR 58079, Oct. 28, 1993]

Subpart B—Statewide Transportation Planning and Programming

§613.200 Statewide transportation planning and programming.

The regulations in 23 CFR part 450, subpart B, should be followed in complying with the requirements of this subpart. 23 CFR part 450, subpart B, requires each State to carry out an intermodal statewide transportation planning process, including the development of a statewide transportation plan and transportation improvement program that facilitates the efficient, economic movement of people and

goods in all areas of the State, including those areas subject to the requirements of 23 U.S.C. 135 and sections 3, 5, 8, 9 and 26 of the Federal Transit Act (49 U.S.C. app. 1602, 1604, 1607, 1607a, and 1622).

[58 FR 58079, Oct. 28, 1993]

Subpart C—Coordination of Federal and Federally Assisted Programs and Projects

§ 613.300 Coordination of Federal and federally assisted programs and projects.

The coordination of Federal and federally assisted programs and projects implementing OMB revised Circular No. A–95, which are set forth in 23 CFR part 420, subpart C, are incorporated into this subpart.

[41 FR 33443, Aug. 9, 1976]

PART 614—TRANSPORTATION INFRASTRUCTURE MANAGEMENT

AUTHORITY: 23 U.S.C. 303; 49 U.S.C. 5303–5305; and 49 CFR 1.48 and 1.51.

SOURCE: 61 FR 67175, Dec. 19, 1996, unless otherwise noted.

§ 614.101 Cross-reference to management systems.

The regulations in 23 CFR Part 500, subparts A and B shall be followed in complying with the requirements of this part. Part 500, subparts A and B implement 23 U.S.C. 303 for State development, establishment, and implementation of systems for managing traffic congestion (CMS), public transportation facilities and equipment (PTMS), intermodal transportation facilities and systems (IMS), and traffic monitoring for highways and public transportation facilities and equipment.

PART 622—ENVIRONMENTAL IMPACT AND RELATED PROCEDURES

Subpart A—Environmental Procedures

Sec.
622.101 Cross-reference to procedures.

Subpart B [Reserved]

Subpart C—Requirements for Energy Assessments

622.301 Buildings.

Subpart A—Environmental Procedures

AUTHORITY: 42 U.S.C. 4321 *et seq.*; 49 U.S.C. 1601 *et seq.;* 49 CFR 1.51.

§ 622.101 Cross-reference to procedures.

The procedures for complying with the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 *et seq.*), and related statutes, regulations, and orders are set forth in part 771 of title 23 of the Code of Federal Regulations.

[52 FR 32660, Aug. 28, 1987]

Subpart B [Reserved]

Subpart C—Requirements for Energy Assessments

AUTHORITY: Sec. 403(b), Pub. L. 95–620; E.O. 12185.

§ 622.301 Buildings.

(a) FTA assistance for the construction, reconstruction, or modification of buildings for which applications are submitted to FTA after October 1, 1980, will be approved only after the completion of an energy assessment. An energy assessment shall consist of an analysis of the total energy requirements of a building, within the scope of the proposed construction activity and at a level of detail appropriate to that scope, which considers:

(1) Overall design of the facility or modification, and alternative designs;

(2) Materials and techniques used in construction or rehabilitation;

(3) Special or innovative conservation features that may be used;

(4) Fuel requirements for heating, cooling, and operations essential to the function of the structure, projected over the life of the facility and including projected costs of this fuel; and

(5) Kind of energy to be used, including:

(i) Consideration of opportunities for using fuels other than petroleum and natural gas, and

(ii) Consideration of using alternative, renewable energy sources.

(b) Compliance with the requirements of paragraph (a) of this section shall be documented as part of the Environmental Assessment or Environmental Impact Statement for projects which are subject to a requirement for one. Projects for which there is no environmental assessment or EIS shall document compliance by submission of appropriate material with the application for FTA assistance for actual construction.

(c) The cost of undertaking and documenting an energy assessment may be eligible for FTA participation if the requirements of Federal Management Circular 74–4 (A–87) are met.

(d) This requirement shall not apply to projects for which the final project application or environmental assessment have been submitted to FTA prior to October 1, 1980.

[45 FR 58038, Aug. 29, 1980]

PART 624—CLEAN FUELS FORMULA GRANT PROGRAM

Sec.

624.1 Eligible applicant.
624.3 Eligible activities.
624.5 Application process.
624.7 Certification.
624.9 Formula.
624.11 Reporting.

APPENDIX A TO PART 624—PRE-APPLICATION WORKSHEET

AUTHORITY: 49 U.S.C. 5308; 49 CFR 1.51.

SOURCE: 67 FR 40104, June 11, 2002, unless otherwise noted.

§ 624.1 Eligible applicant.

(a) An eligible applicant is a designated recipient (designated recipient has the same meaning as in 49 U.S.C. 5307(a)(2)) in either an:

(1) Ozone and carbon monoxide nonattainment areas that have the specific classifications established by the 1990 Clean Air Act Amendments [Public Law 101–549], or

(2) Ozone and carbon monoxide (CO) ''maintenance'' areas that, before they were redesignated to attainment by the Environmental Protection Agency (EPA), had these same classifications.

(b) The nonattainment classifications for ozone are ''marginal,'' ''moderate,'' ''serious,'' ''severe,'' and ''extreme.'' The nonattainment classifications for CO are ''moderate'' and ''serious.''

§ 624.3 Eligible activities.

(a) Eligible activities include the purchase or lease of clean fuel buses and facilities, repowering or retrofitting buses to operate on clean fuels, and the improvement of existing facilities to accommodate clean fuel buses.

(b) The term ''clean fuel vehicle'' means a vehicle that—

(1) Is powered by —

(i) Compressed natural gas;

(ii) Liquefied natural gas;

(iii) Biodiesel fuels;

(iv) Batteries;

(v) Alcohol-based fuels;

(vi) Hybrid electric;

(vii) Fuel cells;

(viii) Clean diesel, to the extent allowed under this section; or

(ix) Other low or zero emissions technology; and

(2) The Administrator of the Environmental Protection Agency has certified sufficiently reduces harmful emissions.

(c) Eligible projects are the following:

(1) Purchasing or leasing clean fuel buses, including buses that employ a lightweight composite primary structure, and vans for use in revenue service. The purchase or lease of non-revenue vehicles is not an eligible project.

(2) Constructing or leasing clean fuel bus facilities or electrical recharging facilities and related equipment. Facilities and related equipment for clean diesel buses are not eligible.

(3) Improving existing mass transportation facilities to accommodate clean fuel buses.

(4) Repowering pre-1993 engines with clean fuel technology that meets the current urban bus emission standards. Repowering means the removal of an engine from a bus followed by the installation of another engine and applies to engines that are replaced with new, previously unused, engines as well as those exchanged from an inventory of rebuilt engines.

(5) Retrofitting or rebuilding pre-1993 engines if before half life (*e.g.,* prior to six years of bus life) to rebuild; ''retrofit'' means use of the latest aftermarket technology such as ''upgrade kits,'' or after-treatment devices that treat the exhaust after it has left the engine, such as catalytic converters and particulate filters.

(6) At the discretion of FTA, projects relating to clean fuel, biodiesel, hybrid electric, or zero emissions technology vehicles that achieve emissions reductions equivalent or superior to existing clean fuel or hybrid electric technologies.

§ 624.5 Application process.

(a) Pre-applications must be submitted to the appropriate FTA regional office no later than January 1 of each fiscal year. Subject to the availability of funds, FTA will apportion the funds based on the formula and the pool of applicants, no later than February 1 of each year. Once the applicant has been notified of the apportionment of funds and the eligibility of its application, it should proceed to complete and file the final application. The final application must be submitted electronically if the grantee is using the electronic application process (*i.e.,* TEAM).

(b) The pre-application consists of a Letter of Interest and a Pre-application Worksheet as described as follows:

(1) *Letter of interest.* This letter serves as the cover letter for the Pre-application Worksheet, expressing interest in submitting an application. It describes the overall clean fuel technology program of the agency, including the technology selected, describes the necessary infrastructure to support the program and the long-range objectives of the program including the eventual size of the clean fuel fleet. It summarizes the eligible activities for which the agency is applying and the amount of funds that the agency is seeking.

(2) *Pre-application worksheet.* Applicants must use the worksheet found in Appendix A to this part.

§ 624.7 Certification.

The applicant must use the certification contained in the Annual Notice of Assurances and Certifications published in the FEDERAL REGISTER each October.

§ 624.9 Formula.

The Clean Fuels Formula funds will be apportioned according to the following formula:

(a) *Areas with population 1,000,000 and above.* Two thirds of the funds available each fiscal year shall be apportioned to applicants with eligible projects in urban areas with a population of 1,000,000 and above. Of this, 50 percent shall be apportioned so that each applicant receives a grant in an amount equal to the ratio between:

(1) The number of vehicles in the bus fleet of the eligible applicant, weighted by the severity of nonattainment for the area in which the eligible applicant is located; and

(2) The total number of vehicles in the bus fleets of all eligible applicants in areas with a population of 1,000,000 and above, weighted by the severity of nonattainment for all areas in which those eligible projects are located as provided in paragraphs (c) and (d) of this section. The remaining 50 percent shall be apportioned such that each designated recipient receives a grant in an amount equal to the ratio between:

(i) The number of bus passenger miles of the eligible designated recipient, weighted by the severity of nonattainment of the area in which the eligible applicant is located as provided in paragraphs (c) and (d) of this section.

(ii) The total number of bus passenger miles of all eligible applicants in areas with a population of 1,000,000 and above, weighted by the severity of nonattainment of all areas in which those eligible applicants are located as provided in paragraphs (c) and (d) of this section.

(b) *Areas under 1,000,000 population.* The formula for areas under 1,000,000 in population is the same as paragraph (a) of this section, except the formula removes the pool of eligible applicants in areas with a population of 1,000,000 and above and replaces it with the pool of eligible applicants in areas with populations under 1,000,000.

(c) *Weighting factors.* (1) The weighting factor for ozone shall be determined based on the following factors.

(i) 1.0 if, at the time of the apportionment, the area is a maintenance area for ozone;

(ii) 1.1 if, at the time of the apportionment, the area is classified as a marginal ozone nonattainment area;

(iii) 1.2 if, at the time of the apportionment, the area is classified as a moderate ozone nonattainment area;

(iv) 1.3 if, at the time of the apportionment, the area is classified as a serious ozone nonattainment area;

(v) 1.4 if, at the time of the apportionment, the area is classified as a severe ozone nonattainment area;

(vi) 1.5 if, at the time of the apportionment, the area is classified as an extreme ozone nonattainment area;

(2) The weighting factor for CO shall be determined based on the factors:

(i) 1.0 if, at the time of the apportionment, the area is a maintenance area for carbon monoxide;

(ii) 1.2 if, at the time of the apportionment, the area is classified as a moderate carbon monoxide nonattainment area;

(iii) 1.3 if, at the time of the apportionment, the area is classified as a serious carbon monoxide nonattainment area.

(3) The number of buses in the fleet and the bus passenger miles shall be multiplied by the higher of the ozone or CO factors.

(d) *Additional adjustment.* The number of buses in the fleet and the bus passenger miles shall be further multiplied by a factor of 1.2 if the area is both nonattainment for CO and either nonattainment or maintenance for ozone.

(e) *Limitation on uses.* (1) Not less than 5 percent of the amount made available by or appropriated under 49 U.S.C. 5338 in each fiscal year to carry out this section shall be available for any eligible projects for which an application is received from a designated recipient for the purchase or construction of hybrid electric or battery-powered buses or facilities specifically designed to service those buses.

(2) Not more than 35 percent of the amount made available by or appropriated under 49 U.S.C. 5338 in each fiscal year to carry out this section may be made available to fund clean diesel buses.

(3) Not more than 5 percent of the amount made available by or appropriated under 49 U.S.C. 5338 in each fiscal year to carry out this section may be made available to fund 21 retrofitting or replacement of the engines of buses that do not meet the clean air standards of the Environmental Protection Agency, as in effect on the date on which the application for such retrofitting or replacement is submitted under § 624.5.

NOTE TO § 624.9. Maximum grant amount. The amount of a grant made to a designated recipient under this section shall not exceed the lesser of—for an eligible project in an area with a population of less than 1,000,000, $15,000,000,—and for an eligible project in an area with a population of at least 1,000,000, $25,000,000; or 80 percent of the total cost of the eligible project. Any amounts that would otherwise be apportioned to a designated reciipient under this Note that exceed the amount described in this Note shall be reapportioned among other designated recipients in accordance with this section.

[67 FR 41579, June 18, 2002]

§ 624.11 Reporting.

(a) Recipients of financial assistance under 49 U.S.C. 5308 who purchase or lease hybrid electric, battery electric and fuel cell vehicles must report to the appropriate FTA regional office on a quarterly basis for the first three years of the useful life of the vehicle with the following information:

(1) Vehicle miles traveled;

(2) Fuel/energy costs;

(3) Vehicle fuel/energy consumption and oil consumption;

(4) Number of road calls or breakdowns resulting from clean fuel and advanced propulsion technology systems, and

(5) Maintenance costs associated with the clean fuels or advanced propulsion system.

(b) Recipients of financial assistance under 49 U.S.C. 5308 who purchase or lease compressed natural gas (CNG), liquefied natural gas (LNG), and liquefied petroleum gas (LPG) vehicles may report the information described in paragraph (a) of this section, but this reporting is voluntary.

(c) Recipients of financial assistance under 49 U.S.C. 5308 who purchase or lease clean diesel vehicles should not

report information beyond the normal FTA quarterly reporting requirements.

APPENDIX A TO PART 624—PRE–APPLICATION WORKSHEET

The following are instructions for completing the pre-application worksheet:

(1) *Requesting Agency.* Fill in the name of the applicant. The applicant must be a designated recipient.

(2) *UZA (or Urban Area).* List the name of the urbanized area if the applicant is located in an urbanized area. Otherwise, indicate the name of the city or town.

(3) *Nonattainment or Maintenance Area Name.* List the name of the nonattainment or maintenance area in which your agency provides service.

(4) *Classification for Ozone.* List the current EPA nonattainment classification for your service area. (The classification must be of the following terms: marginal, moderate, serious, severe, or extreme.)

(5) *Classification for Carbon Monoxide.* List the current EPA nonattainment classification for your service area. (The classification must be either moderate or serious.)

I. Proposed activity.

(1) *New Bus Purchase/Lease.* Enter the number of vans or buses by fuel category in the pre-application. For hybrid electric vehicles, include fuel types. Indicate whether the structure is lightweight composite or traditional structure and weight. Enter the total and Federal amount for each fuel type.

(2) *Construct/Lease New Clean Fuel Facility and Related Equipment.* Indicate the Federal and total amount for a clean fuels facility, related equipment or electrical recharging facility. Enter any descriptive or explanatory information on the lines for additional information, including what fuel type is being accommodated. Facilities to accommodate clean diesel are not eligible.

(3) Indicate the Federal amount and total amount for improvements to existing facilities to accommodate clean fuel buses. Enter any descriptive or explanatory information on the line for additional items, including what fuel type is being accommodated.

(4) Indicate the Federal amount and total amount for repowering/replacing pre-1993 engines with engines that meet current emissions standards when installed. Please include a separate entry for each fuel type. For the purposes of this program, repowering/replacement means the removal of an engine from the bus followed by the installation of another engine. This applies to engines that are replaced with new, previously unused engines, as well as those exchanged from an inventory of rebuilt engines.

(5) Enter a quantity, Federal amount, and total amount by fuel type for retrofit/rebuild of pre-1993 engines to comply with latest EPA-certified emissions standards. For the purposes of this program, ''retrofit'' means the use of the latest after-market technology such as ''upgrade kits,'' or after-treatment device(s) that treat the exhaust after it has left the engine, such as catalytic converters or particulate filters. ''Before the half-life rebuild'' means that the retrofitting would need to occur before the bus is six years old. Since this provision applies to pre-1993 engines, this provision is of limited time availability.

(6) This section should describe any proposed clean fuel project not included in the categories above. Since any project not included above requires approval at the discretion of FTA, projects included here should also be described in the letter of interest. Include the Federal amount and total.

(7) *Summary.* Indicate the Totals for the Federal and Total Amounts requested for all projects listed in this Section I.

II. Data

This section contains the active bus fleet and annual bus passenger miles information that is required to run the Clean Fuels formula.

(1) Enter the number of buses in the active fixed route fleet. For this purpose, ''bus'' includes articulated motorbus, Class A bus (>35 seats), Class B bus (25–35 seats), Class C bus (<25 seats), double-decked bus, school bus, and electric trolley bus. Use NTD data that was reported 2 years prior (*e.g.,* if applying in FY 2003, use data from FY 2001). For UZAs that have already submitted information to the National Transit Database (NTD), add the data from column H of Form 408 for the following vehicle types: AB, BA, BB, BC, DD, SB, and TB. (These vehicle types are defined in reporter's guidance for the NTD.)

(2) Enter the fixed route annual bus passenger miles for 2 years prior (*e.g.,* if applying in FY 2003, use data from FY 2001. This may include motorbus (see types above) or trolley bus. For UZAs that have submitted NTD data, add the information from column I of line 25 of Form 406 for the modes MB and TB.

III. Projects Subject to Minimum/Maximum Apportionments

This section provides a dollar total for the areas that are affected by either maximum or minimum constraints. These constraints apply to the entire program and not to individual applicants. However, in order to comply with these constraints, FTA must know how much each applicant is applying for in each of these areas.

(1) Enter the total Federal dollar amount for the purchase/lease of clean diesel vehicles.

(2) Enter the total Federal dollar amount for project elements that fall into the category of purchasing hybrid electric or battery-powered buses or constructing facilities designed to service them.

(3) Enter the total Federal dollar amount for project elements that fall into the category of retrofitting or replacing bus engines that do not meet the clean air standards of the EPA.

NOTE: Because of the uncertainty of how many grantees will apply, the actual amount that a grantee receives in an apportionment may be different from the amount requested in the application that was submitted. Furthermore, because clean diesel and retrofit/replacement of bus engines are subject to maximum constraints, the amounts specifically apportioned for those purposes may not resemble the proportionality of the application. For example, suppose Grantee A's application included $500,000 for clean diesel and $100,000 for a compressed natural gas bus. If the 35 percent ceiling for clean diesel is exceeded by the total applications, Grantee A may only be allowed $50,000 to be used specifically for clean diesel because of the ceiling. The remainder of the funds apportioned to Grantee A (say, $300,000) would have to be used in areas without a maximum constraint, *i.e.*, in areas other than clean diesel or retrofit/replacement of bus engines if applied for.

IV. Certification

The chief executive officer or the general manager of the transit agency should sign this certification.

Appendix A to Part 624 - CLEAN FUELS FORMULA PROGRAM Pre-Application Worksheet

Agency Name

Non-Attainment or Maintenance Area Name

UZA (or Urban Area)

Classification For Ozone

Classification For Carbon Monoxide

I. PROPOSED ACTIVITY

1) New Bus Purchase/Lease

Fuel Type	Quantity	Composite or Traditional	Federal Amount	Total Amount
CNG			$	$
LNG			$	$
Biodiesel			$	$
Batteries			$	$
Alcohol-based			$	$
Hybrid elec.			$	$
Fuel cell			$	$
Clean diesel			$	$
Other (Specify) _____			$	$

2) Construct/Lease New Clean Fuel Facility & Related Equipment
(Indicate The Federal and Total Amounts For Each Category)

	Federal Amount	Total Amount
Electrical Recharging Facility	$	$
Clean Fuels Facility (Specify fuel type _____)	$	$
Related Equipment	$	$

Description _____

_____

3) Improvements To Existing Facilities To Accommodate Clean Fuel Buses

	Federal Amount	Total Amount
Facility Improvements (Specify fuel type _____)	$	$

Description _____

_____

4) Re-power/Replace Pre-1993 Engines With Engines That Meet Emissions Standards When Installed In The Respective Vehicle. (Separate Entry For Each Fuel Type)

Fuel Type	Quantity	Federal Amount	Total Amount
CNG		$	$
LNG		$	$
Biodiesel		$	$
Batteries		$	$
Alcohol-based		$	$
Hybrid elec.		$	$
Fuel cell		$	$
Clean diesel		$	$
Other (Specify) _____		$	$

5) Retrofit/Rebuild Pre-1993 Engines To Comply With Latest Emissions Standards

Fuel Type	Quantity	Federal Amount	Total Amount
CNG		$	$
LNG		$	$
Biodiesel		$	$
Batteries		$	$
Alcohol-based		$	$
Hybrid elec.		$	$
Fuel cell		$	$
Clean diesel		$	$
Other (Specify) _____		$	$

6) Other

Description _____

_____

Federal Amount $ Total Amount $

7) Summary

Total Requested For All Projects $

Federal Requested For All Projects $

II. DATA

1) Total Active Year 20___ Bus Fleet (number of buses) _____
(Motor Bus & Trolley Bus)

2) Year 20___ Bus Passenger Miles _____
(Motor Bus & Trolley Bus)

III. FEDERAL DOLLAR AMOUNT FOR THE PROJECTS LISTED ABOVE SUBJECT TO MINIMUM OR MAXIMUM APPORTIONMENTS

Purchase/Lease Clean Diesel Buses	$
Hybrid Electrical or Battery Powered Buses/Facilities	$
Retrofit or Replace Engines That Meet EPA Clean Air Standards	$

IV. CERTIFICATION

I understand that the Clean Fuels Formula Grant Program funds will be apportioned based on the information in this pre-application worksheet. I certify that to the best of my knowledge the information contained on this pre-application worksheet is true and correct. In addition, I understand that since funds have been apportioned on the basis of the information contained in this worksheet, we are limited in our ability to make any revisions to the final application.

_____
CEO or General Manager

_____
Date

PART 630—UNIFORM SYSTEM OF ACCOUNTS AND RECORDS AND REPORTING SYSTEM

Sec.

630.1 Purpose.
630.2 Scope.
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630.5 Failure to report data.
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APPENDIX A TO PART 630—OVERVIEW AND EXPLANATION OF THE URBAN MASS TRANSPORTATION INDUSTRY UNIFORM SYSTEM OF ACCOUNTS AND RECORDS AND REPORTING SYSTEM

AUTHORITY: Sec. 111, Pub. L. 93–503, 88 Stat. 1573 (49 U.S.C. 1611); Secs. 303(a) and 304(c), Public Law 97–424, 96 Stat. 2141 (49 U.S.C. 1607); and 49 CFR 1.51.

SOURCE: 58 FR 4888, Jan. 15, 1993, unless otherwise noted.

§ 630.1 Purpose.

The purpose of this part is to prescribe requirements and procedures necessary for compliance with the Uniform System of Accounts and Records and Reporting System mandated by section 15 of the Federal Transit Act, as amended, 49 U.S.C. 1611, and to set forth the procedures for addressing a reporting agency's failure to comply with these requirements.

§ 630.2 Scope.

This part applies to all applicants and beneficiaries of Federal financial assistance under section 9 of the Federal Transit Act, as amended (49 U.S.C. 1607a).

§ 630.3 Definitions.

(a) Except as otherwise provided, terms defined in the Federal Transit

Act, as amended (49 U.S.C. 1601 *et seq.*), are used in this part as so defined.

(b) Terms defined in the current editions of the Urban Mass Transportation Industry Uniform System of Accounts and Records and the annual Reporting Manual, are used in this part as so defined.

(c) For purposes of this part:

Administrator means the Federal Transit Administrator or the Administrator's designee.

Applicant means an applicant for assistance under section 9 of the Federal Transit Act, as amended.

Assistance means Federal financial assistance for the acquisition, construction, or operation of public mass transportation services.

Beneficiary means any organization operating and delivering urban transit services that directly receives benefits from assistance under section 9 of the Federal Transit Act, as amended.

Chief Executive Officer (CEO) means the principal executive in charge of and responsible for the reporting agency.

Current edition of the Urban Mass Transportation Industry Uniform System of Accounts and Records and the Reporting Manual means the most recently issued edition of the reference documents.

Days mean calendar days.

The Federal Transit Act means the Federal Transit Act, as amended (49 U.S.C. 1601a et seq.)

Mass Transportation Agency or transit agency means an agency authorized to transport people by bus, rail, or other conveyance, either publicly or privately owned, and which provides to the public general or special service (but not including school, charter, or sightseeing service) on a regular and continuing, scheduled or unscheduled, basis. Transit agencies are classified according to the mode of transit service operated. A multi-mode transit agency operates two or more modes, which are defined in the current editions of the Urban Mass Transportation Industry Uniform System of Accounts and Records and the Reporting Manual.

Reference Document(s) means the current editions of the Urban Mass Transportation Industry Uniform System of Accounts and Records, and the Reporting Manual. These documents are subject to periodic revision. Beneficiaries and applicants are responsible for using the current editions of the reference documents.

Reporting agency means the agency required to submit a report under section 15.

§ 630.4 Requirements.

(a) *Uniform system of accounts and records.* Each applicant for and direct beneficiary of Federal financial assistance under section 9 of the Federal Transit Act must comply with the applicable requirements of the section 15 Uniform System of Accounts and Records, as set forth in the current edition of the ''Urban Mass Transportation Industry Uniform System of Accounts and Records''; the ''Reporting Manual''; Circulars; and other reference documentation.

(b) *Reporting system.* Each applicant for, and direct beneficiary of, Federal financial assistance under section 9 of the Federal Transit Act must comply with the applicable requirements of the section 15 Reporting System, as set forth in the current edition of the ''Urban Mass Transportation Industry Uniform System of Accounts and Records''; the ''Reporting Manual''; Circulars; and other reference documentation.

(c) *Copies.* Copies of these referenced documents are available from the Federal Transit Administration, Office of Grants Management, Audit Review and Analysis Division, P.O. Box 61126, Washington, DC 20039–1126. These reference documents are subject to periodic revision. Revisions of these documents will be mailed to all persons required to comply and a notice of any significant changes in these reference documents will be published in FEDERAL REGISTER.

§ 630.5 Failure to report data.

Failure to report data in accordance with this part will result in the reporting agency being ineligible to receive any section 9 grants directly or indirectly (e.g., a public agency receiving The FTA funds through another public agency rather than directly from the FTA). This ineligibility applies to all

reporting agencies without regard to the size of the urbanized area served by the reporting agency.

§ 630.6 Late and incomplete reports.

(a) *Late reports.* Each reporting agency shall ensure that its report is received by the FTA on due dates prescribed in the annual Reporting Manual. A reporting agency may request an extension of 30 days after the due date. The FTA will treat a failure to submit the required report by the due date as failure to report data under § 630.05.

(b) *Incomplete reports.* The FTA will treat any report or submission which does not contain all the necessary reporting forms, data, or certifications for services directly operated by the reporting agency in substantial conformance with the definitions, procedures, and format requirements set out in the section 15 Uniform System of Accounts and Records and Reporting System as failure to report data under § 630.05. The FTA will treat the submission of a report with incomplete data or missing forms for services provided under contract to the reporting agency by private or public carriers as failure to report data under § 630.05 provided that the reporting agency has exhausted all possibilities for obtaining this information.

§ 630.7 Failure to respond to questions.

The FTA will review each section 15 report to verify the reasonableness of the data submitted. If any of the data do not appear reasonable, the FTA will notify the reporting agency of this fact and request written justification to document the accuracy of the questioned data. Failure of a reporting agency to make a good faith written response to this request will be treated under § 630.5 as failure to report data.

§ 630.8 Questionable data items.

The FTA may enter a zero or adjust any questionable data item(s) in a reporting agency's section 15 report used in computing the section 9 apportionment. These adjustments may be made if any data appear inaccurate or have not been collected and reported in accordance with the FTA's definitions and/or confidence and precision levels, or if there is lack of adequate documentation or a reliable recordkeeping system.

§ 630.9 Notice of FTA action.

Before taking final action under § 630.5, § 630.6, § 630.7 or § 630.8, the FTA will transmit a written request to the reporting agencies to provide the necessary information within a specified reasonable period of time. The FTA will advise the reporting agency of its final decision in this regard.

§ 630.10 Waiver of reporting requirements.

Waivers of one or more sections of the reporting requirements may be granted at the discretion of the Administrator on a written showing that the party seeking the waiver cannot furnish the required data without unreasonable expense and inconvenience. Each waiver will be for a specified period of time.

§ 630.11 Data adjustments.

Errors in the data used in making the apportionment may be discovered after any particular year's apportionment is completed. If so, the FTA shall make adjustments to correct these errors in a subsequent year's apportionment to the extent feasible.

§ 630.12 Display of OMB control numbers.

All of the information collection requests in this part have been approved by the Office of Management and Budget under control number 2132–0008.

APPENDIX A TO PART 630—OVERVIEW AND EXPLANATION OF THE URBAN MASS TRANSPORTATION INDUSTRY UNIFORM SYSTEM OF ACCOUNTS AND RECORDS AND REPORTING SYSTEM

A. Introduction

Section 15 of the Federal Transit Act, as amended, provides for establishment of two information-gathering analytic systems: A Uniform System of Accounts and Records, and a Reporting System for the collection and dissemination of public mass transportation financial and operating data by uniform categories. The purpose of these two Systems is to provide information on which to base public transportation planning and public sector investment decisions. The section 15 system is administered by the Federal Transit Administration (FTA).

The Uniform System of Accounts and Records consists of:

- Various categories of accounts and records for classifying financial and operating data;
- Precise definitions as to what data elements are to be included in these categories; and
- Definitions of practices for systematic colloection and recording of such information.
- While a specific accounting system is recommended for this recordkeeping, it is possible to make a translation from most existing accounting systems to comply with the *Section 15 Reporting System,* which consists of forms and procedures:
- For transmitting data from transit agencies to the FTA;
- For editing and storing the data; and
- For the FTA to report information to various groups.

Under the terms of section 15 of the Federal Transit Act, as amended, all applicants for, and beneficiaries of, Federal assistance under section 9 of the Act (under the formula grant programs) must comply with the Reporting System and the Uniform System of Accounts and Records in order to be eligible for Federal grants. It should be noted that separate and complete Section 15 reports must be submitted by or for each purchased transportation service provider that operates 100 or more revenue vehicles for the purchased service during the maximum service period.

B. Purpose of This Appendix

This appendix presents a general introduction to the structure and operation of the two Systems. It is not a detailed set of instructions for completion of a Section 15 report or establishment of a System of Accounts and Records. Persons in need of more information should refer to the current editions of the Urban Mass Transportation Industry Uniform System of Accounts and Records and the Reporting Manual, available from: Federal Transit Administration, Audit Review and Analysis Division, Office of Capital and Formula Assistance, P.O. Box 61126, Washington, DC 20039–1126.

The FTA periodically updates these reference documents or supplements them to revise or clarify section 15 definitions, reporting forms and instructions. Section 630.4 makes clear that reporting agencies must use the most recent edition of reference documents and reporting forms to comply with the section 15 requirements. The FTA therefore encourages local officials to check with the FTA before completing a Section 15 report to avoid unnecessary efforts and delays.

C. Special (Reduced) Reporting Requirements

Certain information collection and recording requirements were tailored to accommodate the unique characteristics of certain transportation modes. Reduced requirements were permitted during limited time periods to ease transition to complete reporting for these modes. Reduced reporting requirements for commuter rail systems and vanpool services ended in the 1987 report year. In addition, the reduced reporting requirements for private subscription and private noncontract conventional bus service is eliminated for the 1992 report year.

D. A Single Required Level of Section 15 Reporting and Recordkeeping

The FTA has developed a single required reporting format for use by all transit agencies. The single required level accommodates variations in size, local laws, and modes of transport.

The Uniform Systems also contain a limited amount of additional more detailed financial and operational data that can be submitted at the reporting agency's option. Because the optional subcategories of data can be aggregated to the required level, these subcategories define the more aggregated data. The definitions for data reported at the required level are consistent with, and summarized from, those for the more detailed optional data.

E. The Uniform System of Accounts and Records

The Uniform System of Accounts and Records (USOA) consists of a financial accounting and operational recordkeeping system designed for mass transportation managers and planners. Its uniformity permits more thorough and accurate comparisons and analyses of different transit agencies' operating costs and efficiencies than if each had a unique recordkeeping and accounting system. The System establishes various categories of accounts and records for classifying mass transportation operating and financial data, and includes precise definitions of transportation terminology to ensure that all users share a common understanding of how to use and interpret the collected data.

(1) Use of the Accounts and Records System

Beneficiaries of, and applicants for, Federal assistance are not required to use the Uniform System of Accounts and Records in keeping their own records. If an applicant or beneficiary chooses not to use the System, however, it must nevertheless be able to translate its accounts and records system to the accounts prescribed in the System. The accounting system that the reporting agency uses must permit preparation of financial and operating data that conform to the Uniform System directly from its records at the

end of the fiscal year, and must be consistent with the following:

(i) The data must have been developed using the accrual method of accounting. Those transit systems that use cash-basis accounting, in whole or in part, must make work sheet adjustments in their account books to record the data on the accrual basis.

(ii) Reporting agencies must follow or be able to directly translate their system to the accounting treatment specified in the publication ''Uniform System of Accounts and Records.''

(iii) The reporting agency's accounting categories (chart of accounts) must be correctly related, using a clear audit trail, to the accounting categories prescribed in the Uniform System of Accounts and Records.

(2) General Structure of Uniform System of Accounts and Records

In the Section 15 Uniform System of Accounts and Records, operating expenses incurred by the transit system are classified by transit mode. The FTA developed expense classifications in two dimensions for uniformity and to enhance the usefulness of the data collected under section 15. The classifications are typical of those of most transit accounting systems. The two dimensions are:

(i) The type of expenditure (expense object class); and

(ii) The function or activity performed.

Operating expenses can be identified either in function or object class categories, or cross-classified, allowing identification using both categories. The Uniform System also categorizes expenditures by four basic functions submitted by all reporting agencies. A limited number of additional details are optional. All reporting agencies are required to use a single set of object class categories.

The Uniform System has a single set of revenue object classes to be used by all reporting agencies, and provides a limited number of additional details that are optional.

The Uniform System provides a classification for sources and uses of capital to be submitted by all reporting agencies. These classifications replace capital information previously required on the balance sheet and capital subsidiary schedule.

The Uniform System of Accounts and Records also includes collecting and recording of certain operating data elements.

Details and definitions of the expense object classes, functions, revenue object classes, sources and uses of capital, and operating data elements are contained in the current edition of the ''Reporting Manual,'' which is updated annually, and the USOA reference documents.

F. The Reporting System

(1) The Section 15 Reporting System consists of forms and procedures for transmitting data from transit agencies to the FTA. All beneficiaries of Federal financial assistance must submit the required forms and information in order to allow the FTA to: (1) Store and generate information on the Nation's mass transportation systems; and (2) calculate apportionment allocations for the section 9 formula grant program (for urbanized areas of 200,000 or more inhabitants). Agencies submitting Section 15 reports may only submit data for transit services which they directly operate and purchase under contract from public agencies and/or private carriers.

Separate and complete Section 15 reports must be submitted by or for each purchased transportation service provider that operates 100 or more revenue vehicles for the purchased service during the maximum service period. The reporting requirements include the following major segments, which are based on information assembled through the Uniform System of Accounts and Records:

1. Capital report.
2. Revenue report.
3. Expense report.
4. Nonfinancial operating data reports.
5. Miscellaneous auxiliary questionnaires and subsidiary schedules.
6. Data declarations.

(2) The Section 15 Reporting System includes two data declarations.

(a) The Chief Executive Officer (CEO) Certification.

The CEO of each reporting agency is required to submit a certification with each annual Section 15 report. The certification must attest:

- To the accuracy of all data contained in the Section 15 report;
- That all data submitted in the Section 15 report are in accord with Section 15 definitions;
- If applicable, that the reporting agency's accounting system used to derive all data submitted in the Section 15 report is the section 15 Uniform System of Accounts and Records and that a Section 15 report using this system was certified by an independent auditor in a previous report year;
- If applicable, the fact that the reporting agency's internal accounting system is other than the Uniform System of Accounts and Records, and that its: (i) accounting system uses the accrual basis of accounting, (ii) accounting system is directly translated, using a clear audit trail, to the accounting treatment and categories specified by the section 15 Uniform System of Accounts and Records, and (iii) accounting system and direct translation to the Uniform System of Accounts and Records are the same as those certified

by an independent auditor in a previous reporting year; and

• That a 100% count of passenger mile data was conducted or that the sampling method used to collect passenger mile data for each mode/type of service meets the FTA requirements.

(b) Auditor Statement on Section 15 Financial Data Reporting Forms and Section 9 Data.

Reporting agencies must submit with their Section 15 report a statement signed by an independent public accountant or other responsible independent entity such as a state audit agency. This statement must express an opinion on whether the financial data reporting forms in the Section 15 report present fairly, in all material respects, the information required to be set forth therein in accordance with the Uniform System of Accounts and Records. The statement shall also indicate whether any of the reporting forms or data elements do not conform to the section 15 requirements, and describe the discrepancies. The statement must consider both required and optional data entries.

Each agency is required to file an Auditor Statement unless it received a written waiver from the FTA. The criteria in either Condition I or Condition II for granting a financial data waiver are:

Condition I. The reporting agency (1) has adopted the Industry Uniform System of Accounts and Records (USOA) and (2) has previously submitted a Section 15 report that was compiled using the USOA and was reviewed by an independent auditor; or

Condition II. The reporting agency (1) uses an internal accounting system other than the accounting system prescribed by the USOA, (2) uses the accrual basis of accounting, (3) directly translates the system and accounting categories, using a clear audit trail, to the accounting treatment and categories specified by the USOA, and (4) has previously submitted a Section 15 report that was compiled using the same internal accounting system and translation to the USOA and was reviewed by an independent auditor.

For agencies that have received a waiver, the CEO annual Certification must verify that the financial data meet one of the above two conditions.

Additionally, all reporting agencies that are in or serve urbanized areas with populations of 200,000 or more and whose report covers 100 or more vehicles in annual maximum service across all modes and types of service must have an independent auditor review all section 15 data used in the section 9 formula allocation. The statement should discuss, by mode and type of service: directional route miles, vehicle revenue miles, passenger miles, and operating cost, and include both directly operated and purchased service. The independent, certified public accountant shall perform the verification in accordance with the ''Statements on Standards for Attestation Engagements'' issued by the American Institute of Certified Public Accountants. The specific procedures to be reviewed are described in the most recent Section 15 Reporting Manual.

PART 633—PROJECT MANAGEMENT OVERSIGHT

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AUTHORITY: 49 U.S.C. 1601 et. seq., 1619.

SOURCE: 54 FR 36711, Sept. 1, 1989, unless otherwise noted.

Subpart A—General Provisions

§ 633.1 Purpose.

This part implements section 324 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100–17), which added section 23 to the FT Act. The part provides for a two-part program for major capital projects receiving assistance from the agency. First, subpart B discusses project management oversight, designed primarily to aid FTA in its role of ensuring successful implementation of federally-funded projects. Second, subpart C discusses the project management plan (PMP) required of all major capital projects. The PMP is designed to enhance the recipient's planning and implementation efforts and to assist FTA's grant application analysis efforts.

§ 633.3 Scope.

This rule applies to a recipient of Federal financial assistance undertaking a major capital project using funds made available under:

(a) Sections 3, 9, or 18 of the Federal Mass Transit Act of 1964, as amended;

(b) 23 U.S.C. 103(e)(4); or

(c) Section 14(b) of the National Capital Transportation Amendments of 1979 (93 Stat. 1320, Pub. L. 96–184).

§ 633.5 Definitions.

As used in this part:

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Days means calendar days.

Fixed guideway means any public transportation facility which utilizes and occupies a separate right-of-way or rails. This includes, but is not limited to, rapid rail, light rail, commuter rail, automated guideway transit, people movers, and exclusive facilities for buses and other high occupancy vehicles.

Full funding agreement means a written agreement between FTA and a recipient that establishes a financial ceiling with respect to the Government's participation in a project; sets forth the scope of a project; and sets forth the mutual understanding, terms, and conditions relating to the construction and management of a project.

Major capital project means a project that:

(1) Involves the construction of a new fixed guideway or extension of an existing fixed guideway;

(2) Involves the rehabilitation or modernization of an existing fixed guideway with a total project cost in excess of $100 million; or

(3) The Administrator determines is a major capital project because the project management oversight program will benefit specifically the agency or the recipient. Typically, this means a project that:

(i) Generally is expected to have a total project cost in excess of $100 million or more to construct;

(ii) Is not exclusively for the routine acquisition, maintenance, or rehabilitation of vehicles or other rolling stock;

(iii) Involves new technology;

(iv) Is of a unique nature for the recipient; or

(v) Involves a recipient whose past experience indicates to the agency the appropriateness of the extension of this program.

Project management oversight means the monitoring of a major capital project's progress to determine whether a project is on time, within budget, in conformance with design criteria, constructed to approved plans and specifications and is efficiently and effectively implemented.

Project management plan means a written document prepared by a recipient that explicitly defines all tasks necessary to implement a major capital project.

Recipient means a direct recipient of Federal financial assistance from FTA.

FT Act means the Federal Mass Transit Act of 1964, as amended.

FTA means the Federal Transit Administration.

Subpart B—Project Management Oversight Services

§ 633.11 Covered projects.

The Administrator may contract for project management oversight services when the following two conditions apply:

(a) The recipient is using funds made available under section 3, 9, or 18 of the Federal Mass Transit Act of 1964, as amended; 23 U.S.C. 103(e)(4); or section 14(b) of the National Capital Transportation Amendments of 1979; and

(b) The project is a ''major capital project''.

§ 633.13 Initiation of PMO services.

PMO services will be initiated as soon as it is practicable, once the agency determines this part applies. In most cases, this means that PMO will begin during the preliminary engineering phase of the project. However, consistent with other provisions in this part, the Administrator may determine that a project is a ''major capital project'' at any point during its implementation. Should this occur, PMO will begin as soon as practicable after this agency determination.

§ 633.15 Access to information.

A recipient of FTA funds for a major capital project shall provide the Administrator and the PMO contractor chosen under this part access to its records and construction sites, as reasonably may be required.

§ 633.17 PMO contractor eligibility.

(a) Any person or entity may provide project management oversight services in connection with a major capital project, with the following exceptions:

(1) An entity may not provide PMO services for its own project; and

(2) An entity may not provide PMO services for a project if there exists a conflict of interest.

(b) In choosing private sector persons or entities to provide project management oversight services, FTA uses the procurement requirements in the government-wide procurement regulations, found at 48 CFR CH I.

§ 633.19 Financing the PMO program.

(a) FTA is authorized to expend up to ½ of 1 percent of the funds made available each fiscal year under sections 3, 9, or 18 of the FT Act, 23 U.S.C. 103(e)(4), or section 14(b) of the National Capital Transportation Amendments of 1979 (93 Stat. 1320) to contract with any person or entity to provide a project management oversight service in connection with a major capital project as defined in this part.

(b) A contract entered into between FTA and a person or entity for project management oversight services under this part will provide for the payment by FTA of 100 percent of the cost of carrying out the contract.

Subpart C—Project Management Plans

§ 633.21 Basic requirement.

(a) If a project meets the definition of major capital project, the recipient shall submit a project management plan prepared in accordance with § 633.25 of this part, as a condition of Federal financial assistance. As a general rule, the PMP must be submitted during the grant review process and is part of FTA's grant application review. This section applies if:

(1) The project fails under one of the automatic major capital investment project categories (§ 633.5(1) or (2) of this part); or

(2) FTA makes a determination that a project is a major capital project, consistent with the definition of major capital project in § 633.5. This determination normally will be made during the grant review process. However, FTA may make such determination after grant approval.

(b)(1) FTA will notify the recipient when it must submit the PMP. Normally, FTA will notify the recipient sometime during the grant review process. If FTA determines the project is major under its discretionary authority after the grant has been approved, FTA will inform the recipient of its determination as soon as possible.

(2) Once FTA has notified the recipient that it must submit a plan, the recipient will have a minimum of 90 days to submit the plan.

§ 633.23 FTA review of PMP.

Within 60 days of receipt of a project management plan, the Administrator will notify the recipient that:

(a) The plan is approved;

(b) The plan is disapproved, including the reasons for the disapproval;

(c) The plan will require modification, as specified, before approval; or

(d) The Administrator has not yet completed review of the plan, and state when it will be reviewed.

§ 633.25 Contents of a project management plan.

At a minimum, a recipient's project management plan shall include—

(a) A description of adequate recipient staff organization, complete with well-defined reporting relationships, statements of functional responsibilities, job descriptions, and job qualifications;

(b) A budget covering the project management organization, appropriate consultants, property acquisition, utility relocation, systems demonstration staff, audits, and such miscellaneous costs as the recipient may be prepared to justify;

(c) A construction schedule;

(d) A document control procedure and recordkeeping system;

(e) A change order procedure which includes a documented, systematic approach to the handling of construction change orders;

(f) A description of organizational structures, management skills, and staffing levels required throughout the construction phase;

(g) Quality control and quality assurance programs which define functions, procedures, and responsibilities for construction and for system installation and integration of system components;

(h) Material testing policies and procedures;

(i) Plan for internal reporting requirements including cost and schedule control procedures; and

(j) Criteria and procedures to be used for testing the operational system or its major components;

§ 633.27 Implementation of a project management plan.

(a) Upon approval of a project management plan by the Administrator the recipient shall begin implementing the plan.

(b) If a recipient must modify an approved project management plan, the recipient shall submit the proposed changes to the Administrator along with an explanation of the need for the changes.

(c) A recipient shall submit periodic updates of the project management plan to the Administrator. Such updates shall include, but not be limited to:

(1) Project budget;

(2) Project schedule;

(3) Financing, both capital and operating;

(4) Ridership estimates, including operating plan; and

(5) Where applicable, the status of local efforts to enhance ridership when estimates are contingent, in part, upon the success of such efforts.

(d) A recipient shall submit current data on a major capital project's budget and schedule to the Administrator on a monthly basis.

§ 633.29 PMP waivers.

A waiver will be considered upon initiation by the grantee or by the agency itself. The Administrator may, on a case-by-case basis, waive:

(a) Any of the PMP elements in § 633.25 of this part if the Administrator determines the element is not necessary for a particular plan; or

(b) The requirement of having a new project management plan submitted for a major capital project if a recipient seeks to manage the major capital project under a previously-approved project management plan.

PART 639—CAPITAL LEASES

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639.21 Determination of cost-effectiveness.
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Subpart D—Lease Management

639.31 Early lease termination or modification.
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AUTHORITY: 49 U.S.C. 5302; 49 CFR 1.51.

SOURCE: 56 FR 51794, Oct. 15, 1991, unless otherwise noted.

Subpart A—General

§ 639.1 General overview of this part.

This part contains the requirements to qualify for capital assistance when leasing facilities or equipment under the Federal transit laws. This part is set out in four subparts, with subpart A containing general information on scope and definitions. Subpart B contains the principal requirements of this

part, including eligibility requirements, the self-certification system used, and identification of the various forms of leases and grants that are eligible under the program. Subpart B also contains a section on other Federal requirements that may apply. Subpart C includes the actual calculations that each recipient should undertake before certifying that a lease is cost-effective. Finally, subpart D contains requirements on early lease termination and project management in general.

[63 FR 68366, Dec. 10, 1998]

§ 639.3 Purpose of this part.

This rule implements section 3003 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178). Section 3003 amended section 5302 of Chapter 53 of Title 49 of the United States Code to allow a recipient to use capital funds to finance the leasing of facilities and equipment on the condition that the leasing arrangements are more cost effective than purchase or construction.

[63 FR 68367, Dec. 10, 1998]

§ 639.5 Scope of this part.

This part applies to all requests for capital assistance under Chapter 53 of Title 49 of the United States Code where the proposed method of obtaining a capital asset is by lease rather than purchase or construction.

[63 FR 68367, Dec. 10, 1998]

§ 639.7 Definitions.

In this part:

Applicant is included in the term ''recipient''.

Capital asset means facilities or equipment with a useful life of at least one year, which are eligible for capital assistance.

Capital assistance means Federal financial assistance for capital projects under section 9 of the FT Act.

Capital lease means any transaction whereby the recipient acquires the right to use a capital asset without obtaining full ownership regardless of the tax status of the transaction.

Equipment means non-expendable personal property.

Facilities means real property, including land, improvements and fixtures.

Interest rate means the most advantageous interest rate actually available to the recipient in the market.

Present value means the value at the time of calculation of a future payment, or series of future payments discounted by the time value of money as represented by an interest rate or similar cost of funds.

Recipient means an entity that receives Federal financial assistance from FTA, including an entity that receives Federal financial assistance from FTA through a State or other public body. In this part, a recipient includes an applicant for Federal financial assistance.

FT Act means the Federal Mass Transit Act of 1964, as amended, 49 U.S.C. 1601 *et seq.*

FTA means the Federal Transit Administration.

Subpart B—Requirements

§ 639.11 Lease qualification requirements.

(a) A lease may qualify for capital assistance if it meets the following criteria:

(1) The capital asset to be acquired by lease is otherwise eligible for capital assistance;

(2) There is or will be no existing Federal interest in the capital asset as of the date the lease will take effect unless as determined pursuant to § 639.13(b); and

(3) Lease of the capital asset is more cost-effective than purchase or construction of the asset, as determined under subpart C of this part.

(b) Once a lease has been qualified for capital assistance, it need not be requalified absent an affirmative act or omission by the recipient that vitiates the cost-effectiveness determination.

§ 639.13 Eligible types of leases.

(a) *General.* Any leasing arrangement, the terms of which provide for the recipient's use of a capital asset, potentially is eligible as a capital project under Chapter 53 of Title 49 of the United States Code, regardless of the classification of the leasing arrangement for tax purposes.

(b) *Special circumstances.* A recipient may request FTA to determine the eligibility of a certain financial arrangement if the recipient believes it might not meet the requirements of this part.

(c) *Lump sum lease.* A recipient that wishes to enter into a lease which requires the draw down of a single lump sum payment at the inception of the lease (or payments in advance of the incurrence of costs) rather than periodic payments during the life of the lease must notify FTA prior to execution of the lease concerning how it will ensure satisfactory continuing control of the asset for the duration of the lease. FTA has the right to disapprove any arrangements where it has not been demonstrated that the recipient will have control over the asset. FTA may require the recipient to submit its cost-effectiveness comparison for review.

(d) *Pre-existing lease.* A lease entered into before grant approval, or before November 14, 1991 may be eligible for capital assistance for costs incurred after approval of such a lease by FTA under this part, if

(1) The lease is otherwise eligible under this part;

(2) The recipient can demonstrate that the lease, when entered into, was more cost effective than purchase or construction; and

(3) The procurement of the asset by lease was in accordance with Federal requirements that applied at the time the procurement tool place.

[56 FR 51794, Oct. 15, 1991, as amended at 63 FR 68367, Dec. 10, 1998]

§ 639.15 Eligible forms of grant.

A recipient may choose to receive capital assistance for a capital lease approved under this part—

(a) In a single grant under which lease payments may be drawn down periodically for the life of the lease; or

(b) In increments that are obligated by FTA periodically (usually in annual section 9 grants). In this case, a recipient—

(1) Must certify to FTA that it has the financial capacity to meet its future obligations under the lease in the event Federal funds are not available for capital assistance in subsequent years; and

(2) May incur costs under its lease before FTA's obligation of future increments of funding for such a lease. These costs are reimbursable in future grants, so long as the terms of the lease do not substantially change.

§ 639.17 Eligible lease costs.

(a) All costs directly attributable to making a capital asset available to the lessee are eligible for capital assistance, including, but not limited to—

(1) Finance charges, including interest;

(2) Ancillary costs such as delivery and installation charges; and

(3) Maintenance costs.

(b) Any asset leased under this part must be eligible for capital assistance under a traditional purchase or construction grant.

[61 FR 25090, May 17, 1996]

§ 639.19 Other Federal requirements.

(a) A recipient of capital assistance for a capital lease is subject to the same statutory and administrative requirements as a recipient who purchases or constructs a capital asset.

(b) A lessor of a capital lease is subject to the same statutory and administrative requirements as a direct seller of the same capital asset would be when the lessor—

(1) Purchases or constructs a capital asset in contemplation of leasing it to a recipient; or

(2) Modifies an existing capital asset in contemplation of leasing it to a recipient.

Subpart C—Cost-Effectiveness

§ 639.21 Determination of cost-effectiveness.

(a) To qualify a lease for capital assistance, a recipient must—

(1) Make a written comparison of the cost of leasing the asset with the cost of purchasing or constructing it; and

(2) Certify to FTA before entering into the lease or before receiving a capital grant for the asset, whichever is later, that obtaining the asset by lease is more cost-effective than purchase or construction of such asset.

(b) For purposes of this part, obtaining the asset by lease is more cost-effective than purchase or construction when the lease cost calculated under §639.25 of this part is less than the purchase cost calculated under §639.23 of this part.

(c) If a recipient is unable to perform the prescribed cost-effectiveness comparison as described in this subpart, it may ask FTA to approve an alternate form of cost-effectiveness evaluation.

§ 639.23 Calculation of purchase or construction cost.

(a) For purposes of this subpart, the purchase or construction cost of a capital asset is—

(1) The estimated cost to purchase or construct the asset; plus

(2) Ancillary costs such as delivery and installation; plus

(3) The net present value of the estimated future cost to provide any other service or benefit requested by the applicant in its proposal to obtain the capital asset.

(b) The estimated cost to purchase or construct must be—

(1) Reasonable;

(2) Based on realistic current market conditions; and

(3) Based on the expected useful life of the asset in mass transportation service, as indicated in paragraph (c) of this section.

(c) For purposes of this part, the expected useful life of a revenue vehicle is the useful life which is established by FTA for recipients of Federal assistance under FTA's Circulars for section 9 recipients. For assets other than revenue vehicles, the applicant is responsible for establishing a reasonable expected useful life. If the recipient does not intend to use the capital asset it is proposing to obtain by lease in mass transportation service for its entire expected useful life, when calculating the purchase cost, the recipient must calculate the fair market value of the asset as of the date the lease will terminate pursuant to Guidelines found in section 108(b) of part II Standard Terms and Conditions for valuation of property withdrawn from transit use before the end of its useful life and subtract that amount from the purchase price. The resulting amount is the purchase price for purposes of this rule.

§ 639.25 Calculation of lease cost.

(a) For purposes of this part, the lease cost of a capital asset is—

(1) The cost to lease the asset for the same use and same time period specified in the recipient's proposal to obtain the asset by purchase or construction; plus

(2) Ancillary costs such as delivery and installation; plus

(3) The net present value of the estimated future cost to provide any other service or benefit requested by the applicant in its proposal to obtain the capital asset.

(b) The estimated lease costs must be reasonable, based on realistic market conditions applicable to the recipient and must be expressed in present value terms.

§ 639.27 Minimum criteria.

In making the comparison between leasing and purchasing or constructing an asset, recipients should ascribe a realistic dollar value to any non-financial factors that are considered by using performance-based specifications in the comparison. In addition to factors unique to each recipient, the following factors are to be used where possible and appropriate:

(a) Operation costs;

(b) Reliability of service;

(c) Maintenance costs;

(d) Difference in warranties;

(e) Passenger comfort;

(f) Insurance costs;

(g) Costs/savings related to timing of acquisition of asset.

(h) Value of asset at expiration of the lease.

Subpart D—Lease Management

§ 639.31 Early lease termination or modification.

(a) Except as provided in paragraph (c) of this section, if a capital lease under this part is terminated or its terms substantially modified before the end of the period used in the cost-effectiveness evaluation, or if the recipient by an affirmative act or omission vitiates the cost-effectiveness determination of the lease, future lease

costs will no longer qualify as eligible capital expenses. In addition, the recipient must reimburse the project—

(1) Any Federal funds paid for the portion of the lease term eliminated by early termination; and

(2) The Federal share of the excess, if any, of the present value of lease costs, which exceeds the purchase costs as calculated under subpart C of this part for the period of the lease up to the point of termination.

(b) Penalties resulting from early termination of a capital lease under this part are not eligible for Federal financial assistance.

(c) Paragraph (a) of this section does not apply if a lessor defaults on or otherwise does not meet its obligations under the capital lease and the recipient takes appropriate action to ensure that the procurement continues to be cost-effective. FTA shall be notified of any such event.

§ 639.33 Management of leased assets.

Each recipient must maintain an inventory of capital assets acquired by standard FTA project management guidelines.

PART 640—CREDIT ASSISTANCE FOR SURFACE TRANSPORTATION PROJECTS

AUTHORITY: Secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241, as amended; 23 U.S.C. 181–189 and 315; 49 CFR 1.51.

§ 640.1 Cross-reference to credit assistance.

The regulations in 49 CFR part 80 shall be followed in complying with the requirements of this part. Title 49, CFR, part 80 implements the Transportation Infrastructure Finance and Innovation Act of 1998, secs. 1501 *et seq.*, Pub. L. 105–178, 112 Stat. 107, 241.

[64 FR 29753, June 2, 1999]

PART 655—PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

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AUTHORITY: 49 U.S.C. 5331; 49 CFR 1.51.

SOURCE: 66 FR 42002, Aug. 9, 2001, unless otherwise noted.

Subpart A—General

§ 655.1 Purpose.

The purpose of this part is to establish programs to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.

§ 655.2 Overview.

(a) This part includes nine subparts. Subpart A of this part covers the general requirements of FTA's drug and alcohol testing programs. Subpart B of this part specifies the basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program. Subpart C of this part describes prohibited drug use. Subpart D of this part describes prohibited alcohol use. Subpart E of this part describes the types of alcohol and drug tests to be conducted. Subpart F of this part addresses the testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in 49 CFR Part 40. Subpart G of this part lists the consequences for covered employees who engage in alcohol misuse or prohibited drug use. Subpart H of this part contains administrative matters, such as reports and recordkeeping requirements. Subpart I of this part specifies how a recipient certifies compliance with the rule.

(b) This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

§ 655.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to:

(1) Each recipient and subrecipient receiving Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4); and

(2) Any contractor of a recipient or subrecipient of Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4).

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR Part 219 and §655.83 for its railroad operations, and shall follow this part for its non-railroad operations, if any.

§ 655.4 Definitions.

For this part, the terms listed in this section have the following definitions. The definitions of additional terms used in this part but not listed in this section can be found in 49 CFR Part 40.

Accident means an occurrence associated with the operation of a vehicle, if as a result:

(1) An individual dies; or

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles (including non-FTA funded vehicles) incurs disabling damage as the result of the occurrence and such vehicle or vehicles are transported away from the scene by a tow truck or other vehicle; or

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official that the recipient has complied with the provisions of this part. (See § 655.82 and § 655.83 for certification requirements.)

Contractor means a person or organization that provides a safety-sensitive service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including an applicant or transferee, who performs or will perform a safety-sensitive function for an entity subject to this part. A volunteer is a covered employee if:

(1) The volunteer is required to hold a commercial driver's license to operate the vehicle; or

(2) The volunteer performs a safety-sensitive function for an entity subject to this part and receives remuneration in excess of his or her actual expenses incurred while engaged in the volunteer activity.

Disabling damage means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) *Inclusion.* Damage to a motor vehicle, where the vehicle could have been driven, but would have been further damaged if so driven.

(2) *Exclusions.* (i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or tail light damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.

DOT or *The Department* means the United States Department of Transportation.

DOT agency means an agency (or ''operating administration'') of the United States Department of Transportation administering regulations requiring drug and alcohol testing. See 14 CFR part 121, appendices I and J; 33 CFR part 95; 46 CFR parts 4, 5, and 16; and 49 CFR parts 199, 219, 382, and 655.

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Positive rate for random drug testing means the number of verified positive results for random drug tests conducted under this part plus the number of refusals of random drug tests required by this part, divided by the total number of random drug tests results (*i.e.*, positive, negative, and refusals) under this part.

Railroad means:

(1) All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:

(i) Commuter or other short-haul rail passenger service in a metropolitan or

suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

(2) Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).

Refuse to submit means any circumstance outlined in 49 CFR 40.191 and 40.261.

Safety-sensitive function means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. 5307 or 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. 5311 and contracts out such services;

(5) Carrying a firearm for security purposes.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

Violation rate for random alcohol testing means the number of 0.04 and above random alcohol confirmation test results conducted under this part plus the number of refusals of random alcohol tests required by this part, divided by the total number of alcohol random screening tests (including refusals) conducted under this part.

[66 FR 42002, Aug. 9, 2001, as amended at 68 FR 75462, Dec. 31, 2003]

§ 655.5 Stand-down waivers for drug testing.

(a) An employer subject to this part may petition the FTA for a waiver allowing the employer to stand down, per 49 CFR Part 40, an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

(b) Each petition for a waiver must be in writing and include facts and justification to support the waiver. Each petition must satisfy the requirements for obtaining a waiver, as provided in 49 CFR 40.21.

(c) Each petition for a waiver must be submitted to the Office of Safety and Security, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, SW. Washington, DC 20590.

(d) The Administrator may grant a waiver subject to 49 CFR 40.21(d).

§ 655.6 Preemption of state and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any state or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the state or local requirement and any requirement in this part is not possible; or

(2) Compliance with the state or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of state criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

§ 655.7 Starting date for testing programs.

An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations.

Subpart B—Program Requirements

§ 655.11 Requirement to establish an anti-drug use and alcohol misuse program.

Each employer shall establish an anti-drug use and alcohol misuse program consistent with the requirements of this part.

§ 655.12 Required elements of an anti-drug use and alcohol misuse program.

An anti-drug use and alcohol misuse program shall include the following:

(a) A statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use and alcohol misuse. This policy statement shall include all of the elements specified in § 655.15. Each employer shall disseminate the policy consistent with the provisions of § 655.16.

(b) An education and training program which meets the requirements of § 655.14.

(c) A testing program, as described in Subparts C and D of this part, which meets the requirements of this part and 49 CFR Part 40.

(d) Procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional, consistent with 49 CFR Part 40.

§ 655.13 [Reserved]

§ 655.14 Education and training programs.

Each employer shall establish an employee education and training program for all covered employees, including:

(a) *Education.* The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) *Training.* (1) *Covered employees.* Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

(2) *Supervisors.* Supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 655.15 Policy statement contents.

The local governing board of the employer or operator shall adopt an anti-drug and alcohol misuse policy statement. The statement must be made available to each covered employee, and shall include the following:

(a) The identity of the person, office, branch and/or position designated by the employer to answer employee questions about the employer's anti-drug use and alcohol misuse programs.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior and conduct prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs or alcohol misuse under this part.

(e) The procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug and alcohol testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug or alcohol test, and a statement that such a refusal constitutes a violation of the employer's policy.

(h) The consequences for a covered employee who has a verified positive drug or a confirmed alcohol test result with an alcohol concentration of 0.04 or greater, or who refuses to submit to a

test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional, as required by 49 CFR Part 40.

(i) The consequences, as set forth in §655.35 of subpart D, for a covered employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(j) The employer shall inform each covered employee if it implements elements of an anti-drug use or alcohol misuse program that are not required by this part. An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

§655.16 Requirement to disseminate policy.

Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug and alcohol misuse policies and procedures.

§655.17 Notice requirement.

Before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part.

§§655.18–655.20 [Reserved]

Subpart C—Prohibited Drug Use

§655.21 Drug testing.

(a) An employer shall establish a program that provides testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

(1) Marijuana;
(2) Cocaine;
(3) Opiates;
(4) Amphetamines; and
(5) Phencyclidine.

(c) Consumption of these products is prohibited at all times.

§§655.22–655.30 [Reserved]

Subpart D—Prohibited Alcohol Use

§655.31 Alcohol testing.

(a) An employer shall establish a program that provides for testing for alcohol in the following circumstances: post-accident, reasonable suspicion, random, and return to duty/follow-up. An employer may also conduct pre-employment alcohol testing.

(b) Each employer shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from performing or continuing to perform a safety-sensitive function.

§655.32 On duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

§655.33 Pre-duty use.

(a) *General.* Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) *On-call employees.* An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§ 655.34 Use following an accident.

Each employer shall prohibit alcohol use by any covered employee required to take a post-accident alcohol test under § 655.44 for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§ 655.35 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart E of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

§§ 655.36–655.40 [Reserved]

Subpart E—Types of Testing

§ 655.41 Pre-employment drug testing.

(a)(1) Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result. An employer may not allow a covered employee, including an applicant, to perform a safety-sensitive function unless the employee takes a drug test administered under this part with a verified negative result.

(2) When a covered employee or applicant has previously failed or refused a pre-employment drug test administered under this part, the employee must provide the employer proof of having successfully completed a referral, evaluation and treatment plan as described in § 655.62.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test administered under this part with a verified negative result.

(c) If a pre-employment drug test is canceled, the employer shall require the covered employee or applicant to take another pre-employment drug test administered under this part with a verified negative result.

(d) When a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has not been in the employer's random selection pool during that time, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result.

§ 655.42 Pre-employment alcohol testing.

An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, the employer must comply with the following requirements:

(a) The employer must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(b) The employer must treat all covered employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(c) The employer must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(d) The employer must conduct all pre-employment alcohol tests using the alcohol testing procedures set forth in 49 CFR Part 40.

(e) The employer must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates

an alcohol concentration of less than 0.02.

§ 655.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug and/or alcohol test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug and/or engaged in alcohol misuse.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. A supervisor(s), or other company official(s) who is trained in detecting the signs and symptoms of drug use and alcohol misuse must make the required observations.

(c) Alcohol testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, just preceding, or just after the period of the workday that the covered employee is required to be in compliance with this part. An employer may direct a covered employee to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

§ 655.44 Post-accident testing.

(a) Accidents. (1) *Fatal accidents.* (i) As soon as practicable following an accident involving the loss of human life, an employer shall conduct drug and alcohol tests on each surviving covered employee operating the mass transit vehicle at the time of the accident. Post-accident drug and alcohol testing of the operator is not required under this section if the covered employee is tested under the fatal accident testing requirements of the Federal Motor Carrier Safety Administration rule 49 CFR 389.303(a)(1) or (b)(1).

(ii) The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) *Nonfatal accidents.* (i) As soon as practicable following an accident not involving the loss of human life in which a mass transit vehicle is involved, the employer shall drug and alcohol test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) If an alcohol test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and maintain the record. Records shall be submitted to FTA upon request of the Administrator.

(b) An employer shall ensure that a covered employee required to be drug tested under this section is tested as soon as practicable but within 32 hours of the accident.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative

of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) The decision not to administer a drug and/or alcohol test under this section shall be based on the employer's determination, using the best available information at the time of the determination that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test.

(e) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(f) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer. Such test results may be used only when the employer is unable to perform a post-accident test within the required period noted in paragraphs (a) and (b) of this section.

§ 655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 10 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the FEDERAL REGISTER the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of § 655.72 for the calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing. (1)(i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 655.72 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all

covered employees if the Administrator determines that the data received under the reporting requirements of §655.72 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2)(i) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §655.72 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §655.72 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. If the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions. A covered employee may be randomly tested for prohibited drug use anytime while on duty.

(j) If a given covered employee is subject to random drug and alcohol testing under the testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug and alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may—

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

§ 655.46 Return to duty following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result of 0.04 or greater.

Where a covered employee refuses to submit to a test, has a verified positive drug test result, and/or has a confirmed alcohol test result of 0.04 or greater, the employer, before returning the employee to duty to perform a safety-sensitive function, shall follow the procedures outlined in 49 CFR Part 40.

§ 655.47 Follow-up testing after returning to duty.

An employer shall conduct follow-up testing of each employee who returns to duty, as specified in 49 CFR Part 40, subpart O.

§ 655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

If an employer chooses to permit a covered employee to perform a safety-sensitive function within 8 hours of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer shall retest the covered employee to ensure compliance with the provisions of §655.35. The covered employee may not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02.

§ 655.49 Refusal to submit to a drug or alcohol test.

(a) Each employer shall require a covered employee to submit to a post-accident drug and alcohol test required under §655.44, a random drug and alcohol test required under §655.45, a reasonable suspicion drug and alcohol test required under §655.43, or a follow-up drug and alcohol test required under §655.47. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

(b) When an employee refuses to submit to a drug or alcohol test, the employer shall follow the procedures outlined in 49 CFR Part 40.

§ 655.50 [Reserved]

Subpart F—Drug and Alcohol Testing Procedures

§ 655.51 Compliance with testing procedures requirements.

The drug and alcohol testing procedures in 49 CFR Part 40 apply to employers covered by this part, and must be read together with this part, unless expressly provided otherwise in this part.

§ 655.52 Substance abuse professional (SAP).

The SAP must perform the functions in 49 CFR Part 40.

§ 655.53 Supervisor acting as collection site personnel.

An employer shall not permit an employee with direct or immediate supervisory responsibility or authority over another employee to serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee.

§§ 655.54–655.60 [Reserved]

Subpart G—Consequences

§ 655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.

(a) (1) Immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive drug test result, the employer shall require that the covered employee cease performing a safety-sensitive function.

(2) Immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.04 or greater, the employer shall require that the covered employee cease performing a safety-sensitive function.

(3) If an employee refuses to submit to a drug or alcohol test required by this part, the employer shall require that the covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure the employee meets the requirements of 49 CFR Part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.

§ 655.62 Referral, evaluation, and treatment.

If a covered employee has a verified positive drug test result, or has a confirmed alcohol test of 0.04 or greater, or refuses to submit to a drug or alcohol test required by this part, the employer shall advise the employee of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAPs) and counseling and treatment programs.

§§ 655.63–655.70 [Reserved]

Subpart H—Administrative Requirements

§ 655. 71 Retention of records.

(a) *General requirement.* An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) *Period of retention.* In determining compliance with the retention period requirement, each record shall be maintained for the specified minimum period of time as measured from the date of the creation of the record. Each employer shall maintain the records in accordance with the following schedule:

(1) *Five years.* Records of covered employee verified positive drug or alcohol test results, documentation of refusals to take required drug or alcohol tests, and covered employee referrals to the substance abuse professional, and copies of annual MIS reports submitted to FTA.

(2) *Two years.* Records related to the collection process and employee training.

(3) *One year.* Records of negative drug or alcohol test results.

(c) *Types of records.* The following specific records must be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.

(iv) Documents generated in connection with decisions on post-accident drug and alcohol testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breathe sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a test administered under this part.

(3) Records related to referral and return to duty and follow-up testing: Records concerning a covered employee's entry into and completion of the treatment program recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.

(ii) Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

§ 655.72 Reporting of results in a management information system.

(a) Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under this part during the previous calendar year.

(b) When requested by FTA, each recipient shall submit to FTA's Office of Safety and Security, or its designated agent, by March 15, a report covering the previous calendar year (January 1 through December 31) summarizing the results of its anti-drug and alcohol misuse programs.

(c) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, contractor, consortium or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf.

(d) As an employer, you must use the Management Information System (MIS) form and instructions as required by 49 CFR part 40, § 40.25 and appendix H. You may also use the electronic version of the MIS form provided by the DOT. The Administrator may designate means (*e.g.*, electronic program transmitted via the Internet), other than hard-copy, for MIS form submission. For information on where to submit MIS forms and for the electronic version of the form, see: *http://transit-safety.volpe.dot.gov\DAMIS.*

(e) To calculate the total number of covered employees eligible for random testing throughout the year, as an employer, you must add the total number of covered employees eligible for testing during each random testing period for the year and divide that total by the number of random testing periods. Covered employees, and only covered employees, are to be in an employer's random testing pool, and all covered employees must be in the random pool. If you are an employer conducting random testing more often than once per month (*e.g.*, you select daily, weekly, bi-weekly), you do not need to compute this total number of covered employees rate more than on a once per month basis. As an employer, you may use a service agent (*e.g.*, C/TPA) to perform random selections for you; and your covered employees may be part of a larger random testing pool of covered employees. However, you must ensure that the service agent you use is testing at the appropriate percentage established for your industry and that only covered employees are in the random testing pool.

(f) If you have a covered employee who performs multi-DOT agency functions (*e.g.*, an employee drives a paratransit vehicle and performs pipeline maintenance duties for you), count the employee only on the MIS report for the DOT agency under which he or she is random tested. Normally, this will be the DOT agency under which the employee performs more than 50% of his or her duties. Employers may have to explain the testing data for these employees in the event of a DOT agency inspection or audit.

(g) A service agent (*e.g.*, Consortia/Third Party Administrator as defined in 49 CFR part 40) may prepare the MIS report on behalf of an employer. However, a company official (*e.g.*, Designated Employer Representative as defined in 49 CFR part 40) must certify the accuracy and completeness of the MIS report, no matter who prepares it.

[66 FR 42002, Aug. 9, 2001, as amended at 68 FR 75462, Dec. 31, 2003]

§ 655.73 Access to facilities and records.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by § 655.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon the employer's receipt of payment for the production of those records.

(c) An employer shall permit access to all facilities utilized and records compiled in complying with the requirements of this part to the Secretary of Transportation or any DOT

agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs required to be maintained by this part, to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems, upon the Secretary's request or the respective agency's request.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's drug or alcohol testing related to the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from the covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug or alcohol test under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

(i) An employer may disclose drug and alcohol testing information required to be maintained under this part, pertaining to a covered employee, to the State oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures of 49 CFR parts 40 and 655.

§§ 655.74–655.80 [Reserved]

Subpart I—Certifying Compliance

§ 655.81 Grantee oversight responsibility.

A grantee shall ensure that the recipients of funds under 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) comply with this part.

§ 655.82 Compliance as a condition of financial assistance.

(a) *General.* A recipient may not be eligible for Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 or under 23 U.S.C. 103(e)(4), if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by this part. Failure to certify compliance with these requirements, as specified in §655.83, may result in the suspension of a grantee's eligibility for Federal funding.

(b) *Criminal violation.* A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under 18 U.S.C. 1001.

(c) *State's role.* Each State shall certify compliance on behalf of its 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) subrecipients, as applicable. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 5307, 5309, 5311 or 103(e)(4) subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§ 655.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall annually certify compliance, as set forth in §655.82, to the applicable FTA Regional Office.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so.

(c) A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part.

PART 659—RAIL FIXED GUIDEWAY SYSTEMS; STATE SAFETY OVERSIGHT

Subpart A—General Provisions

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APPENDIX TO PART 659—SAMPLE CERTIFICATION OF COMPLIANCE.

AUTHORITY: 49 U.S.C. § 5330.

SOURCE: 60 FR 67046, Dec. 27, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 659.1 Purpose.

This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety of rail fixed guideway systems through a designated oversight agency.

§ 659.3 Scope.

This part applies to a State that has within its boundaries a rail fixed guideway system not regulated by the Federal Railroad Administration (FRA).

§ 659.5 Definitions.

As used in this part—

Accident means any event involving the revenue service operation of a rail fixed guideway system if as a result:

(1) An individual dies;

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) A collision, derailment, or fire causes property damage in excess of $100,000.

APTA Guidelines means the American Public Transit Association's ''Manual for the Development of Rail Transit System Safety Program Plans,'' published on August 20, 1991.

Contractor means an entity that performs tasks required by this part on behalf of the oversight or transit agency. The transit agency may not be a contractor for the oversight agency.

FTA means the Federal Transit Administration, an agency within the U.S. Department of Transportation.

Hazardous condition means a condition that may endanger human life or property. It includes unacceptable hazardous conditions.

Investigation means a process to determine the probable cause of an accident or an unacceptable hazardous condition; it may involve no more than a review and approval of the transit agency's determination of the probable cause of an accident or unacceptable hazardous condition.

Oversight agency means the entity, other than the transit agency, designated by the State or several States to implement this part.

Rail fixed guideway system means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that is:

(1) Included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas (49 U.S.C. 5336); and

(2) Not regulated by the Federal Railroad Administration.

Safety means freedom from danger.

Safety review means a formal, comprehensive, on-site examination by the oversight agency of a transit agency's safety practices to determine whether they comply with the policies and procedures required under the transit agency's system safety program plan.

Security means freedom from intentional danger.

System safety program plan means a document adopted by the transit agency detailing its safety policies, objectives, responsibilities, and procedures.

System safety program standard means the standard developed and adopted by the State oversight agency which, at a

minimum, complies with the APTA Guidelines and which addresses personal security.

Transit agency means an entity operating a rail fixed guideway system.

Unacceptable hazardous condition means a hazardous condition determined to be an unacceptable hazardous condition using the APTA Guidelines' Hazard Resolution Matrix (APTA Guidelines, checklist number 7).

§ 659.7 Withholding of funds for noncompliance.

The Administrator of the FTA may withhold up to five percent of the amount required to be apportioned for use in any State or affected urbanized area in such State under FTA's formula program for urbanized areas for any fiscal year beginning after September 30, 1997, if the State in the previous fiscal year has not met the requirements of this part and the Administrator determines that the State is not making adequate efforts to comply with this part.

Subpart B—The Role of the State

§ 659.21 Designation of oversight agency.

(a) For a transit agency or agencies operating within a single State, the State must designate an agency of the State, other than a transit agency, to serve as the oversight agency and to implement the requirements of this part.

(b) For a transit agency operating a system within more than one State, those States may designate a single entity, other than the transit agency, to implement the requirements of this part.

§ 659.23 Confidential investigation reports.

The State may prohibit an investigation report that may be prepared by the oversight agency from being admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

Subpart C—The Oversight Agency's Role

§ 659.31 The system safety program standard.

(a) The oversight agency must develop and adopt a system safety program standard that, at a minimum—

(1) Complies with the American Public Transit Association's ''Manual for the Development of Rail Transit System Safety Program Plans'' (APTA Guidelines) published on August 20, 1991, hereby incorporated by reference; and

(2) Requires the transit agency to address the personal security of its passengers and employees.

(b) The APTA Guidelines specify procedures for developing a system safety program plan, generally discuss the principles of system safety, and specifically address certain issues critical to the safe operation of a rail fixed guideway system.

(c) The incorporation by reference of the APTA Guidelines has been approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of the APTA Guidelines may be obtained from the American Public Transit Association, 1201 New York Avenue, NW., Washington DC 20005–3917, (202) 893–4000. The Guidelines may be inspected at, and are available from the Federal Transit Administration, Office of Safety and Security, 400 7th Street, SW., Washington, D.C. 20590, and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.*

[60 FR 67046, Dec. 27, 1995, as amended at 69 FR 18803, Apr. 9, 2004]

§ 659.33 System safety program plans.

(a) Except as provided in §659.33(b), the oversight agency must —

(1) Require the transit agency to implement, beginning on January 1, 1997,

a system safety program plan conforming to the oversight agency's system safety program standard; and

(2) Approve in writing before January 1, 1997, the transit agency's system safety program plan.

(b) The oversight agency must —

(1) Require the transit agency to implement beginning on January 1, 1998, the security portion of its system safety program plan; and

(2) Approve in writing before January 1, 1998, the security portions of the transit agency's system safety program plan.

(c) After December 31, 1996, the oversight agency must review and approve, in writing, the transit agency's system safety program plan, as necessary, and require the transit agency to update its system safety program plan, as necessary.

(d) The oversight agency may prohibit a transit agency from publicly disclosing the security aspects of the system safety program plan.

[60 FR 67046, Dec. 27, 1995, as amended at 61 FR 67493, Dec. 23, 1996]

§ 659.35 Transit agency annual audit reports.

The oversight agency must—

(a) Require that the transit agency submit, annually, a copy of the annual safety audit report prepared by the transit agency as a result of the Internal Safety Audit Process (APTA Guidelines, checklist number 9); and

(b) Review the annual safety audit reports prepared by the transit agency.

§ 659.37 Safety reviews.

At least every three years the oversight agency must conduct an on-site safety review of the transit agency's implementation of its system safety program plan and prepare and issue a report containing findings and recommendations resulting from that review, which, at a minimum, must include an analysis of the efficacy of the system safety program plan and a determination of whether it should be updated.

§ 659.39 Transit agency report on accidents and unacceptable hazardous conditions.

The oversight agency must require that the transit agency report accidents and unacceptable hazardous conditions to the oversight agency within a specified period of time.

§ 659.41 Investigations.

The oversight agency must—

(a) Establish procedures to investigate accidents and unacceptable hazardous conditions.

(b) Unless the National Transportation Safety Board has investigated or will investigate an accident, the oversight agency must investigate accidents and unacceptable hazardous conditions occurring at a transit agency under its jurisdiction.

§ 659.43 Corrective actions.

The oversight agency must require the transit agency to minimize, control, correct, or eliminate any investigated hazardous condition within a time period specified by and in accordance with a corrective action plan approved by the oversight agency.

§ 659.45 Oversight agency report to the Federal Transit Administration.

(a) *Initial submissions.* Before January 1, 1997, the oversight agency must submit to FTA the following information, which must be updated as necessary:

(1) The name and address of the oversight agency;

(2) The name(s) and address(es) of the transit agency or agencies subject to the oversight agency's jurisdiction under this part; and

(3) A written description of the oversight agency's oversight program including the following information:

(i) A copy of its system safety program standard;

(ii) Its procedures or process for reviewing and approving the transit agency's system safety program plan;

(iii) Its investigatory procedures; and

(iv) Its procedures for ensuring that appropriate corrective actions have been taken by the transit agency to correct, eliminate, minimize, or control investigated hazardous conditions.

(b) *Annual submissions.* Before March 15 of each year, the oversight agency must submit to FTA a publicly available annual report summarizing its oversight activities for the preceding twelve months, including a description of the most common probable causal factors of accidents and unacceptable hazardous conditions.

(c) *Periodic submissions.* Status reports of accidents, hazardous conditions, and corrective action plans must be forwarded to the FTA upon request.

(d) *Addresses.* Reports and annual summaries must be sent to: Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, DC 20590.

[60 FR 67046, Dec. 27, 1995, as amended at 61 FR 67493, Dec. 23, 1996]

§ 659.47 Use of contractors.

(a) The oversight agency may use a contractor to—

(1) Develop a system safety program standard;

(2) Review system safety program plans;

(3) Review annual audit reports;

(4) Conduct safety reviews;

(5) Prepare safety review findings;

(6) Establish investigation procedures;

(7) Conduct investigations;

(8) Review corrective action plans; and/or

(9) Prepare initial or annual submissions to FTA.

(b) The oversight agency may allow a transit agency to use a contractor to—

(1) Develop or update a system safety program plan;

(2) Prepare annual audit reports; and/or

(3) Develop a corrective action plan.

§ 659.49 Certification of compliance.

(a) Before January 1, 1997, and annually thereafter, the oversight agency must certify to the FTA that it has complied with the requirements of this part. Each certification shall comply with the applicable sample certification provided in the appendix to this part. Each certification shall be sent to: Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, DC 20590.

(b) Each certification must be signed by an official authorized by the oversight agency and must comply with the applicable sample certification provided in the appendix to this part.

APPENDIX TO PART 659—SAMPLE CERTIFICATION OF COMPLIANCE

This appendix contains an example of certification language.

I, (name), (title), certify that (name of the oversight agency) has implemented a State oversight program that meets the requirements of 49 CFR part 659 and further certify that I have no conflict of interest with any rail fixed guideway system overseen as a result of 49 CFR part 659, nor does (name of the oversight agency) and its contractors.

PART 661—BUY AMERICA REQUIREMENTS—SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982, AS AMENDED

Sec.

661.1 Applicability.
661.3 Definitions.
661.5 General requirements.
661.6 Certification requirement for procurement of steel or manufactured products.
661.7 Waivers.
661.9 Application for waivers.
661.11 Rolling stock procurements.
661.12 Certification requirement for procurement of buses, other rolling stock and associated equipment.
661.13 Grantee responsibility.
661.15 Investigation procedures.
661.17 Failure to comply with certification.
661.18 Intentional violations.
661.19 Sanctions.
661.20 Rights of third parties.
661.21 State Buy America provisions.

AUTHORITY: 49 U.S.C. 5323(j) (formerly sec. 165, Pub. L. 97–424; as amended by sec. 337, Pub. L. 100–17, sec. 1048, Pub. L. 102–240, and sec. 3020(b), Pub. L. 105–178); 49 CFR 1.51.

SOURCE: 56 FR 932, Jan. 9, 1991, unless otherwise noted.

§ 661.1 Applicability.

Unless otherwise noted, this part applies to all federally assisted procurements using funds authorized by the Federal Mass Transit Act of 1964, as amended; 23 U.S.C. 103(e)(4); and section 14 of the National Capital Transportation Act of 1969, as amended.

§ 661.3 Definitions.

As used in this part:

Act means the Surface Transportation Assistance Act of 1982 (Pub. L. 97–424), as amended by section 337 of the Surface Transportation and Uniform Relocation Assistance of 1987 (Pub. L. 100–17).

Administrator means the Administrator of FTA, or designee.

Component means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

Grantee means any entity that is a recipient of FTA funds.

Manufacutured product means an item produced as a result of manufacturing process.

Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

Rolling stock means transit vehicles such as buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services.

STURAA means the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. No. 100–17).

FTA means the Federal Transit Administration.

United States means the several States, the Commonwealth of Puerto Rico, the District of Columbia, Guam, American Samoa, the Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

[56 FR 932, Jan. 9, 1991, as amended at 61 FR 6302, Feb. 16, 1996]

§661.5 General requirements.

(a) Except as provided in §661.7 and §661.11 of this part, no funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States.

(b) All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.

(c) The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock.

(d) For a manufactured product to be considered produced in the United States:

(1) All of the manufacturing processes for the product must take place in the United States; and

(2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

[61 FR 6302, Feb. 16, 1996]

§661.6 Certification requirement for procurement of steel or manufactured products.

If steel or manufactured products (as defined in §§661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in §661.13(b) of this part.

Certificate of Compliance With Section 165(a)

The bidder hereby certifies that it will comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations in 49 CFR part 661.

Date _____
Signature _____
Company Name _____
Title _____

Certificate for Non-Compliance With Section 165(a)

The bidder hereby certifies that it cannot comply with the requirements of section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, but it may qualify for an exception to the requirement pursuant to section 165 (b)(2) or (b)(4) of the Surface Transportation Assistance Act of 1982 and regulations in 49 CFR 661.7.

Date _____
Signature _____

Company Name _____
Title _____

§ 661.7 Waivers.

(a) Section 165(b) of the Act provides that the general requirements of section 165(a) shall not apply in four specific instances. This section sets out the conditions for the three statutory waivers based on public interest, non-availability, and price-differential. Section 661.11 of this part sets out the conditions for the fourth statutory waiver governing the procurement of rolling stock and associated equipment.

(b) Under the provision of section 165(b)(1) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that their application would be inconsistent with the public interest. In determining whether the conditions exist to grant this public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general exception is specifically set out in this part.

(c) Under the provision of section 165(b)(2) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.

(1) It will be presumed that the conditions exist to grant this non-availability waiver if no responsive and responsible bid is received offering an item produced in the United States.

(2) In the case of a sole source procurement, the Administrator will grant this non-availability waiver only if the grantee provides sufficient information which indicates that the item to be procured is only available from a single source or that the item to be procured is not produced in sufficient and reasonably available quantities of a satisfactory quality in the United States.

(d) Under the provision of section 165(b)(4) of the Act, the Administrator may waive the general requirements of section 165(a) if the Administrator finds that the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent. The Administrator will grant this price-differential waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States multiplied by 1.25 is less than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States.

(e) The four statutory waivers of section 165(b) of the Act as set out in this part shall be treated as being separate and distinct from each other.

(f) The waivers described in paragraphs (b) and (c) of this section may be granted for a component or subcomponent in the case of the procurement of the items governed by section 165(b)(3) of the Act (requirements for rolling stock). If a waiver is granted for a component or a subcomponent, that component or subcomponent will be considered to be of domestic origin for the purposes of § 661.11 of this part.

(g) The waivers described in paragraphs (b) and (c) of this section may be granted for a specific item or material that is used in the production of a manufactured product that is governed by the requirements of § 661.5(d) of this part. If such a waiver is granted to such a specific item or material, that item or material will be treated as being of domestic origin.

(h) The provisions of this section shall not apply to products produced in a foreign country if the Secretary, in consultation with the United States Trade Representative, determines that:

(1) That foreign country is party to an agreement with the United States pursuant to which the head of an agency of the United States has waived the requirements of this section; and

(2) That foreign country has violated the terms of the agreement by discriminating against products covered by this section that are produced in the United States and are covered by the agreement.

APPENDIX A TO § 661.7—GENERAL WAIVERS

(a) All waivers published in 48 CFR 25.108 which establish excepted articles, materials, and supplies for the Buy American Act of 1933 (41 U.S.C. 10a–d), as the waivers may be amended from time to time, apply to this part under the provisions of § 661.7 (b) and (c).

(b) Under the provisions of §661.7(b) of this part, 15 passenger vans produced by Chrysler Corporation are exempt from the requirement that final assembly of the vans take place in the United States (49 FR 13944, April 9, 1984).

(c) Under the provisions of §661.7(b) of this part, 15 Passenger Wagons produced by Chrysler Corporation are exempt from the requirement that final assembly of the wagons take place in the United States (letter to Chrysler Corporation dated May 13, 1987.)

(d) Under the provisions of §661.7 (b) and (c) of this part, microcomputer equipment, including software, of foreign origin can be procured by grantees (50 FR 18760, May 2, 1985 and 51 FR 36126, October 8, 1986).

(e) Under the provisions of §661.7(b) of this part, a general public interest waiver from the Buy America requirements for ''small purchases'' (as defined in the ''common grant rule,'' at 49 CFR 18.36(d)) made by FTA grantees with capital, planning, or operating assistance.

[56 FR 932, Jan. 9, 1991, as amended at 60 FR 37928, July 24, 1995, 61 FR 6302, Feb. 16, 1996]

§661.9 Application for waivers.

(a) This section sets out the application procedures for obtaining all waivers, except those general exceptions set forth in this part for which individual applications are unnecessary and those covered by section 165(b)(3) of the Act. The procedures for obtaining an exception covered by section 165(b)(3) are set forth in §661.11 of this part.

(b) A bidder who seeks to establish grounds for an exception must seek the exception, in a timely manner, through the grantee.

(c) Except as provided in paragraph (d) of this section, only a grantee may request a waiver. The request must be in writing, include facts and justification to support the waiver, and be submitted to the Administrator through the appropriate Regional Office.

(d) FTA will consider a request for a waiver from a potential bidder or supplier only if the waiver is being sought under §661.7 (f) or (g) of this part.

(e) The Administrator will issue a written determination setting forth the reasons for granting or denying the exception request. Each request for an exception, and FTA's action on the request, are available for public inspection under the provisions of 49 CFR part 601, subpart C.

§661.11 Rolling stock procurements.

(a) The provisions of §661.5 do not apply to the procurement of buses and other rolling stock (including train control, communication, and traction power equipment), if the cost of components produced in the United States is more than 60 percent of the cost of all components and final assembly takes place in the United States.

(b) The domestic content requirements in paragraph (a) of this section also apply to the domestic content requirements for components set forth in paragraphs (i), (j), and (l) of this section.

(c) A component is any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location.

(d) A component may be manufactured at the final assembly location if the manufacturing process to produce the component is an activity separate and distinct from the final assembly of the end product.

(e) A component is considered to be manufactured if there are sufficient activities taking place to advance the value or improve the condition of the subcomponents of that component; that is, if the subcomponents have been substantially transformed or merged into a new and functionally different article.

(f) Except as provided in paragraph (k) of this section, a subcomponent is any article, material, or supply, whether manufactured or unmanufactured, that is one step removed from a component (as defined in paragraph (c) of this section) in the manufacturing process and that is incorporated directly into a component.

(g) For a component to be of domestic origin, more that 60 percent of the subcomponents of that component, by cost, must be of domestic origin, and the manufacture of the component must take place in the United States. If, under the terms of this part, a component is determined to be of domestic origin, its entire cost may be used in calculating the cost of domestic content of an end product.

(h) A subcomponent is of domestic origin if it is manufactured in the United States.

(i) If a subcomponent manufactured in the United States is exported for inclusion in a component that is manufactured outside the United States and it receives tariff exemptions under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent retains its domestic identity and can be included in the calculation of the domestic content of an end product even if such a subcomponent represents less than 60 percent of the cost of a particular component.

(j) If a subcomponent manufactured in the United States is exported for inclusion in a component manufactured outside the United States and it does not receive tariff exemption under the procedures set forth in 19 CFR 10.11 through 10.24, the subcomponent loses its domestic identity and cannot be included in the calculation of the domestic content of an end product.

(k) Raw materials produced in the United States and then exported for incorporation into a component are not considered to be a subcomponent for the purpose of calculating domestic content. The value of such raw materials is to be included in the cost of the foreign component.

(l) If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of the domestic subcomponents and the cost of manufacturing the component may be included in the calculation of the domestic content of the end product.

(m) For purposes of this section, except as provided in paragraph (o) of this section:

(1) The cost of a component or a subcomponent is the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent. Transportation costs to the final assembly location must be included in calculating the cost of foreign components and subcomponents.

(2) If a component or subcomponent is manufactured by the bidder or offeror, the cost of the component is the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.

(n) The cost of a component of foreign origin is set using the foreign exchange rate at the time the bidder or offeror executes the appropriate Buy America certificate.

(o) The cost of a subcomponent that retains its domestic identity consistent with paragraph (j) of this section shall be the cost of the subcomponent when last purchased, f.o.b. United States port of exportation or point of border crossing as set out in the invoice and entry papers or, if no purchase was made, the value of the subcomponent at the time of its shipment for exportation, f.o.b. United States port of exportation or point of border crossing as set out in the invoice and entry papers.

(p) In accordance with 49 U.S.C. 5323(j), labor costs involved in final assembly shall not be included in calculating component costs.

(q) The actual cost, not the bid price, of a component is to be considered in calculating domestic content.

(r) Final assembly is the creation of the end product from individual elements brought together for that purpose through application of manufacturing processes. If a system is being procured as the end product by the grantee, the installation of the system qualifies as final assembly.

(s) An end product means any item subject to 49 U.S.C. 5323(j) that is to be acquired by a grantee, as specified in the overall project contract.

(t) Train control equipment includes, but is not limited to, the following equipment:

(1) Mimic board in central control
(2) Dispatcher's console
(3) Local control panels
(4) Station (way side) block control relay cabinets
(5) Terminal dispatcher machines
(6) Cable/cable trays
(7) Switch machines
(8) Way side signals
(9) Impedance bonds
(10) Relay rack bungalows
(11) Central computer control
(12) Brake equipment
(13) Brake systems

(u) Communication equipment includes, but is not limited to, the following equipment:

(1) Radios
(2) Space station transmitter and receivers
(3) Vehicular and hand-held radios
(4) PABX telephone switching equipment
(5) PABX telephone instruments
(6) Public address amplifiers
(7) Public address speakers
(8) Cable transmission system cable
(9) Cable transmission system multiplex equipment
(10) Communication console at central control
(11) Uninterruptible power supply inverters/rectifiers
(12) Uninterruptible power supply batteries
(13) Data transmission system central processors
(14) Data transmission system remote terminals
(15) Line printers for data transmission system
(16) Communication system monitor test panel
(17) Security console at central control

(v) Traction power equipment includes, but is not limited to the following:
(1) Primary AC switch gear
(2) Primary AC transformer rectifiers
(3) DC switch gear
(4) Traction power console and CRT display system at central control
(5) Bus ducts with buses (AC and DC)
(6) Batteries
(7) Traction power rectifier assemblies
(8) Distribution panels (AC and DC)
(9) Facility step-down transformers
(10) Motor control centers (facility use only)
(11) Battery chargers
(12) Supervisory control panel
(13) Annunciator panels
(14) Low voltage facility distribution switch board
(15) DC connect switches
(16) Negative bus boxes
(17) Power rail insulators
(18) Power cables (AC and DC)
(19) Cable trays
(20) Instrumentation for traction power equipment
(21) Connectors, tensioners, and insulators for overhead power wire systems
(22) Negative drainage boards
(23) Inverters
(24) Traction motors
(25) Propulsion gear boxes
(26) Third rail pick-up equipment
(27) Pantographs

(w) The power or third rail is not considered traction power equipment and is thus subject to the requirements of 49 U.S.C. 5323(j) and the requirements of §661.5.

(x) A bidder on a contract for an item covered by 49 U.S.C. 5323(j) who will comply with section 165(b)(3) and regulations in this section is not required to follow the application for waiver procedures set out in §661.9. In lieu of these procedures, the bidder must submit the appropriate certificate required by §661.12.

APPENDIX A TO §661.11—GENERAL WAIVERS

(a) The provisions of §661.11 of this part do not apply when foreign sourced spare parts for buses and other rolling stock (including train control, communication, and traction power equipment) whose total cost is 10 percent or less of the overall project contract cost are being procured as part of the same contract for the major capital item.

(b) [Reserved]

APPENDIX B TO §661.11—TYPICAL COMPONENTS OF BUSES

The following is a list of items that typically would be considered components of a bus. This list is not all-inclusive.

Engines, transmissions, front axle assemblies, rear axle assemblies, drive shaft assemblies, front suspension assemblies, rear suspension assemblies, air compressor and pneumatic systems, generator/alternator and electrical systems, steering system assemblies, front and rear air brake assemblies, air conditioning compressor assemblies, air conditioning evaporator/condenser assemblies, heating systems. passenger seats, driver's seat assemblies, window assemblies, entrance and exit door assemblies, door control systems, destination sign assemblies, interior lighting assemblies, front and rear end cap assemblies, front and rear bumper assemblies, specialty steel (structural steel tubing, etc.) aluminum extrusions, aluminum, steel or fiberglass exterior panels, and interior trim, flooring, and floor coverings.

APPENDIX C TO §661.11—TYPICAL COMPONENTS OF RAIL ROLLING STOCK

The following is a list of items that typically would be considered components of rail rolling stock. This list is not all inclusive.

Car shells, main transformer, pantographs, traction motors, propulsion gear boxes, interior linings, acceleration and braking resistors, propulsion controls, low voltage auxiliary power supplies, air conditioning equipment, air brake compressors, brake controls, foundation brake equipment, articulation assemblies, train control systems, window assemblies, communication equipment, lighting, seating, doors, door actuators, and controls, couplers and draft gear, trucks, journal bearings, axles, diagnostic equipment, and third rail pick-up equipment.

[61 FR 6302, Feb. 16, 1996, as amended at 62 FR 40954, July 31, 1997]

§ 661.12 Certification requirement for procurement of buses, other rolling stock and associated equipment.

If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in § 661.13(b) of this part.

Certificate of Compliance With Section 165(b)(3)

The bidder hereby certifies that it will comply with the requirements of section 165(b)(3), of the Surface Transportation Assistance Act of 1982, as amended, and the regulations of 49 CFR 661.11.

Date _____
Signature _____
Company Name _____
Title _____

Certificate for Non-Compliance with Section 165(b)(3)

The bidder hereby certifies that it cannot comply with the requirements of section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirement consistent with section 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 CFR 661.7.

Date _____
Signature _____
Company Name _____
Title _____

§ 661.13 Grantee responsibility.

(a) The grantee shall adhere to the Buy America clause set forth in its grant contract with FTA.

(b) The grantee shall include in its bid specification for procurement within the scope of this part an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid a completed Buy America certificate in accordance with § 661.6 or § 661.12 of this part, as appropriate.

(1) A bidder or offeror who has submitted an incomplete Buy America certificate or an incorrect certificate of noncompliance through inadvertent or clerical error (but not including failure to sign the certificate, submission of certificates of both compliance and non-compliance, or failure to submit any certification), may submit to the FTA Chief Counsel within ten (10) days of bid opening a written explanation of the circumstances surrounding the submission of the incomplete or incorrect certification in accordance with 28 U.S.C. 1746, sworn under penalty of perjury, stating that the submission resulted from inadvertent or clerical error. The bidder or offeror will also submit evidence of intent, such as information about the origin of the product, invoices, or other working documents. The bidder or offeror will simultaneously send a copy of this information to the FTA grantee.

(2) The FTA Chief Counsel may request additional information from the bidder or offeror, if necessary. The grantee may not make a contract award until the FTA Chief Counsel issues his/her determination, except as provided in § 661.15(m).

(3) Certification based on ignorance of the proper application of the Buy America requirements is not an inadvertent or clerical error.

(c) Whether or not a bidder or offeror certifies that it will comply with the applicable requirement, such bidder or offerer is bound by its original certification and is not permitted to change its certification after bid opening. A bidder or offeror that certifies that it will comply with the applicable Buy America requirements is not eligible for a waiver of those requirements.

[56 FR 932, Jan. 9, 1991, as amended at 68 FR 9799, Feb. 28, 2003]

§ 661.15 Investigation procedures.

(a) It is presumed that a bidder who has submitted the required Buy America certificate is complying with the

Buy America provision. A false certification is a criminal act in violation of 18 U.S.C. 1001.

(b) Any party may petition FTA to investigate the compliance of a successful bidder with the bidder's certification. That party (''the petitioner'') must include in the petition a statement of the grounds of the petition and any supporting documentation. If FTA determines that the information presented in the petition indicates that the presumption in paragraph (a) of this section has been overcome, FTA will initiate an investigation.

(c) In appropriate circumstances, FTA may determine on its own to initiate an investigation without receiving a petition from a third party.

(d) When FTA determines under paragraph (b) or (c) of this section to conduct an investigation, it requests that the grantee require the successful bidder to document its compliance with its Buy America certificate. The successful bidder has the burden of proof to establish that it is in compliance. Documentation of compliance is based on the specific circumstances of each investigation, and FTA will specify the documentation required in each case.

(e) The grantee shall reply to the request under paragraph (d) of this section within 15 working days of the request. The investigated party may correspond directly with FTA during the course of investigation, if it informs the grantee that it intends to do so, and if the grantee agrees to such action in writing. The grantee must inform FTA, in writing, that the investigated party will respond directly to FTA. An investigated party may provide confidential or proprietary information (see paragraph (l) of this section) directly to FTA while providing other information required to be submitted as part of the investigation through the grantee.

(f) Any additional information requested or required by FTA must be submitted within 5 working days after the receipt of such request unless specifically exempted by FTA.

(g) The grantee's reply (or that of the bidder) will be transmitted to the petitioner. The petitioner may submit comments on the reply to FTA within 10 working days after receipt of the reply. The grantee and the low bidder will be furnished with a copy of the petitioner's comments, and their comments must be received by FTA within 5 working days after receipt of the petitioner's comments.

(h) The failure of a party to comply with the time limits stated in this section may result in resolution of the investigation without consideration of untimely filed comments.

(i) During the course of an investigation, with appropriate notification to affected parties, FTA may conduct site visits of manufacturing facilities and final assembly locations as it considers appropriate.

(j) FTA will, upon request, make available to any interested party information bearing on the substance of the investigation which has been submitted by the petitioner, interested parties or grantees, except to the extent that withholding of information is permitted or required by law or regulation.

(k) If a party submitting information considers that the information submitted contains proprietary material which should be withheld, a statement advising FTA of this fact may be included, and the alleged proprietary information must be identified wherever it appears. Any comments on the information provided shall be submitted within a maximum of ten days.

(l) For purposes of paragraph (j) of this section, confidential or proprietary material is any material or data whose disclosure could reasonably be expected to cause substantial competitive harm to the party claiming that the material is confidential or proprietary.

(m) When a petition for investigation has been filed before award, the grantee will not make an award before the resolution of the investigation, unless the grantee determines that:

(1) The items to be procured are urgently required;

(2) Delivery of performance will be unduly delayed by failure to make the award promptly; or

(3) Failure to make prompt award will otherwise cause undue harm to the grantee or the Federal Government.

(n) In the event that the grantee determines that the award is to be made

during the pendency of an investigation, the grantee will notify FTA before to making such award. FTA reserves the right not to participate in the funding of any contract awarded during the pendency of an investigation.

(o) Initial decisions by FTA will be in written form. Reconsideration of an initial decision of FTA may be requested by any party involved in an investigation. FTA will only reconsider a decision only if the party requesting reconsideration submits new matters of fact or points of law that were not known or available to the party during the investigation. A request for reconsideration of a decision of FTA shall be filed not later than ten (10) working days after the initial written decision. A request for reconsideration will be subject to the procedures in this section consistent with the need for prompt resolution of the matter.

§ 661.17 Failure to comply with certification.

If a successful bidder fails to demonstrate that it is in compliance with its certification, it will be required to take the necessary steps in order to achieve compliance. If a bidder takes these necessary steps, it will not be allowed to change its original bid price. If a bidder does not take the necessary steps, it will not be awarded the contract if the contract has not yet been awarded, and it is in breach of contract if a contract has been awarded.

§ 661.18 Intentional violations.

A person shall be ineligible to receive any contract or subcontract made with funds authorized under the Intermodal Surface Transportation Efficiency Act of 1991 pursuant to part 29 of this title if it has been determined by a court or Federal agency that the person intentionally—

(a) Affixed a label bearing a ''Made in America'' inscription, or an inscription with the same meaning, to a product not made in the United States, but sold in or shipped to the United States and used in projects to which this section applies, or

(b) Otherwise represented that any such product was produced in the United States.

[61 FR 6303, Feb. 16, 1996]

§ 661.19 Sanctions.

A willful refusal to comply with a certification by a successful bidder may lead to the initiation of debarment or suspension proceedings under part 29 of this title.

§ 661.20 Rights of third parties.

The sole right of any third party under the Buy America provision is to petition FTA under the provisions of § 661.15 of this part. No third party has any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee.

§ 661.21 State Buy America provisions.

(a) Except as provided in paragraph (b) of this section, any State may impose more stringent Buy America or buy national requirements than contained in section 165 of the Act and the regulations in this part.

(b) FTA will not participate in contracts governed by the following:

(1) State Buy America or Buy National preference provisions which are not as strict as the Federal requirements.

(2) State and local Buy National or Buy America preference provisions which are not explicitly set out under State law. For example, administrative interpretations of non-specific State legislation will not control.

(3) State and local Buy Local preference provisions.

PART 663—PRE-AWARD AND POST-DELIVERY AUDITS OF ROLLING STOCK PURCHASES

Subpart A—General

Sec.

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663.5 Definitions.
663.7 Certification of compliance to FTA.
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663.21 Pre-award audit requirements.
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663.25 Pre-award Buy America certification.
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663.31 Post-delivery audit requirements.
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663.35 Post-delivery Buy America certification.
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Subpart D—Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards

663.41 Certification of compliance with Federal motor vehicle safety standards.
663.43 Certification that Federal motor vehicle standards do not apply.

AUTHORITY: 49 U.S.C. 1608(j); 23 U.S.C. 103(e)(4); Pub. L. 96–184, 93 Stat. 1320; Pub. L. 101–551, 104 Stat. 2733; 49 CFR 1.51.

SOURCE: 56 FR 48395, Sept. 24, 1991, unless otherwise noted.

Subpart A—General

§ 663.1 Purpose.

This part implements section 12(j) of the Federal Mass Transit Act of 1964, as amended, which was added by section 319 of the 1987 Surface Transportation and Uniform Relocation Assistance Act (Pub. L. 100–17). Section 12(j) requires the Federal Transit Administration, by delegation from the Secretary of Transportation, to issue regulations requiring pre-award and post-delivery audits when a recipient of Federal financial assistance purchases rolling stock with funds made available under the Federal Mass Transit Act, as amended.

§ 663.3 Scope.

This part applies to a recipient purchasing rolling stock to carry passengers in revenue service with funds made available under sections 3, 9, 18, and 16(b)(2) of the Federal Mass Transit Act, as amended; 23 U.S.C. 103(e)(4); and section 14 of the National Capital Transportation Act of 1969, as amended.

§ 663.5 Definitions.

As used in this part—

(a) *Pre-award* means that period in the procurement process before the recipient enters into a formal contract with the supplier.

(b) *Post-delivery* means the time period in the procurement process from when the rolling stock is delivered to the recipient until title to the rolling stock is transferred to the recipient or the rolling stock is put into revenue service, whichever is first.

(c) *Recipient* means a recipient of Federal financial assistance from FTA.

(d) *Revenue service* means operation of rolling stock for transportation of fare-paying passengers as anticipated by the recipient.

(e) *Rolling stock* means buses, vans, cars, railcars, locomotives, trolley cars and buses, ferry boats, and vehicles used for guideways and incline planes.

(f) *Audit* means a review resulting in a report containing the necessary certifications of compliance with Buy America standards, purchaser's requirements specifications, and, where appropriate, a manufacturer's certification of compliance with or inapplicability of the Federal Motor Vehicle Safety Standards, required by section 319 of STURAA and this part.

(g) *FTA* means the Federal Transit Administration.

§ 663.7 Certification of compliance to FTA.

A recipient purchasing revenue service rolling stock with funds obligated by FTA on or after October 24, 1991, must certify to FTA that it will conduct or cause to be conducted pre-award and post-delivery audits as prescribed in this part. In addition, such a recipient must maintain on file the certifications required under subparts B, C, and D of this part.

§ 663.9 Audit limitations.

(a) An audit under this part is limited to verifying compliance with

(1) Applicable Buy America requirements [section 165 of the Surface Transportation Assistance Act of 1982, as amended,]; and

(2) Solicitation specification requirements of the recipient.

(b) An audit under this part includes, where appropriate, a copy of a manufacturer's self certification information that the vehicle complies with Federal Motor Vehicle Safety Standards or a certification that such standards are inapplicable.

(c) An audit conducted under this part is separate from the single annual audit requirement established by Office of Management and Budget Circular A–128, ''Audits of State and Local Governments,'' dated May 16, 1985.

§ 663.11 Audit financing.

A recipient purchasing revenue rolling stock with FTA funds may charge the cost of activities required by this part to the grant which FTA made for such purchase.

§ 663.13 Buy America requirements.

A Buy America certification under this part shall be issued in addition to any certification which may be required by part 661 of this title. Nothing in this part precludes FTA from conducting a Buy America investigation under part 661 of this title.

§ 663.15 Compliance.

A recipient subject to this part shall comply with all applicable requirements of this part. Such compliance is a condition of receiving Federal financial assistance from FTA. A recipient determined not to be in compliance with this part will be subject to the immediate suspension, withholding, or repayment of Federal financial assistance from FTA or other appropriate actions unless and until it comes into compliance with this part.

Subpart B—Pre-Award Audits

§ 663.21 Pre-award audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.

§ 663.23 Description of pre-award audit.

A pre-award audit under this part includes—

(a) A Buy America certification as described in § 663.25 of this part;

(b) A purchaser's requirements certification as described in § 663.27 of this part; and

(c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in § 663.41 or § 663.43 of this part.

§ 663.25 Pre-award Buy America certification.

For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—

(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or

(b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—

(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and

(2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

§ 663.27 Pre-award purchaser's requirements certification.

For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that—

(a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation specification; and

(b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation.

Subpart C—Post-Delivery Audits

§ 663.31 Post-delivery audit requirements.

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.

§ 663.33 Description of post-delivery audit.

A post-delivery audit under this part includes—

(a) A post-delivery Buy America certification as described in § 663.35 of this part;

(b) A post-delivery purchaser's requirements certification as described in § 663.37 of this part; and

(c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in § 663.41 or § 663.43 of this part.

§ 663.35 Post-delivery Buy America certification.

For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—

(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or

(b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—

(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and

(2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.

§ 663.37 Post-delivery purchaser's requirements certification.

For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—

(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—

(1) Provide accurate records of all vehicle construction activities; and

(2) Address how the construction and operation of the vehicles fulfills the contract specifications.

(b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications.

(c) For procurements of ten or fewer buses, or any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications.

§ 663.39 Post-delivery audit review.

(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law.

(b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period of time.

Subpart D—Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards

§ 663.41 Certification of compliance with Federal motor vehicle safety standards.

If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle complies with relevant Federal Motor Vehicle Safety Standards.

§ 663.43 Certification that Federal motor vehicle standards do not apply.

(a) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received a statement to that effect from the manufacturer.

(b) This subpart shall not apply to rolling stock that is not a motor vehicle.

PART 665—BUS TESTING

Subpart A—General

Sec.
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665.7 Grantee certification of compliance.

Subpart B—Bus Testing Procedures

665.11 Testing requirements.
665.13 Test report and manufacturer certification.

Subpart C—Operations

665.21 Scheduling.
665.23 Fees.
665.25 Transportation of vehicle.
665.27 Procedures during testing.
APPENDIX A TO PART 665—TESTS TO BE PERFORMED AT THE BUS TESTING FACILITY

AUTHORITY: Federal Transit Act of 1964, as amended, 49 U.S.C. 1601 *et seq.*, 1608(h); section 317, Surface Transportation and Uniform Relocation Assistance Act of 1987; and 49 CFR 1.51.

SOURCE: 57 FR 33397, July 28, 1992, unless otherwise noted.

Subpart A—General

§ 665.1 Purpose.

An applicant for Federal financial assistance under the Federal Transit Act for the purchase or lease of buses with funds obligated by the FTA after September 30, 1989, must certify to the FTA that any new bus model acquired with such assistance has been tested in accordance with this part. This part contains the information necessary for a recipient to ensure compliance with this provision.

§ 665.3 Scope.

(a) This part applies to a recipient of Federal financial assistance under sections 3, 9, 16(b)(2), or 18 of the FT Act, and, except as provided in subsections (b), (c), and (d) is effective October 1, 1989;

(b) The provisions of section 665.11(e)(3) are effective November 8, 1990;

(c) The provisions in sections 665.11 (c), (d), and (f) concerning partial testing are effective August 27, 1992; and

(d) The provisions in §§ 665.11(e) (4) and (5) concerning the last two categories of buses which must be tested, apply as follows:

(1) For vehicles that are manufactured from modified mass-produced chassis or vans, or manufactured from non-mass-produced chassis or vans, testing and a final report will be required for all vehicles offered in response to advertisements for bids or requests for proposals issued on or after June 1, 1994.

(2) For vehicles manufactured from unmodified mass-produced chassis, testing and a final report will be required for all vehicles offered in response to advertisements for bids or requests for proposals issued on or after October 1, 1994.

[57 FR 33397, July 28, 1992, as amended at 58 FR 10990, Feb. 23, 1993; 58 FR 58733, Nov. 3, 1993]

§ 665.5 Definitions.

As used in this part—

Administrator means the Administrator of the Federal Transit Administration or designee.

Bus means a rubber-tired automotive vehicle used for the provision of mass transportation service by or for a recipient.

Bus model means a bus design or variation of a bus design usually designated by the manufacturer by a specific name and/or model number.

Bus testing facility means a testing facility established by renovation of a facility constructed with Federal assistance at Altoona, Pennsylvania, under section 317(b)(1) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, and includes proving ground facilities operated in connection with the facility.

FT Act means the Federal Transit Act, as amended (49 U.S.C. app. 1601 *et seq.*).

Major change in chassis design means, for vehicles manufactured on a mass produced chassis, a change in frame structure, material or configuration, or a change in chassis suspension type.

Major change in components means:

(1) For those vehicles that are not manufactured on a mass produced chassis, a change in a vehicle's engine, axle, transmission, suspension, or steering components;

(2) For those that are manufactured on a mass produced chassis, a change in the vehicle's chassis from one major design to another.

Major change in configuration means a change which may have a significant impact on vehicle handling and stability, or structural integrity.

Mass produced van or chassis means a van or chassis that has or is projected to have an annual production rate of 20,000 or more units.

Mass transportation service means the operation of a vehicle which provides general or special service to the public on a regular and continuing basis.

Modified mass-produced chassis or van means a vehicle that is manufactured from an incomplete, partially assembled mass-produced chassis or van as provided by an OEM to a small bus manufacturer. This includes vehicles whose chassis structure has been modified to include: The addition of a tandem or tag axle; the installation of a drop or lowered floor; changes to the GVWR from the OEM rating; or other modifications that are *not* made in strict conformance with the OEM's modifications guidelines.

New bus model means a bus model which—

(1) Has not been used in mass transit service in the United States before October 1, 1988; or

(2) Has been used in such service but which after September 30, 1988, is being produced with a major change in configuration or components.

Non-mass-produced chassis or van means a vehicle that is manufactured from an incomplete, partially assembled chassis or van as provided by an OEM to a secondary small bus manufacturer, and where the annual production rate of the OEM chassis or van is less than 20,000 units.

Original Equipment Manufacturer (OEM) means the original manufacturer of a chassis or van supplied as a complete or incomplete vehicle to a small bus manufacturer.

Partial testing means the performance of those bus tests which may yield significantly different data from that obtained in previous bus testing conducted at the bus testing facility.

Recipient means an entity which receives funds under sections 3, 9, 16(b)(2), or 18 of the FT Act, either directly from FTA or through a State administering agency.

Small bus manufacturer means a secondary market assembler that acquires a chassis or van from an original equipment manufacturer for subsequent modification/assembly and sale as 5-year/150,000-mile and/or 4-year/100,000-mile minimum service life vehicles.

Test report means the final document prepared by the operator of the bus testing facility stating the results of the tests performed on each bus.

Unmodified mass-produced chassis means a vehicle that is manufactured from an incomplete, partially assembled mass-produced chassis as provided by an OEM to a small bus manufacturer. This includes vehicles whose chassis structure has either not been modified, or is modified in strict conformance with the OEM's modification

guidelines. The addition of a tandem or tag axle would exclude a bus model from this definition.

Unmodified mass-produced van means a vehicle that is mass-produced, complete and fully assembled as provided by an OEM. This includes vans with raised roofs, and/or wheelchair lifts, or ramps that are installed by the OEM, or by a party other than the OEM provided that the installation of these components is completed in strict conformance with the OEM modification guidelines.

[57 FR 33397, July 28, 1992, as amended at 58 FR 58733, Nov. 3, 1993]

§ 665.7 Grantee certification of compliance.

(a) In each application to the FTA for the purchase or lease of buses, a recipient shall certify that any new bus model, or any bus model with a major change in configuration or components, to be acquired or leased with funds obligated by the FTA after September 30, 1989, will be tested at the bus testing facility, and a test report provided before final acceptance of the first vehicle by the recipient.

(b) It is the responsibility of the recipient in dealing with a manufacturer, to determine whether a vehicle to be acquired is subject to these procedures.

Subpart B—Bus Testing Procedures

§ 665.11 Testing requirements.

(a) A new bus model to be tested at the bus testing facility shall—

(1) Be a single model;

(2) Meet all applicable Federal Motor Vehicle Safety Standards, as defined by the National Highway Traffic Safety Administration in part 571 of this title;

(3) Be substantially fabricated and assembled by techniques and tooling that will be used in production of subsequent buses of that model.

(b) If the new bus model had not been previously tested at the bus testing facility, then the new bus model shall undergo the full tests requirements for maintainability, reliability, safety, performance, structural integrity, fuel economy, and noise;

(c) If the new bus model had not been previously tested at the bus testing facility and is being produced on a mass produced chassis that has been previously tested on another bus model at the bus testing facility, then the new bus model may undergo partial testing requirements;

(d) If the new bus model had been previously tested at the bus testing facility, then the new bus model may undergo partial testing requirements.

(e) The following vehicle types shall be tested:

(1) Minimum service life of 12 years or 500,000 miles—typified by heavy duty large buses, approximately 35–40 foot, as well as articulated buses.

(2) Minimum service life of ten years or 350,000 miles—typified by heavy duty small buses, approximately 30 foot.

(3) Minimum service life of seven years or 200,000 miles—typified by medium duty mid-size buses, approximately 25–35 foot.

(4) Minimum service life of five years or 150,000 miles—typified by light duty mid-size buses, approximately 25–35 foot.

(5) Minimum service life of four years or 100,000 miles—typified by light duty small buses, cutaways, and modified vans, approximately 16–28 foot.

(f) Tests performed in a higher service life category (*i.e.*, longer service life) need not be repeated when the same bus model is used in lesser service life applications. However, the use of a bus model in a service life application higher than it has been tested for may make the bus subject to the bus testing requirements.

(g) The operator of the facility shall develop a test plan for the testing of vehicles at the facility, which generally follows the guidelines set forth in appendix A of this part.

§ 665.13 Test report and manufacturer certification.

(a) Upon completion of testing, the operator of the facility shall provide a test report to the entity that submitted the bus for testing.

(b)(1) A manufacturer of a new bus model or a bus produced with a major change in component or configuration shall provide a copy of the test report to a recipient during the point in the procurement process specified by the recipient.

(2) A manufacturer who releases a report under paragraph (b)(1) of this section also shall provide notice to the operator of the facility that the report is available to the public.

(c) If a bus model subject to a test report has a change that is not a major change under this part, the manufacturer shall advise the recipient during the procurement process and shall include description of the change and its basis for concluding that it is not a major change.

(d) A test report shall be available publicly once the owner of the report makes it available during the recipient's procurement process. The operator of the facility will have available for distribution copies of all the publicly available reports.

(e) The test report is the only information or documentation that will be made available publicly in connection with any bus model tested at the facility.

Subpart C—Operations

§ 665.21 Scheduling.

(a) A manufacturer may schedule a vehicle for testing by contacting Penn State's Transportation Institute (PSTI) at the following address: The Pennsylvania State University, Pennsylvania Transportation Institute, Research Building B, University Park, PA 16802, (814) 863–1889.

(b) Upon contacting PSTI, the manufacturer will be provided the following:

(1) A draft contract for the testing;

(2) A fee schedule; and

(3) The draft test procedures that will be conducted on the vehicle.

(c) PSTI will provide final test procedures to be conducted on the vehicle at the time of contract execution.

(d) PSTI will process vehicles for testing in the order in which the contracts are signed.

§ 665.23 Fees.

(a) Fees charged by the operator are according to a schedule approved by the FTA, which include different fees for partial testing.

(b) Fees will be prorated for a vehicle withdrawn from the facility before the completion of testing.

§ 665.25 Transportation of vehicle.

A manufacturer is responsible for transporting its vehicle to and from the facility at the beginning and completion of the testing.

§ 665.27 Procedures during testing.

(a) The facility operator shall perform all testing, consistent with established procedures at the facility and with the test procedures provided to the manufacturer at the time of contract execution.

(b) The manufacturer of a bus being tested may terminate the test program at any time before the completion of testing, and shall be charged a fee for the tests performed.

(c) The operator shall perform all maintenance and repairs on the test vehicle, consistent with manufacturers specifications, unless the operator determines that the nature of the maintenance or repair is best performed by the manufacturer under the operator's supervision.

(d) The manufacturer may observe all tests. The manufacturer may not provide maintenance or service unless requested to do so by the operator.

Appendix A to Part 665—Tests To Be Performed at the Bus Testing Facility

The seven tests to be performed on each vehicle are required by STURAA and are based in part on tests described in the FTA report ''First Article Transit Bus Test Plan'', which is mentioned in the legislative history of section 317. When appropriate, SAE test procedures and other procedures accepted by the transit industry will be used. The seven tests are described in general terms in the following paragraphs.

1. Maintainability

The maintainability test includes bus servicing, preventive maintenance, inspection, and repair. It also will include the removal and reinstallation of the engine and drive train components that would be expected to require replacement during the bus' normal life cycle. Much of the maintainability data will be obtained during the bus durability test at the proving ground. Up to twenty-five percent of the bus life will be simulated and there will be servicing, preventive maintenance, and repair actions. These actions will be done by test facility staff, although manufacturers will be allowed to maintain a representative on site during the testing. Test

facility staff may require a manufacturer to provide vehicle servicing or repair, under the supervision of the facility staff. Since the operator will not become familiar with the detailed design of all new bus models that are tested, tests to determine the time and skill required to remove and reinstall an engine, a transmission, or other major propulsion system components may require advice from the bus manufacturer. All routine and corrective maintenance will be carried out by the test operator in accordance with the manufacturer's specifications.

The maintainability test report will include the frequency, personnel hours, and replacement parts or supplies required for each action during the test. The accessibility of selected components and other observations that could be important to a bus user will be included in the report.

2. Reliability

The question of reliability will be addressed by recording all bus breakdowns during testing. It is recognized that with one test bus it is not feasible to conduct statistical reliability tests. It is anticipated that bus operation on the durability course should reveal the problems that would otherwise not be detected until much later during scheduled transit service. The bus failures, repair time, and the actions required to get the bus back into operation will be recorded in the report.

3. Safety

The safety test will consist of a handling and stability test. The handling and stability test is an obstacle avoidance or double-lane change test that will be performed at the proving ground. The double-lane change course will be different for each type of bus and the speed could be different for each type of bus. Coach speed will be held constant throughout a given test run. Individual test runs will be made at increasing speeds up to 45 mph or until the coach can no longer be operated safely over the course, whichever speed is lower. Both left-and-right-hand lane changes will be tested.

4. Performance

The performance test will be performed on the proving ground and will measure acceleration and gradeability with the test vehicle operated at seated load weight. Top speed also will be measured if it can be done safely on the track. The test will be performed using a fifth wheel or equivalent and associated instrumentation. The bus will be accelerated at full throttle from standstill to maximum safe speed on the track. The report will include a table of time required to accelerate to each 10 mph increment of speed and when possible, the top speed. The gradeability capabilities will be calculated both from the test data and a test from a dead stop on a minimum of a 15 percent grade.

5. Structural Integrity

Two different structural integrity tests will be performed. Structural strength and distortion tests will be performed at the testing facility in Altoona and structural durability tests will be performed at the proving ground.

a. Structural Strength and Distortion Tests

(1) The structural strength and distortion tests will be conducted and will be different for each type of bus. For example, a shakedown of the bus structure will be conducted by loading and unloading the bus no more than three times with a distributed load equal to 2.5 times gross load. The bus then will be loaded with a distributed load to gross vehicle weight. (Gross vehicle weight is a curb weight plus gross load.) Increase in floor deflection will be measured as the bus weight is increased from curb weight to gross vehicle weight. Then the bus will be loaded with a distributed load equal to 2.5 times gross load. The bus then will be unloaded and inspected for any permanent deformation on the floor or coach structure.

(2) The bus will be loaded to gross vehicle weight, with one wheel on top of a 6-inch-high curb and then in a 6-inch-deep pot hole. This test will be repeated for all four wheels. The test will verify: (a) Normal operation of the steering mechanism and (b) Operability of all passenger doors, passenger escape mechanisms, windows, and service doors. In addition, a water leak test will be conducted.

(3) Using a load-equalizing towing sling, a static tension load equal to 1.2 times the bus curb weight will be applied to the bus towing fixtures (front and rear). The load will be removed and the two eyes and adjoining structure will be inspected for damages or permanent deformations.

(4) The bus at curb weight will be towed with a heavy wrecker truck for several miles after which it will be inspected for structural damage or permanent deformation.

(5) With the bus at curb weight probable damages due to tire deflating and jacking will be tested.

(6) With the bus at curb weight possible damages or deformation associated with lifting the bus on a two post hoist system or supporting it on jack stands will be assessed.

b. Structural Durability

The structural durability test also will be different for each type of bus, but all tests will be performed on the durability course at the proving ground, simulating up to twenty-five percent of the vehicle's normal service life. During the test there will be inspections of the bus structure and the mileage

and identification of possible structural anomalies.

6. Fuel Economy

This test will be run to determine the fuel economy in miles per gallon or equivalent of the new bus models. The test will be run at seated load weight on a duty cycle that simulates transit service for the type of vehicle being tested. The fuel measurement devices under consideration include volumetric, gravimetric, flow and pressure.

This fuel economy test bears no relation to the calculations done by the Environmental Protection Agency (EPA) to determine fuel economy levels for the Corporate Average Fuel Economy Program. However, the test will provide data which can be used by recipients in their purchase decisions.

7. Noise

There will be two noise tests: a. Interior noise and vibration; and b. Exterior noise. It is recognized that different levels of noise are expected and acceptable with different types of vehicles and different test procedures might be required.

CHAPTER VII—NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK)

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PART 700—ORGANIZATION, FUNCTIONING AND AVAILABLE INFORMATION

Sec.

700.1 Purpose.
700.2 Organization and functioning of Amtrak.
700.3 Availability of documents, assistance, and information.

AUTHORITY: 5 U.S.C. 552(a) (1), (2).

SOURCE: 49 FR 24378, June 13, 1984, unless otherwise noted.

§ 700.1 Purpose.

This part describes the organization and functioning of Amtrak and the availability to the public of documents and information concerning its policies, procedures and activities.

§ 700.2 Organization and functioning of Amtrak.

The creation of the National Railroad Passenger Corporation (''Amtrak'') was authorized by the Rail Passenger Service Act, as amended, 84 Stat. 1327, 45 U.S.C. 541 *et seq.* (''the Act''). The Act requires that Amtrak be operated and managed as a for-profit corporation, that it be incorporated under the District of Columbia Business Corporation Act, and subject to the provisions of that statute to the extent not inconsistent with the Act, and that it provide a balanced transportation system by developing, operating, and improving intercity rail passenger service. The Act also states that Amtrak will not be an agency or establishment of the United States Government. Amtrak thus is a corporation created by Congress to compete for the transportation business of the intercity traveller, to the end that the travelling public will have a choice of travel modes. The address of its headquarters is 400 North Capitol Street, NW., Washington, DC 20001. Telephone: (202) 383–3000.

(a) *Board of Directors.* Amtrak's major policies are established by its board of directors. The nine members of the board are selected as follows: The Secretary of Transportation serves as an ex-officio member and Amtrak's President, ex-officio, is Chairman of the Board; three members are appointed by the President of the United States and confirmed by the Senate (representing labor, State Governors, and business); two represent commuter authorities and are selected by the President from lists drawn up by those authorities; and two are selected by the Corporation's preferred stockholder, the Department of Transportation.

(b) *Officers and central management.* Amtrak is managed by a President and a Management Committee consisting of four Executive Vice Presidents. Reporting to the Executive Vice Presidents are eleven vice presidents representing sales, transportation marketing, planning and development, computer services, labor relations, finance and treasurer, personnel, passenger and operating services, government affairs, operations and maintenance, engineering, and the General Counsel. Areas handled as special matters with the authority of vice presidents, such as corporate communications, safety, real estate, procurement, materials management, police and security, contract administration, and internal audit are supervised by assistant vice presidents and directors.

(c) *Regional and field structure.* The need for decentralization of functions in the areas of passenger services and transportation operations has led to the creation of Amtrak's regional and field structure. Field offices are located in major cities such as Baltimore, Philadelphia, New York, Albany, Boston, Chicago, Seattle and Los Angeles. Pursuant to overall policies established at headquarters in Washington, DC, these offices handle matters like the assignment and scheduling of employees who work on board moving trains; purchase, stowage and preparation of food for dining service; maintenance and rehabilitation of rolling stock; and daily operating arrangements such as the make-up of trains or the cleaning and repairing of cars on trains.

(d) *Route system.* Amtrak's basic route system has been established pursuant to statutory guidelines, and in some cases by specific statutory directive. Out of a route system covering about 23,000 route-miles, Amtrak owns a right-of-way of about 2,600 track miles in the Northeast Corridor (Washington-New York-Boston; New Haven-

Springfield; and Philadelphia-Harrisburg) and small segments of track near Albany, New York, and Kalamazoo, Michigan. In the Northeast Corridor Amtrak trains are run by operating crews consisting of Amtrak employees. On other routes, Amtrak operates trains on the tracks of about twenty different privately owned railroads and compensates the railroad for the use of their facilities and for the services of their employees, including engineers, conductors, and maintenance personnel. Those private railroads are responsible for the conditions of the roadbed and for coordinating the flow of traffic over their lines.

(e) *Operations.* Amtrak provides about 250 trains daily, serving about 500 stations in over forty states. Amtrak owns most of its cars and locomotives, some of its stations, and most of its repair facilities. Its capital improvements and almost half of its operating losses are supported principally through Federal financing, with some State, regional and local financial support for some trains and stations. Congress requires Amtrak to earn revenues equivalent to at least fifty percent of its operating costs, and it currently does so.

(f) *Revenue production.* The sale of tickets for transportation and accommodations, Amtrak's principal source of revenue, is accomplished through Amtrak ticket agents at stations, travel agencies, and five central reservation offices which service a nationwide telephone network. National Timetables contain basic information about routes, stations, and services.

§ 700.3 Availability of documents, assistance, and information.

(a) A member of the public having need for assistance or information concerning any of the matters described in § 700.2 should address his or her concerns in a letter or other written communication directed to the appropriate vice president or to the Director of Corporate Communications. Amtrak will bring such communications to the attention of the appropriate official if they are misdirected in the first instance. Formal requests for ''records'' under 5 U.S.C. 552(a)(3) of the Freedom of Information Act are to be made in accordance with the provisions of 49 CFR 701.4.

(b) The National Train Timetables described in § 700.2(f) are widely distributed in the continental United States and are available in major cities in Europe, Canada and Mexico. When they are updated (usually in April and October each year) each printing involves about 1,000,000 copies. They are ordinarily available at staffed Amtrak stations and copies are usually kept on hand in the offices of about 9800 travel agents who are authorized to sell Amtrak tickets. A person unable to obtain a copy locally should request one from the Director of Corporate Communications at the Washington, DC headquarters. The timetable depicts the major Amtrak train routes on a map of the United States, and most of the remainder of the booklet shows the schedules for specific trains. Several pages are used to offer travel information dealing with the availability of assistance to handicapped travellers, red cap service, purchase of tickets on board, use of credit cards and personal checks, handling of baggage, refunds for unused tickets and similar matters.

(c) Also available to members of the public at most staffed Amtrak stations, and usually maintained in the offices of travel agencies authorized to sell Amtrak tickets, is a copy of the Reservations and Ticketing Manual (RTM) which constitutes a compendium of information governing Amtrak employees in furnishing transportation to the travelling public. It contains substantial segments dedicated to the following topics: Amtrak's computer system and its communication codes; interline service agreements; passenger and baggage services; customer relations functions; reservations policy and procedures; acceptance of checks and credit cards; refunds; missed connection policies; ticketing; accommodations; employee pass travel; location maps for Amtrak stations; and intermodal state maps.

(d) A full statement of Amtrak's tariffs containing the fares for point-to-point travel, regional plan travel and all relevant travel conditions, such as excursions, discounts, family plans, accommodations, etc., is contained in the privately published *Official Railway*

Guide, which is available by subscription from its publisher at 424 West 33rd Street, New York, New York 10001. A copy of the guide can usually be found at each staffed Amtrak station, and at the offices of travel agents authorized to sell Amtrak tickets. Tariff changes which occur between issues of the Guide are published and widely distributed by Amtrak pending their publication in the next issue of the Guide.

(e) Each of the documents described in paragraphs (b) through (d) of this section is available to the public for inspection during regular business hours at the office of Amtrak's Freedom of Information Office at its headquarters at 400 North Capitol Street, NW., Washington, DC 20001, and at the office of the Division Manager, Human Resources, in New Haven, Philadelphia, Baltimore, New York, Los Angeles and Chicago. Each document has its own index. Since each index is useful only in connection with the document to which it pertains, and since requests for indices are uncommon, Amtrak has determined that publication of its indices as described in 5 U.S.C. 552(a)(2) would be unnecessary and impracticable.

PART 701—AMTRAK FREEDOM OF INFORMATION ACT PROGRAM

Sec.

701.1 General provisions.
701.2 Definitions.
701.3 Policy.
701.4 Amtrak public information.
701.5 Requirements for making requests.
701.6 Release and processing procedures.
701.7 Timing of responses to requests.
701.8 Responses to requests.
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701.12 Other rights and services.

AUTHORITY: 5 U.S.C. 552; 49 U.S.C. 24301(e).

SOURCE: 63 FR 7311, Feb. 13, 1998, unless otherwise noted.

§ 701.1 General provisions.

This part contains the rules that the National Railroad Passenger Corporation (''Amtrak'') follows in processing requests for records under the Freedom of Information Act (FOIA), Title 5 of the United States Code, section 552. Information routinely provided to the public (*i.e.*, train timetables, press releases) may be obtained without following Amtrak's FOIA procedures. As a matter of policy, Amtrak may make discretionary disclosures of records or information exempt under the FOIA whenever disclosure would not foreseeably harm an interest protected by an FOIA exemption; however, this policy does not create any right enforceable in court.

§ 701.2 Definitions.

Unless the context requires otherwise in this part, masculine pronouns include the feminine gender and ''includes'' means ''includes but is not limited to.''

(a) *Amtrak or Corporation* means the National Railroad Passenger Corporation.

(b) *Appeal* means a request submitted to the President of Amtrak or designee for review of an adverse initial determination.

(c) *Business days* means working days; Saturdays, Sundays, and legal public holidays are excluded in computing response time for processing FOIA requests.

(d) *Disclose or disclosure* means making records available for examination or copying, or furnishing a copy of non-exempt responsive records.

(e) *Electronic data* means records and information (including E-mail) that are created, stored, and retrievable by electronic means.

(f) *Exempt information* means information that is exempt from disclosure under one or more of the nine exemptions to the FOIA.

(g) *Final determination* means a decision by the President of Amtrak or designee concerning a request for review of an adverse initial determination received in response to an FOIA request.

(h) *Freedom of Information Act or ''FOIA''* means the statute as codified in section 552 of Title 5 of the United States Code as amended.

(i) *Freedom of Information Officer* means the Amtrak official designated to fulfill the responsibilities of implementing and administering the Freedom of Information Act as specifically designated under this part.

(j) *Initial determination* means a decision by an Amtrak FOIA Officer in response to a request for information under the FOIA.

(k) *Pages* means paper copies of standard office size or the cost equivalent in other media.

(l) *President* means the President and Chief Executive Officer (CEO) of the National Railroad Passenger Corporation (Amtrak) or designee.

(m) *Record* means any writing, drawing, map, recording, tape, film, photograph, or other documentary material by which information is preserved in any format, including electronic format. A record must exist and be in the possession and control of Amtrak at the time of the request to be subject to this part and the FOIA. The following are not included within the definition of the word ''record'':

(1) Library materials compiled for reference purposes or objects of substantial intrinsic value.

(2) Routing and transmittal sheets, notes, and filing notes which do not also include information, comments, or statements of substance.

(3) Anything that is not a tangible or documentary record such as an individual's memory or oral communication.

(4) Objects or articles, whatever their historical or value as evidence.

(n) *Request* means any request for records made pursuant to 5 U.S.C. 552(a)(3).

(o) *Requester or requesting party* means any person who has submitted a request to Amtrak.

(p) *Responsive records* means documents determined to be within the scope of a FOIA request.

§ 701.3 Policy.

(a) Amtrak will make records of the Corporation available to the public to the greatest practicable extent in keeping with the spirit of the law. Therefore, records of the Corporation are available for public inspection and copying as provided in this part with the exception of those that the Corporation specifically determines should not be disclosed either in the public interest, for the protection of private rights, or for the efficient conduct of public or corporate business, but only to the extent withholding is permitted by law.

(b) A record of the Corporation, or parts thereof, may be withheld from disclosure if it comes under one or more exemptions in 5 U.S.C. 552(b) or is otherwise exempted by law. Disclosure to a properly constituted advisory committee, to Congress, or to federal agencies does not waive the exemption.

(c) In the event one or more exemptions apply to a record, any reasonably segregable portion of the record will be made available to the requesting person after deletion of the exempt portions. The entire record may be withheld if a determination is made that nonexempt material is so inextricably intertwined that disclosure would leave only essentially meaningless words or phrases, or when it can be reasonably assumed that a skillful and knowledgeable person could reconstruct the deleted information.

(d) The procedures in this part apply only to records in existence at the time of a request. The Corporation has no obligation to create a record solely for the purpose of making it available under the FOIA or to provide a record that will be created in the future.

(e) Each officer and employee of the Corporation dealing with FOIA requests is directed to cooperate in making records available for disclosure under the Act in a prompt manner consistent with this part.

(f) The FOIA time limits will not begin to run until a request has been identified as being made under the Act and deemed received by the Freedom of Information Office.

(g) Generally, when a member of the public complies with the procedures established in this part for obtaining records under the FOIA, the request shall receive prompt attention, and a response shall be made within twenty business days.

§ 701.4 Amtrak public information.

(a) *Public reading room.* Amtrak maintains a public reading room at its headquarters at 60 Massachusetts Avenue, N.E. in Washington, D.C. The public reading room contains records required under the FOIA to be regularly available for public inspection and copying. A current subject-matter index shall be

maintained of records in the public reading room that are available for inspection and copying. The index shall be updated at least quarterly with respect to newly included records. A copy of the index shall be provided upon request at a cost not to exceed the direct cost of duplication.

(b) *Electronic reading room.* Amtrak will make available electronically reading room records created by the Corporation on or after November 1, 1996 on its World Wide Web site which can be accessed at http://www.Amtrak.com. An index of the Corporation's reading room records will also be made available at the web site. The index will indicate reading room records that are available electronically.

(c) *Frequently requested information.* The FOIA requires that copies of records, regardless of form or format, released pursuant to a FOIA request under 5 U.S.C. 552(a)(3) that have become or are likely to become the subject of subsequent requests for substantially the same records be made publicly available. Such records created by the Corporation after November 1, 1996 will be made available electronically while records created prior to this date will be made available for inspection and copying in Amtrak's public reading room.

(1) Amtrak shall decide on a case-by-case basis whether records fall into the category of ''frequently requested FOIA records'' based on the following factors:

(i) Previous experience with similar records;

(ii) The nature and type of information contained in the records;

(iii) The identity and number of requesters and whether there is widespread media or commercial interest in the records.

(2) The provision in this paragraph is intended for situations where public access in a timely manner is important. It is not intended to apply where there may be a limited number of requests over a short period of time from a few requesters. Amtrak may remove the records from this category when it is determined that access is no longer necessary.

(d) *Guide for making requests.* A guide on how to use the FOIA for requesting records from Amtrak shall be made available to the public upon request. Amtrak's major information systems will be described in the guide.

§ 701.5 Requirements for making requests.

(a) *General requirements.* (1) A FOIA request can be made by ''any person'' as defined in 5 U.S.C. 551(2), which encompasses individuals (including foreign citizens; partnerships; corporations; associations; and local, state, tribal, and foreign governments). A FOIA request may not be made by a Federal agency.

(2) A request must be in writing, indicate that it is being made under the FOIA and provide an adequate description of the records sought. The request should also include applicable information regarding fees as specified in paragraphs (d) and (e) of this section.

(b) *How to submit a request.* (1) A request must clearly state on the envelope and in the letter that it is a Freedom of Information Act or ''FOIA'' request.

(2) The request must be addressed to the Freedom of Information Office; National Railroad Passenger Corporation; 60 Massachusetts Avenue, N.E.; Washington, D.C. 20002. Requests will also be accepted by facsimile at (202) 906–2169. Amtrak cannot assure that a timely or satisfactory response under this part will be given to written requests addressed to Amtrak offices, officers, or employees other than the Freedom of Information Office. Amtrak employees receiving a communication in the nature of a FOIA request shall forward it to the FOIA Office expeditiously. Amtrak shall advise the requesting party of the date that an improperly addressed request is received by the FOIA Office.

(c) *Content of the request.* (1) *Description of records*—Identification of records sought under the FOIA is the responsibility of the requester. The records sought should be described in sufficient detail so that Amtrak personnel can locate them with a reasonable amount of effort. When possible, the request should include specific information

such as dates, title or name, author, recipient, subject matter of the record, file designation or number, or other pertinent details for each record or category of records sought.

(2) *Reformulation of a request.* Amtrak is not obligated to act on a request until the requester provides sufficient information to locate the record. Amtrak may offer assistance in identifying records and reformulating a request where: the description is considered insufficient, the production of voluminous records is required, or a considerable number of work hours would be required that would interfere with the business of the Corporation. The Freedom of Information Office shall notify the requester within ten business days of the type of information that will facilitate the search. The requesting party shall be given an opportunity to supply additional information and may submit a revised request, which will be treated as a new request.

(d) *Payment of fees.* The submission of a FOIA request constitutes an agreement to pay applicable fees accessed up to $25.00 unless the requesting party specifies a willingness to pay a greater or lesser amount or seeks a fee waiver or reduction in fees.

(1) *Fees in excess of $25.00.* When Amtrak determines or estimates that applicable fees are likely to exceed $25.00, the requesting party shall be notified of estimated or actual fees, unless a commitment has been made in advance to pay all fees. If only a portion of the fee can be estimated readily, Amtrak shall advise the requester that the estimated fee may be a portion of the total fee.

(i) In order to protect requesters from large and/or unexpected fees, Amtrak will request a specific commitment when it estimates or determines that fees will exceed $100.00.

(ii) A request shall not be considered received, and further processing carried out until the requesting party agrees to pay the anticipated total fee. Any such agreement must be memorialized in writing. A notice under this paragraph will offer the requesting party an opportunity to discuss the matter in order to reformulate the request to meet the requester's needs at a lower cost.

(iii) Amtrak will hold in abeyance for forty-five (45) days requests requiring agreement to pay fees and will thereafter deem the request closed. This action will not prevent the requesting party from refiling the FOIA request with a fee commitment at a subsequent date.

(2) *Fees in excess of $250.* When Amtrak estimates or determines that allowable charges are likely to exceed $250, an advance deposit of the entire fee may be required before continuing to process the request.

(e) *Information regarding fee category.* In order to determine the appropriate fee category, a request should indicate whether the information sought is intended for commercial use or whether the requesting party is a member of the staff of an educational or noncommercial scientific institution or a representative of the news media.

(f) *Records concerning other individuals.* If the request is for records concerning another individual, either a written authorization signed by that individual permitting disclosure of those records to the requesting party or proof that the individual is deceased (i.e., a copy of a death certificate or an obituary) will help to expedite processing of the request.

§ 701.6 Release and processing procedures.

(a) *General provisions.* In determining records that are responsive to a request, Amtrak will ordinarily include only records that exist and are in the possession and control of the Corporation as of the date that the search is begun. If any other date is used, the requesting party will be informed of that date.

(b) *Authority to grant or deny requests.* Amtrak's FOIA officer is authorized to grant or deny any request for records.

(c) *Notice of referral.* If Amtrak refers all or any part of the responsibility for responding to a request to another organization, the requesting party will be notified. A referral shall not be considered a denial of access within the meaning of this part. All consultations and referrals of requests will be handled according to the date that the FOIA request was initially received.

(d) *Creating a record.* There is no obligation on the part of Amtrak to create, compile, or obtain a record to satisfy a FOIA request. The FOIA also does not require that a new computer program be developed to extract the records requested. Amtrak may compile or create a new record, however, when doing so would result in a more useful response to the requesting party or would be less burdensome to Amtrak than providing existing records. The cost of creating or compiling such a record may not be charged to the requester unless the fee for creating the record is equal to or less than the fee that would be charged for providing the existing record.

(e) *Incomplete records.* If the records requested are not complete at the time of a request, Amtrak may, at its discretion, inform the requester that complete nonexempt records will be provided when available without having to submit an additional request.

(f) *Electronic records.* Amtrak is not obligated to process a request for electronic records where creation of a record, programming or a particular format would result in a significant expenditure of resources or interfere with the corporation's operations.

§ 701.7 Timing of responses to requests.

(a) *General.* (1) The time limits of the FOIA will begin only after the requirements for submitting a request as established in § 701.5 have been met, and the request is deemed received by the Freedom of Information Office.

(2) A request for records shall be considered to have been received on the later of the following dates:

(i) The requester has agreed in writing to pay applicable fees in accordance with § 701.5(d), or

(ii) The fees have been waived in accordance with § 701.11(k), or

(iii) Payment in advance has been received from the requester when required in accordance with § 701.11(i).

(3) The time for responding to requests set forth in paragraph (b) of this section may be delayed if:

(i) The request does not sufficiently identify the fee category applicable to the request;

(ii) The request does not state a willingness to pay all fees;

(iii) A request seeking a fee waiver does not address the criteria for fee waivers set forth in § 701.11(k);

(iv) A fee waiver request is denied, and the request does not include an alternative statement indicating that the requesting party is willing to pay all fees.

(b) *Initial determination.* Whenever possible, an initial determination to release or deny a record shall be made within twenty business days after receipt of the request. In ''unusual circumstances'' as described in paragraph (d) of this section, the time for an initial determination may be extended for ten business days.

(c) *Multitrack processing.* (1) Amtrak may use two or more processing tracks by distinguishing between simple and more complex requests based on the amount of work and/or time needed to process a request or the number of pages involved.

(2) In general, when requests are received, Amtrak's FOIA Office will review and categorize them for tracking purposes. Requests within each track will be processed according to date of receipt.

(3) The FOIA Office may contact a requester when a request does not appear to qualify for fast track processing to provide an opportunity to limit the scope of the request and qualify for a faster track. Such notification shall be at the discretion of the FOIA Office and will depend largely on whether it is believed that a narrowing of the request could place the request on a faster track.

(d) *Unusual circumstances.* (1) The requesting party shall be notified in writing if the time limits for processing a request cannot be met because of unusual circumstances, and it will be necessary to extend the time limits for processing the request. The notification shall include the date by which the request can be expected to be completed. Where the extension is for more than ten business days, the requesting party will be afforded an opportunity to either modify the request so that it may be processed within the time limits or to arrange an alternative time

period for processing the initial request or modified request.

(2) If Amtrak believes that multiple requests submitted by a requester or by a group of requesters acting in concert constitute a single request that would otherwise involve unusual circumstances and the requests involve clearly related matters, the requests may be aggregated. Multiple requests concerning unrelated matters may not be aggregated.

(3) Unusual circumstances that may justify delay include:

(i) The need to search for and collect the requested records from other facilities that are separate from Amtrak's headquarters offices.

(ii) The need to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request.

(iii) The need for consultation, which shall be conducted with all practicable speed, with agencies having a substantial interest in the determination of the request, or among two or more Amtrak components having a substantial subject-matter interest in the request.

(e) *Expedited processing.* (1) Requests and appeals may be taken out of order and given expedited treatment whenever it is determined that they involve a compelling need, which means:

(i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; and

(ii) An urgency to inform the public about an actual or alleged Amtrak activity, if made by a person primarily engaged in disseminating information.

(2) A request for expedited processing may be made at the time of the initial request for records or at a later date.

(3) A requester seeking expedited processing must submit a statement, certified to be true and correct to the best of that person's knowledge and belief, explaining in detail the basis for requesting expedited processing. This statement must accompany the request in order to be considered and responded to within the ten calendar days required for decisions on expedited access.

(4) A requester who is not a full-time member of the news media must establish that he is a person whose main professional activity or occupation is information dissemination, though it need not be his sole occupation. A requester must establish a particular urgency to inform the public about the Amtrak activity involved in the request.

(5) Within ten business days of receipt of a request for expedited processing, Amtrak shall determine whether to grant such a request and notify the requester of the decision. If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable.

(6) Amtrak shall provide prompt consideration of appeals of decisions denying expedited processing.

§ 701.8 Responses to requests.

(a) *Granting of requests.* When an initial determination is made to grant a request in whole or in part, the requesting party shall be notified in writing and advised of any fees charged under § 701.11(e). The records shall be disclosed to the requesting party promptly upon payment of applicable fees.

(b) *Adverse determination of requests.* (1) *Types of denials*—The requesting party shall be notified in writing of a determination to deny a request in any respect. Adverse determinations or denials of records consist of:

(i) A determination to withhold any requested record in whole or in part;

(ii) A determination that a requested record does not exist or cannot be located;

(iii) A denial of a request for expedited treatment; and

(iv) A determination on any disputed fee matter including a denial of a request for a fee waiver.

(2) *Deletions.* When practical, records disclosed in part shall be marked or annotated to show both the amount and location of the information deleted.

(3) *Content of denial letter.* The denial letter shall be signed by the Freedom of Information Officer or designee and shall include:

(i) A brief statement of the reason(s) for the adverse determination including any FOIA exemptions applied in denying the request;

(ii) An estimate of the volume of information withheld (number of pages or some other reasonable form of estimation). An estimate does not need to be provided if the volume is indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption;

(iii) A statement that an appeal may be filed under § 701.10 and a description of the requirements of that section; and

(iv) The name and title or position of the person responsible for the denial.

§ 701.9 Business information.

(a) *General.* Business information held by Amtrak will be disclosed under the FOIA only under this section.

(b) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Business information* means commercial or financial information held by Amtrak that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity including partnerships; corporations; associations; and local, state, tribal, and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(d) *Notice to submitters.* Amtrak shall provide a submitter with prompt written notice of an FOIA request or an appeal that seeks its business information when required under paragraph (e) of this section, except as provided in paragraph (h), in order to give the submitter an opportunity to object to disclosure of any specified portion of the information under paragraph (f). The notice shall either describe the business information requested or include copies of the requested records or portions of records containing the information.

(e) *When notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) Amtrak has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* Amtrak will allow a submitter a reasonable amount of time to respond to the notice described in paragraph (d) of this section.

(1) A detailed written statement must be submitted to Amtrak if the submitter has any objection to disclosure. The statement must specify all grounds for withholding any specified portion of the information sought under the FOIA. In the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential.

(2) In the event that a submitter fails to respond within the time specified in the notice, the submitter will be considered to have no objection to disclosure of the information sought under the FOIA.

(3) Information provided by a submitter in response to the notice may be subject to disclosure under the FOIA.

(g) *Notice of intent to disclose.* Amtrak shall consider a submitter's objections and specific grounds for disclosure in making a determination whether to disclose the information. In any instance, when a decision is made to disclose information over the objection of a submitter, Amtrak shall give the submitter written notice which shall include:

(1) A statement of the reason(s) why each of the submitter's objections to disclosure was not sustained;

(2) A description of the information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of this section shall not apply if:

(1) Amtrak determines that the information should not be disclosed;

(2) The information has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than the FOIA);

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous. In such a case, Amtrak shall within a reasonable time prior to a specified disclosure date, give the submitter written notice of the final decision to disclose the information; or

(5) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, unless Amtrak has substantial reason to believe that disclosure of the information would result in competitive harm.

(i) *Notice of a FOIA lawsuit.* Whenever a FOIA requester files a lawsuit seeking to compel disclosure of business information, Amtrak shall promptly notify the submitter.

(j) *Notice to requesters.* (1) When Amtrak provides a submitter with notice and an opportunity to object to disclosure under paragraph (f) of this section, the FOIA Office shall also notify the requester(s).

(2) When Amtrak notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, Amtrak shall also notify the requester(s).

(3) When a submitter files a lawsuit seeking to prevent the disclosure of business information, Amtrak shall notify the requester(s).

§ 701.10 Appeals.

(a) *Appeals of adverse determinations.* (1) The requesting party may appeal:

(i) A decision to withhold any requested record in whole or in part;

(ii) A determination that a requested record does not exist or cannot be located;

(iii) A denial of a request for expedited treatment; or

(iv) Any disputed fee matter or the denial of a request for a fee waiver.

(2) The appeal must be addressed to the President and Chief Executive Officer (CEO); National Railroad Passenger Corporation; 60 Massachusetts Avenue, N.E., Washington, D.C. 20002.

(3) The appeal must be in writing and specify the relevant facts and the basis for the appeal. The appeal letter and envelope must be marked prominently ''Freedom of Information Act Appeal'' to ensure that it is properly routed.

(4) The appeal must be received by the President's Office within thirty (30) days of the date of denial.

(5) An appeal will not be acted upon if the request becomes a matter of FOIA litigation.

(b) *Responses to appeals.* The decision on any appeal shall be made in writing.

(1) A decision upholding an adverse determination in whole or in part shall contain a statement of the reason(s) for such action, including any FOIA exemption(s) applied. The requesting party shall also be advised of the provision for judicial review of the decision contained in 5 U.S.C. 552(a)(4)(B).

(2) If the adverse determination is reversed or modified on appeal in whole or in part, the requesting party shall be notified, and the request shall be reprocessed in accordance with the decision.

(c) *When appeal is required.* The requesting party must appeal any adverse determination prior to seeking judicial review.

§ 701.11 Fees.

(a) *General.* Amtrak shall charge for processing requests under the FOIA in accordance with this section. A fee of $9.50 per quarter hour shall be charged for search and review. For information concerning other processing fees, refer to paragraph (e) of this section. Amtrak shall collect all applicable fees before releasing copies of requested records to the requesting party. Payment of fees shall be made by check or money order payable to the National Railroad Passenger Corporation.

(b) *Definitions.* For purposes of this section:

(1) *Search* means the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(2) *Review* means the process of examining a record located in response to a request to determine whether one or more of the statutory exemptions of the FOIA apply. Processing any record for disclosure includes doing all that is necessary to redact the record and prepare it for release. Review time includes time spent considering formal objection to disclosure by a commercial submitter under §701.9, but does not include time spent resolving general legal or policy issues regarding the application of exemptions. Review costs are recoverable even if a record ultimately is not disclosed.

(3) *Reproduction* means the making of a copy of a record or the information contained in it in order to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (*i.e.*, magnetic tape or disk) among others. Amtrak shall honor a requester's specified preference for the form or format of disclosure if the record is readily reproducible with reasonable effort in the requested form or format by the office responding to the request.

(4) *Direct costs* means those expenses actually incurred in searching for and reproducing (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include such costs as the salary of the employee performing the work (the basic rate of pay for the employee plus applicable benefits and the cost of operating reproduction equipment). Direct costs do not include overhead expenses such as the costs of space and heating or lighting of the facility.

(c) *Fee categories.* There are four categories of FOIA requesters for fee purposes: ''commercial use requesters,'' ''representatives of the news media,'' ''educational and non-commercial scientific institution requesters,'' and ''all other requesters.'' The categories are defined in paragraphs (c)(1) through (5), and applicable fees, which are the same for two of the categories, will be assessed as specified in paragraph (d) of this section.

(1) *Commercial requesters.* The term ''commercial use'' request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers his commercial, trade, or profit interests, including furthering those interests through litigation. Amtrak shall determine, whenever reasonably possible, the use to which a requester will put the records sought by the request. When it appears that the requesting party will put the records to a commercial use, either because of the nature of the request itself or because Amtrak has reasonable cause to doubt the stated intended use, Amtrak shall provide the requesting party with an opportunity to submit further clarification. Where a requester does not explain the use or where explanation is insufficient, Amtrak may draw reasonable inferences from the requester's identity and charge accordingly.

(2) *Representative of the news media or news media requester* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of news). For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through an organization. A publication contract would be the clearest proof, but Amtrak shall also look to the past publication record of a requester in making this determination. A request for records supporting the news dissemination function of the requester shall not be considered to be for commercial use.

(3) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not

sought for commercial use but to further scholarly research.

(4) *Noncommercial scientific institution* refers to an institution that is not operated on a ''commercial'' basis, as that term is defined in paragraph (c)(1) of this section, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, the requesting party must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for commercial use but to further scientific research.

(5) *Other requesters* refers to requesters who do not come under the purview of paragraphs (c)(1) through (4) of this section.

(d) *Assessing fees.* In responding to FOIA requests, Amtrak shall charge the following fees unless a waiver or a reduction in fees has been granted under paragraph (k) of this section:

(1) *''Commercial use'' requesters:* The full allowable direct costs for search, review, and duplication of records.

(2) *''Representatives of the news media'' and ''educational and non-commercial scientific institution'' requesters:* Duplication charges only, excluding charges for the first 100 pages.

(3) *''All other'' requesters:* The direct costs of search and duplication of records. The first 100 pages of duplication and the first two hours of search time shall be provided without charge.

(e) *Schedule of fees.* (1) *Manual searches*—Personnel search time includes time expended in either manual searches for paper records, searches using indices, review of computer search results for relevant records, and personal computer system searches.

(2) *Computer searches.* The direct costs of conducting a computer search will be charged. These direct costs will include the cost of operating a central processing unit for that portion of the operating time that is directly attributable to searching for responsive records as well as the costs of operator/programmer salary apportionable to the search.

(3) *Duplication fees.* Duplication fees will be charged all requesters subject to limitations specified in paragraph (d) of this section. Amtrak shall charge 25 cents per page for a paper photocopy of a record. For copies produced by computer (such as tapes or printouts), Amtrak will charge the direct costs, including the operator time in producing the copy. For other forms of duplication, Amtrak will charge the direct costs of that duplication.

(4) *Review fees.* Review fees will be assessed for commercial use requests. Such fees will be assessed for review conducted in making an initial determination, or upon appeal, when review is conducted to determine whether an exemption not previously considered is applicable.

(5) *Charges for other services.* The actual cost or amount shall be charged for all other types of output, production, and duplication (e.g., photographs, maps, or printed materials). Determinations of actual cost shall include the commercial cost of the media, the personnel time expended in making the item available for release, and an allocated cost for the equipment used in producing the item. The requesting party will be charged actual production costs when a commercial service is required. Items published and available through Amtrak will be made available at the publication price.

(6) *Charges for special services.* Apart from the other provisions of this section, when Amtrak chooses as a matter of discretion to provide a special service such as certifying that records are true copies or sending records by other than ordinary mail, the direct costs of providing such services shall be charged.

(f) *Commitment to pay fees.* When Amtrak determines or estimates that applicable fees will likely exceed $25.00, the requesting party will be notified of the actual or estimated amount unless a written statement has been received indicating a willingness to pay all fees. To protect requesters from large and/or unexpected fees, Amtrak will request a specific commitment when it is estimated or determined that fees will exceed $100.00. See § 701.5(d) for additional information.

(g) *Restrictions in accessing fees.* (1) *General*—Fees for search and review will not be charged for a quarter-hour

period unless more than half of that period is required.

(2) *Minimum fee.* No fees will be charged if the cost of collecting the fee is equal to or greater than the fee itself. That cost includes the costs to Amtrak for billing, receiving, recording, and processing the fee for deposit, which has been deemed to be $10.00.

(3) *Computer searches.* With the exception of requesters seeking documents for commercial use, Amtrak shall not charge fees for computer search until the cost of search equals the equivalent dollar amount of two hours of the salary of the operator performing the search.

(h) *Nonproductive searches.* Amtrak may charge for time spent for search and review even if responsive records are not located or if the records located are determined to be entirely exempt from disclosure.

(i) *Advance payments.* (1) When Amtrak estimates or determines that charges are likely to exceed $250, an advance payment of the entire fee may be required before continuing to process the request.

(2) When there is evidence that the requester may not pay the fees that would be incurred by processing the request, an advance deposit may be required. Amtrak may require the full amount due plus applicable interest and an advance payment of the full amount of anticipated fees before beginning to process a new request or continuing to process a pending request where a requester has previously failed to pay a properly charged FOIA fee within thirty (30) days of the date of billing. The time limits of the FOIA will begin only after Amtrak has received such payment.

(3) Amtrak will hold in abeyance for forty-five (45) days requests where deposits are due.

(4) Monies owed for work already completed (i.e., before copies are sent to a requester) shall not be considered an advance payment.

(5) Amtrak shall not deem a request as being received in cases in which an advance deposit or payment is due, and further work will not be done until the required payment is received.

(j) *Charging interest.* Amtrak may charge interest on any unpaid bill for processing charges starting on the 31st day following the date of billing the requester. Interest charges will be assessed at the rate that Amtrak pays for short-term borrowing.

(k) *Waiver or reduction of fees.* (1) *Automatic waiver of fees*—When the costs for a FOIA request total $10.00 or less, fees shall be waived automatically for all requesters regardless of category.

(2) *Other fee waivers.* Decisions to waive or reduce fees that exceed the automatic waiver threshold shall be made on a case-by-case basis. Records responsive to a request will be furnished without charge or at below the established charge where Amtrak determines, based on all available information, that disclosure of the requested information is in the public interest because:

(i) It is likely to contribute significantly to public understanding of the operations or activities of Amtrak, and

(ii) It is not primarily in the commercial interest of the requesting party.

(3) To determine whether the fee waiver requirement in paragraph (k)(2)(i) of this section is met, Amtrak will consider the following factors:

(i) *The subject of the request—whether the subject of the requested records concerns the operations or activities of Amtrak.* The subject of the requested records must concern identifiable operations or activities of Amtrak with a connection that is direct and clear, not remote or attenuated.

(ii) *The informative value of the information to be disclosed—whether the disclosure is likely to contribute to an understanding of Amtrak operations or activities.* The disclosable portions of the requested records must be meaningfully informative about Amtrak's operations or activities in order to be found to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding where nothing new would be added to the public's understanding.

(iii) *The contribution to an understanding of the subject by the public likely to result from disclosure—whether disclosure of the requested information will contribute to public understanding.* The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject as opposed to the individual understanding of the requester. A requester's ability and expertise in the subject area as well as the requester's intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media will satisfy this consideration.

(iv) *The significance of the contribution to public understanding—whether the disclosure is likely to contribute significantly to public understanding of Amtrak operations or activities.* The public's understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.

(4) To determine whether the fee waiver requirement in paragraph (k)(2)(ii) of this section is met, Amtrak will consider the following factors:

(i) *The existence and magnitude of a commercial interest—whether the requesting party has a commercial interest that would be furthered by the requested disclosure.* Amtrak shall consider any commercial interest of the requesting party (with reference to the definition of ''commercial use'' in paragraph (c)(1) of this section), or any person on whose behalf the requesting party may be acting that would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(ii) *The primary interest in disclosure—whether the magnitude of the identified commercial interest of the requester is sufficiently large in comparison with the public interest in disclosure, that disclosure is ''primarily in the commercial interest of the requester.''* A fee waiver or reduction is justified where the public interest standard is satisfied and public interest is greater in magnitude than any identified commercial interest in disclosure.

(5) Requests for a fee waiver will be considered on a case-by-case basis, based upon the merits of the information provided. Where it is difficult to determine whether the request is commercial in nature, Amtrak may draw inference from the requester's identity and the circumstances of the request.

(6) Requests for a waiver or reduction of fees must address the factors listed in paragraphs (k) (3) and (4) of this section. In all cases, the burden shall be on the requesting party to present evidence of information in support of a request for a waiver of fees.

(l) *Aggregating requests.* A requester may not file multiple requests at the same time in order to avoid payment of fees. Where Amtrak reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, Amtrak may aggregate those requests and charge accordingly. Amtrak may presume that multiple requests of this type made within a thirty-day period have been made in order to avoid fees. Where requests are separated by a longer period, Amtrak may aggregate them only when there exists a solid basis for determining that aggregation is warranted. Multiple requests involving unrelated matters may not be aggregated.

§ 701.12 Other rights and services.

Nothing in this part shall be construed as entitling any person, as of right, to any service or the disclosure of any record to which such person is not entitled under the FOIA.

CHAPTER VIII—NATIONAL TRANSPORTATION SAFETY BOARD

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PART 800—ORGANIZATION AND FUNCTIONS OF THE BOARD AND DELEGATIONS OF AUTHORITY

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APPENDIX TO PART 800—REQUEST TO THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION TO INVESTIGATE CERTAIN AIRCRAFT ACCIDENTS

AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*); Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*).

SOURCE: 49 FR 26232, June 27, 1984, unless otherwise noted.

Subpart A—Organization and Functions

§ 800.1 Purpose.

This part describes the organization, functions, and operation of the National Transportation Safety Board (Board).

§ 800.2 Organization.

The Board consists of five Members appointed by the President with the advice and consent of the Senate. One of the Members is designated by the President as Chairman with the advice and consent of the Senate and one as Vice Chairman. The Members exercise various functions, powers, and duties set forth in the Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*), and the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*). The Board is an independent agency of the United States. More detailed descriptions of the Board and its work are contained in other parts of this chapter VIII, notably parts 825, 830 through 835, and 840 through 850. Various special delegations of authority from the Board and the Chairman to the staff are set forth in subpart B of this part. The Board's staff is comprised of the following principal components:

(a) The Office of the Managing Director, which assists the Chairman in the discharge of his functions as executive and administrative head of the Board; coordinates and directs the activities of the staff; is responsible for the day-to-day operation of the Board; and recommends and develops plans to achieve the Board's program objectives. The Office of the Managing Director also provides executive secretariat services to the Board.

(b) The Office of Government, Public, and Family Affairs, which supplies the Congress and Federal, State, and local government agencies with information regarding the Safety Board's activities, programs and objectives; supplies the public, the transportation industry and the news media with current, accurate information concerning the work, programs, and objectives of the Board; coordinates public and private responsibilities, including aid to survivors and families of accident victims, in the wake of transportation disasters. This Office maintains the 24-hour Communications Center, which assists in coordinating accident notification and launch operations for all modes and provides an off-hour base for family assistance functions during accident investigations.

(c) The Office of the General Counsel, which provides legal advice and assistance to the Board and its staff; prepares Board rules, opinions and/or orders, and advice to all offices on matters of legal significance; and represents the Board in judicial matters

to which the Board is a party or in which the Board is interested.

(d) The Office of Administrative Law Judges, which conducts all formal proceedings arising under the Federal Aviation Act of 1958, as amended, including proceedings involving civil penalties and suspension or revocation of certificates, and appeals from actions of the Federal Aviation Administrator in refusing to issue airman certificates.

(e) The Office of Aviation Safety, which conducts investigations of all aviation accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future aviation accidents; participates in the investigation of accidents that occur in foreign countries and involve U.S.-registered and/or U.S.-manufactured aircraft; and conducts special investigations into selected aviation accidents involving safety issues of concern to the Board.

(f) The Office of Railroad Safety, which conducts investigations of railroad accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future railroad accidents; and conducts special investigations into selected rail accidents involving safety issues of concern to the Board.

(g) The Office of Highway Safety, which conducts investigations of highway accidents, including railroad grade-crossing accidents, within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future highway accidents; and conducts special investigations into selected highway accidents involving safety issues of concern to the Board.

(h) The Office of Marine Safety, which conducts investigations of marine accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable cause(s) of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future marine accidents; participates in the investigation of accidents that occur in foreign countries and that involve U.S.-registered vessels; and conducts special investigations into selected marine accidents involving safety issues of concern to the Board.

(i) The Office of Pipeline and Hazardous Materials Safety, which conducts investigations of pipeline and hazardous materials accidents within the Board's jurisdiction; prepares reports for submission to the Board and release to the public setting forth the facts and circumstances of such accidents, including a recommendation as to the probable cause(s); determines the probable causes of accidents when delegated authority to do so by the Board; initiates safety recommendations to prevent future pipeline and hazardous materials accidents; and conducts special investigations into selected pipeline and hazardous materials accidents involving safety issues of concern to the Board.

(j) The Office of Research and Engineering, which conducts research and carries out analytical studies and tests involving all modes, including readouts of voice and data recorders, flight path analysis and computer simulation/animation, component examination and material failure analysis; conducts safety studies of specific safety issues; performs statistical analyses of transportation accident and incident data; maintains archival records of the Board's accident investigation and

safety promotion activities and supports public access to these records; and administers the Board's information technology infrastructure, including computer systems, networks, databases, and application software.

(k) The Office of Safety Recommendations & Accomplishments, which oversees the Board's safety recommendations program, including the Board's ''MOST WANTED'' recommendations, and the Board's safety accomplishment program.

[60 FR 61488, Nov. 30, 1996, as amended at 61 FR 14521, April 2, 1995; 63 FR 71605, Dec. 29, 1998; 64 FR 5621, Feb. 4, 1999]

§ 800.3 Functions.

(a) The primary function of the Board is to promote safety in transportation. The Board is responsible for the investigation, determination of facts, conditions, and circumstances and the cause or probable cause or causes of: all accidents involving civil aircraft, and certain public aircraft; highway accidents, including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States; railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train; pipeline accidents in which there is a fatality, significant injury to the environment, or substantial property damage; and major marine casualties and marine accidents involving a public and a non-public vessel or involving Coast Guard functions. The Board makes transportation safety recommendations to Federal, State, and local agencies and private organizations to reduce the likelihood of recurrences of transportation accidents. It initiates and conducts safety studies and special investigations on matters pertaining to safety in transportation, assesses techniques and methods of accident investigation, evaluates the effectiveness of transportation safety consciousness and efficacy in preventing accidents of other Government agencies, and evaluates the adequacy of safeguards and procedures concerning the transportation of hazardous materials.

(b) Upon application of affected parties, the Board reviews in quasijudicial proceedings, conducted pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, denials by the Administrator of the Federal Aviation Administrator of applications for airman certificates and orders of the Administrator modifying, amending, suspending, or revoking certificates or imposing civil penalties. The Board also reviews on appeal the decisions of the Commandant, U.S. Coast Guard, on appeals from orders of administrative law judges suspending, revoking, or denying seamen licenses, certificates, or documents.

(c) The Board, as provided in Part 801 of this chapter, issues reports and orders pursuant to its duties to determine the cause or probable cause or causes of transportation accidents and to report the facts, conditions and circumstances relating to such accidents; issues opinions and/or orders after reviewing on appeal the imposition of a civil penalty or the suspension, amendment, modification, revocation, or denial of any certificate or license issued by the Secretary of the Department of Transportation (who acts through the Administrator of the Federal Aviation Administration or the Commandant of the United States Coast Guard); and issues and makes available to the public safety recommendations, safety studies, and reports of special investigations.

[60 FR 61488, Nov. 30, 1995]

§ 800.4 Operation.

In exercising its functions, duties, and responsibilities, the Board utilizes:

(a) The Board's staff, consisting of specialized offices dealing with particular areas of transportation safety and performing administrative and technical work for the Board. The staff advises the Board and performs duties for the Board that are inherent in the staff's position in the organizational structure or that the Board has delegated to it. The staff is described more fully in § 800.2.

(b) Rules published in the FEDERAL REGISTER and codified in this Title 49 of the Code of Federal Regulations. These rules may be inspected in the Board's public reference room, or purchased from the Superintendent of Documents, Government Printing Office.

(c) Procedures and policies set forth in the agency's internal directives system which govern the activities of employees and organizational components of the Board. The internal directives system is designated as the NTSB Manual and consists of instructions which are called NTSB Orders and NTSB Notices.

(d) Meetings of the Board Members conducted pursuant to the Government in the Sunshine Act.

(e) Public hearings in connection with transportation accident investigations and public hearings and oral arguments in proceedings concerned with certificates or licenses issued by the Secretary or an Administrator of the Department of Transportation. They are held at the time and place announced in the notices thereof which are served on the parties to the proceedings or published in the FEDERAL REGISTER.

[49 FR 26232, June 27, 1984, as amended at 60 FR 61489, Nov. 30, 1995]

§ 800.5 Office locations.

The principal offices of the National Transportation Safety Board are located at 490 L'Enfant Plaza East, SW., Washington, DC 20594. The Board maintains field offices in selected cities throughout the United States.

[60 FR 61489, Nov. 30, 1995]

§ 800.6 Availability of information and materials.

Part 801 of this chapter provides detailed information concerning the availability of Board documents and records. That part also provides a fee schedule and information concerning inspection and copying.

Subpart B—Delegations of Authority to Staff Members

§ 800.21 Purpose.

The purpose of this Subpart B is to publish special delegations of authority to staff members.

[60 FR 61489, Nov. 30, 1995]

§ 800.22 Delegation to the Managing Director.

(a) The Board delegates to the Managing Director the authority to:

(1) Make the final determination, on appeal, as to whether to withhold a Board record from inspection or copying, pursuant to Part 801 of this chapter.

(2) Approve for publication in the FEDERAL REGISTER notices concerning issuance of accident reports and safety recommendations and responses to safety recommendations, as required by sections 304(a)(2) and 307 of the Independent Safety Board Act of 1974 (49 U.S.C. 1131(d) and 1135(c)).

(b) The Chairman delegates to the Managing Director the authority to exercise and carry out, subject to the direction and supervision of the Chairman, the following functions vested in the Chairman:

(1) The appointment and supervision of personnel employed by the Board;

(2) The distribution of business among such personnel and among organizational components of the Board; and

(3) The use and expenditure of funds.

[60 FR 61489, Nov. 30, 1995]

§ 800.23 Delegation to the administrative law judges, Office of Administrative Law Judges.

The Board delegates to the administrative law judges the authority generally detailed in its procedural regulations at Part 821 of this chapter.

[60 FR 61489, Nov. 30, 1995]

§ 800.24 Delegation to the General Counsel.

The Board delegates to the General Counsel the authority to:

(a) Approve, disapprove, request more information, or otherwise handle requests for testimony of Board employees with respect to their participation in the investigation of accidents, and, upon receipt of notice that an employee has been subpoenaed, to make arrangements with the court either to have the employee excused from testifying or to give the employee permission to testify in accordance with the provisions of Part 835 of this Chapter.

(b) Approve or disapprove in safety enforcement proceedings, for good cause shown, requests for extensions of time or for other changes in procedural requirements subsequent to the initial decision, grant or deny requests to file additional and/or *amicus* briefs pursuant to §§ 821.9 and 821.48 of this Chapter, and raise on appeal any issue the resolution of which he deems important to the proper disposition of proceedings under § 821.49 of this Chapter.

(c) Approve or disapprove, for good cause shown, requests to extend the time for filing comments on proposed new or amended regulations.

(d) Issue regulations for the purpose of making editorial changes or corrections in the Board's rules and regulations.

(e) Issue orders staying or declining to stay, pending judicial review, orders of the Board suspending or revoking certificates, and consent to the entry of judicial stays with respect to such orders.

(f) Compromise civil penalties in the case of violations arising under The Independent Safety Board Act of 1974, as amended, or any rule, regulation, or order issued thereunder.

(g) Issue orders dismissing appeals from initial decisions of Board administrative law judges pursuant to the request of the appellant or, where the request is consensual, at the request of any party.

(h) Correct Board orders by eliminating typographical, grammatical, and similar errors, and make editorial changes therein not involving matters of substance.

(i) Take such action as appropriate or necessary adequately to compromise, settle, or otherwise represent the Board's interest in judicial or administrative actions to which the Board is a party or in which the Board is interested.

(j) Dismiss late filed notices of appeal and appeal briefs for lack of good cause.

[60 FR 61489, Nov. 30, 1995, as amended at 63 FR 71606, Dec. 29, 1998]

§ 800.25 Delegation to the Directors of Office of Aviation Safety, Office of Railroad Safety, Office of Highway Safety, Office of Marine Safety, and Office of Pipeline and Hazardous Materials Safety.

The Board delegates to the Directors of the Offices of Aviation, Railroad, Highway, Marine, and Pipeline and Hazardous Materials Safety, the authority to:

(a) Order an investigation into the facts, conditions, and circumstances of accidents that the Board has authority to investigate.

(b) Disclose factual information pertinent to all accidents or incidents as provided for in Part 801 of this chapter.

(c) Determine the probable cause(s) of accidents in which the determination is issued in the ''Brief of Accident'' format, except that the Office Director will submit the findings of the accident investigation to the Board for determination of the probable cause(s) when (1) any Board Member so requests, (2) it appears to the Office Director that, because of significant public interest, a policy issue, or a safety issue of other matter, the determination of the probable cause(s) should be made by the Board, or (3) the accident investigation will be used to support findings in a special investigation or study. Provided, that a petition for reconsideration or modification of a determination of the probable cause(s) made under § 845.41 of this Chapter shall be acted on by the Board.

(d) Consistent with Board resources, investigate accidents as provided under § 304(a) of the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1131(a)) and the Appendix to this Part.

[60 FR 61489, Nov. 30, 1995, as amended at 63 FR 71606, Dec. 29, 1998]

§ 800.26 Delegation to the Chief, Public Inquiries Branch.

The Board delegates to the Chief, Public Inquiries Branch, the authority to determine, initially, the withholding of a board record from inspection or copying, pursuant to part 801 of this chapter.

[63 FR 71606, Dec. 29, 1998]

§ 800.27 Delegation to investigative officers and employees of the Board.

The Board delegates to any officer or employee of the Board designated by the Chairman of the Safety Board the authority to sign and issue subpoenas, and administer oaths and affirmations, and to take depositions or cause them to be taken in connection with the investigation of transportation accidents or incidents.

[60 FR 61490, Nov. 30, 1995]

§ 800.28 Delegation to the Chief Financial Officer.

The Board delegates to the Chief Financial Officer the authority to settle claims for money damages of $2,500 or less against the United States arising under Section 2672 of 28 United States Code (the Federal Tort Claims Act) because of acts or omissions of Board employees.

[63 FR 71606, Dec. 29, 1998]

APPENDIX TO PART 800—REQUEST TO THE SECRETARY OF THE DEPARTMENT OF TRANSPORTATION TO INVESTIGATE CERTAIN AIRCRAFT ACCIDENTS

(a) Acting pursuant to the authority vested in it by Title VII of the Federal Aviation Act of 1958 (49 U.S.C. 1441) and section 304(a)(1) of the Independent Safety Board Act of 1974, the National Transportation Safety Board (Board) hereby requests the Secretary of the Department of Transportation (Secretary) to exercise his authority subject to the terms, conditions, and limitations of Title VII and section 304(a)(1) of the Independent Safety Board Act of 1974, and as set forth below to investigate the facts, conditions, and circumstances surrounding certain fixed-wing and rotorcraft aircraft accidents and to submit a report to the Board from which the Board may make a determination of the probable cause.

(b) The authority to be exercised hereunder shall include the investigation of all civil aircraft accidents involving rotorcraft, aerial application, amateur-built aircraft, restricted category aircraft, and all fixed-wing aircraft which have a certificated maximum gross takeoff weight of 12,500 pounds or less except:

(1) Accidents in which fatal injuries have occurred to an occupant of such aircraft, but shall include accidents involving fatalities incurred as a result of aerial application operations, amateur-built aircraft operations, or restricted category aircraft operations.

(2) Accidents involving aircraft operated in accordance with the provisions of Part 135 of the Federal Air Regulations entitled ''Air Taxi Operators and Commercial Operators of Small Aircraft.''

(3) Accidents involving aircraft operated by an air carrier authorized by certificate of public convenience and necessity to engage in air transportation.

(4) Accidents involving midair collisions.

(c) *Provided,* That the Board may, through the chiefs of its field offices, or their designees who receive the initial notifications, advise the Secretary, through his appropriate designee, that the Board will assume the full responsibility for the investigation of an accident included in this request in the same manner as an accident not so included; and *Provided further,* That the Board, through the chiefs of its field offices, or their designees who receive initial notifications may request the Secretary, through his appropriate designee, to investigate an accident not included in this request, which would normally be investigated by the Board under section (b) (1) through (4) above, and in the same manner as an accident so included.

(d) *Provided,* That this authority shall not be construed to authorize the Secretary to hold public hearings or to determine the probable cause of the accident; and *Provided further,* That the Secretary will report to the Board in a form acceptable to the Board the facts, conditions, and circumstances surrounding each accident from which the Board may determine the probable cause.

(e) *And provided further,* That this request includes authority to conduct autopsies and such other tests of the remains of deceased persons aboard the aircraft at the time of the accident, who die as a result of the accident, necessary to the investigations requested hereunder and such authority may be delegated and redelegated to any official or employee of the Federal Aviation Administration (FAA). For the purpose of this provision, designated aviation examiners are not deemed to be officials or employees of the FAA.

(f) Invoking the provisions of section 701(f) of the Federal Aviation Act of 1958, and section 304(a)(1) of the Independent Safety Board Act of 1974, is necessary inasmuch as sufficient funds have not been made available to the Board to provide adequate facilities and personnel to investigate all accidents involving civil aircraft. This request, therefore, is considered to be temporary in nature and may be modified or terminated by written notice to the Secretary.

[49 FR 26232, June 27, 1984, as amended at 63 FR 71606, Dec. 29, 1998]

PART 801—PUBLIC AVAILABILITY OF INFORMATION

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APPENDIX TO PART 801—FEE SCHEDULE

AUTHORITY: 5 U.S.C. 552; 49 U.S.C. 1101 et seq.; 18 U.S.C. 641 and 2071.

SOURCE: 41 FR 39755, Sept. 16, 1976, unless otherwise noted.

Subpart A—Applicability and Policy

§ 801.1 Applicability.

(a) This part implements the provisions of the Freedom of Information Act (5 U.S.C. 552) as amended by Pub. L. 93–502, November 21, 1974, and the publication and public access requirements embodied in title III of the Independent Safety Board Act of 1974 (88 Stat. 2166 (49 U.S.C. 1901 et seq.)). In addition, it provides for document services and the charges therefor, pursuant to 31 U.S.C. 483a.

(b) This part applies only to records existing when the request for the information is made. The National Transportation Safety Board (Board) is not required to compile or procure records for the sole purpose of making them available hereunder.

(c) Subpart F of this part describes records which are exempt from public disclosure.

§ 801.2 Policy.

In implementing 5 U.S.C. 552, it is the policy of the Board to make information available to the public to the greatest extent possible. Accordingly, all records of the Board, except those that the Board specifically determines must not be disclosed in the national interest, or for the protection of private rights, or for the efficient conduct of public business to the extent permitted by the Freedom of Information Act, are declared to be available for public inspection and copying, as provided in this part. Records are to be made available to the public promptly and to the fullest extent consistent with this policy. No record may be withheld from the public solely because its release might indicate administrative error or embarrass an officer or employee of the Board.

§ 801.3 Definitions.

Record includes any writing, drawing, map, recording, tape, film, photo, or other documentary material by which information is preserved, and this definition also applies to section 306(a) of the Independent Safety Board Act of 1974, which requires public access to any information. In this part, *document* and *record* shall have the same meaning.

Chairman means the Chairman of the Board.

Managing Director means the Managing Director of the Board.

Subpart B—Administration

§ 801.10 General.

(a) The Director, Bureau of Administration, is responsible for the custody and control of all Board records required to be preserved under directives of the General Services Administration, issued pursuant to 44 U.S.C. 3102.

(b) The Director, Bureau of Administration, shall be solely responsible for the initial determination of whether to release records within the 10 working days' limit, or the extension specified in the Freedom of Information Act.

(c) The Public Inquiries Section, Bureau of Administration, shall:

(1) Maintain for public access and commercial reproduction all accident files containing aviation and surface investigator's reports, factual accident reports or group chairman reports, documentation and accident correspondence files, transcripts of public hearings, if any, and exhibits.

(2) Maintain a public reference room (with self-service duplicator) and, on request, permit the public to inspect public documents during normal working hours.

(3) Maintain copies of public documents, specified in the appendix, for inspection and copying in the public reference room.

(d) Requests for documents must be addressed to the Public Inquiries Section, National Transportation Safety Board, Washington, DC 20594. All requests must reasonably identify the record requested, must be accompanied by the fee or agreement (if any) to pay the reproduction costs shown in the fee schedule (see appendix), and must contain the address and telephone number of the person making the request. The envelope in which the request is sent should be marked prominently with the letters ''FOIA.'' The Bureau of Administration, if there is a failure to comply fully, will attempt to contact the requester immediately to rectify the omission. However, the 10-working-day limit for processing shall not commence until the Bureau of Administration receives a totally correct request.

(e) The field offices of the Board shall not maintain, for public access, records maintained by the Bureau of Administration. If requests are made to field offices, advice will be promptly given as to how to make such requests.

(f) The Bureau of Administration shall maintain a contract with a commercial reproduction firm to accommodate requests for reproduction of accident records. The reproduction charges may be subject to change with each contract renewal.

(g) Requests for documents generated by other agencies or entities will not be processed unless they are contained in the Board's accident files.

(h) Requests for records not yet issued will be held in abeyance until issuance and then processed. The person making the request will be so notified.

(i) No charge will be made by the Board for notices, decisions, orders, etc., required by law to be served on a party to any proceeding or matter before the Board.

(j) Upon approval of the Director, Bureau of Administration, subscriptions to Board publications may be entered without charge for States, organizations, or other entities specified in the fee schedule set forth in the appendix.

§ 801.11 Segregability of records.

The initial decision of the Director, Bureau of Administration shall include a determination of segregability. If it is reasonable to do so, the exempt portions will be deleted and the nonexempt portions will be sent to the requester.

§ 801.12 Protection of records.

(a) No person may, without permission, remove from the place where it is

made available any record made available to him for inspection or copying. Stealing, altering, multilating, obliterating, or destroying, in whole or in part, such a record shall be deemed a crime.

(b) Section 641 of title 18 of the U.S.C. provides, in pertinent part, as follows:

''Whoever * * * steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record * * * or thing of value of the United States or of any department or agency thereof * * * Shall be fined not more than $10,000 or imprisoned not more than ten years or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. * * *''

(c) Section 2071(a) of title 18 of the U.S.C. provides, in pertinent part, as follows:

''(a) Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys, or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other things, filed or deposited * * * in any public office, or with any * * * public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.''

Subpart C—Time Limits

§ 801.20 Initial determination.

An initial determination as to whether to release a record shall be made by the Director, Bureau of Administration within 10 working days (excluding Saturdays, Sundays, and legal public holidays) after the request is received, except that this time limit may be extended up to 10 additional working days in accordance with § 801.22, of this part. The person making the request will be notified immediately in writing of such determination. If such determination is to release the requested record, such record shall be made available promptly. If such determination is made not to release the record, the person making the request shall, when he is notified of such determination, be advised of (a) the reason for the determination, (b) the right to appeal the determination, and (c) the name and title or positions of each person responsible for the denial of the request.

§ 801.21 Final determination.

A determination with respect to any appeal made pursuant to § 801.20, shall be made by the Managing Director within 10 working days (excluding Saturdays, Sundays, and legal public holidays) after receipt of such appeal, except that this time limit may be extended for as many as 10 additional working days, in accordance with § 801.22.

§ 801.22 Extension.

In unusual circumstances as specified in this section, the time limits prescribed in either, but not both, § 801.20 or § 801.21, may be extended by written notice to the person making a request and setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. Such notice shall not specify a date that would result in an extension for more than 10 working days. As used in this paragraph, ''unusual circumstances,'' to the extent reasonably necessary to the proper processing of the particular request, means—

(a) The need to search for and collect the requested records from field facilities or other establishments that are separate from the Bureau of Administration;

(b) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(c) The need to consult with another agency which has a substantial interest in the disposition of the request or with two or more components of the agency having substantial subject-matter interest therein.

Subpart D—Accident Investigation Records

§ 801.30 Field aircraft accident investigations.

Upon completion of the field investigation (normally 60 days after the accident), the Board's investigator-in-charge shall complete a factual report (with documentation) and send it to the Director, Bureau of Administration, who shall then make the record available to the public for inspection

or commercial copy order (see appendix).

§ 801.31 Major aircraft accident investigations.

Upon completion of the investigation by a team of Board investigators (normally 60 days after the accident), the report of each investigator (group chairman), with documentation, shall be sent to the Director, Bureau of Administration, who shall make these records available to the public for inspection and commercial copy order (see appendix).

§ 801.32 Aircraft accident public hearings.

Within approximately 2 weeks after a public hearing concerning an aviation accident, the Director, Bureau of Administration, shall make available to the public for inspection or commercial copy order, the hearing transcript and the exhibits introduced at the hearing (see appendix).

§ 801.33 Surface transportation accident investigations.

Upon completion of the Board's investigation of these accidents (normally 60 days after the accident), the investigators shall send to the Director, Bureau of Administration, a file of the documentation obtained. This file shall then be made available by the Bureau of Administration, for public access or commercial copy order (see appendix).

§ 801.34 Surface accident public hearings.

Within approximately 2 weeks after a surface accident public hearing, the Bureau of Administration shall make available for public inspection and commercial copy order, the hearing transcript and exhibits introduced at the hearing.

§ 801.35 Aviation accident reports.

(a) The Board shall report the facts, conditions, and circumstances, and its determination of the cause or probable cause of all U.S. civil aviation accidents approximately 6 months after each accident occurs. All such reports shall be provided by computer printout, published periodically as ''Briefs of Accidents.''

(b) All major or catastropic air carrier accidents and noncatastrophic accidents, involving both air carriers and general aviation, which provide unusually significant safety issues shall be reported by the Board in detailed, narrative format. The formal, narrative report shall provide the facts, conditions, and circumstances, and the Board's determination of the cause or probable cause of the accident; the report shall be issued approximately 6 months after date of accident.

(c) After notice of issuance appears in the FEDERAL REGISTER, as required by section 304(a)(2) of the Independent Safety Board Act of 1974, the report shall be made available for public inspection in the Board's public reference room. (See appendix for copies and subscriptions.)

§ 801.36 Surface transportation accident reports.

Any surface transportation accident investigated by the Board, and certain marine accidents investigated by the U.S. Coast Guard, shall result in a formal Board report. Such report shall provide the facts, conditions, circumstances, and the Board's determination of cause or probable cause of the accident. Reports of accidents investigated by the Board shall be issued approximately 6 months after the date of accident. After notice of issuance appears in the FEDERAL REGISTER, as required by section 304 (a)(2) of the Independent Safety Board Act of 1974, the report shall be made available for public inspection in the Board's public reference room. (See appendix for copies and subscriptions.)

Subpart E—Other Board Documents

§ 801.40 The Board's rules.

The Board's rules are published in the Code of Federal Regulations as parts 800 through 899 of this title 49. Reprints of each part are maintained by the Bureau of Administration and are available on request without cost.

§ 801.41 Transportation safety recommendations.

All transportation safety recommendations issued by the Board, and responses thereto, shall be noticed in the FEDERAL REGISTER as required by section 307 of the Independent Safety Board Act of 1974, and thereafter shall be made available for inspection or copying in the Board's public reference room. (See appendix for copies and subscriptions.)

§ 801.42 Indexes to aviation and maritime enforcement cases.

(a) Pursuant to the Freedom of Information Act, as amended, a quarterly index to the initial decisions of the Board's administrative law judges shall be made available for inspection or copying in the Board's public reference room. (See appendix for subscription to initial decisions.)

(b) Pursuant to the Freedom of Information Act, as amended, a quarterly index to the Board's opinions and orders in aviation and maritime safety enforcement cases shall be made available for inspection or copying in the Board's public reference room. (See appendix for subscription to opinions and orders and availability of bound National Transportation Safety Board Decisions.)

§ 801.43 Administrative staff manuals and instructions and indexes that affect the public.

The index to staff manuals which are not exempt from public disclosure, as set forth in Subpart F, shall be available in the Board's public reference room (see appendix).

§ 801.44 Reports to Congress.

The Board's annual report to Congress, which is required under section 305 of the Independent Safety Board Act of 1974, shall be submitted on July 1 of each year. It may be purchased from the Government Printing Office or inspected in the Board's public reference room. All other reports or comments to Congress shall be available in the Board's public reference room for inspection or by ordering a copy after issuance.

§ 801.45 Other records.

The working files of the Board contain a limited number of records which may not be exempt, in whole or in part, from public disclosure as set forth in Subpart F of this part. Such records shall be made available upon request. Requests for such documents should be made directly to the head of the unit concerned, as set forth in § 801.10(j), and should contain a reasonable description of the specific record desired.

§ 801.46 Special document services.

(a) Although not required by the Freedom of Information Act, the Board provides document services at charges required by 31 U.S.C. 483a, as described in the appendix.

Subpart F—Exemption From Public Disclosure

§ 801.50 General.

This subpart implements section 552 (b) of title 5, United States Code. Section 552 (a) and (b) exempt certain records from public inspection. The Board will, however, release a record authorized to be withheld under section 552(b) unless it determines that the release of that record would be inconsistent with the purpose of the exemption concerned. Examples of records given in §§ 801.51 through 801.58 included within a particular statutory exemption are not necessarily illustrative of all types of records covered by the exemption.

§ 801.51 National defense and foreign policy secrets.

National defense and foreign policy secrets established by Executive Order, and properly classified, are exempt from public disclosure. Requests to the Board for such records will be transferred to the source agency as appropriate. (Executive Orders 11652, March 8, 1972; 10865, February 20, 1960; and 10104, February 1, 1950.)

§ 801.52 Internal personnel rules and practices of the Board.

(a) Records relating solely to internal personnel rules and practices that are within the statutory exemptions

include memoranda pertaining to personnel matters such as staffing policies, and procedures for the hiring, training, promotion, demotion, or discharge of employees, and management plans, records, or proposals relating to labor-management relations.

(b) The purpose of this section is to protect any records relating to internal personnel rules and practices dealing with the relations between Board management and employees.

§ 801.53 Records exempt by statute from disclosure.

This exemption applies to records specifically exempted from disclosure by statute (other than 5 U.S.C. 552b): *Provided,* That such statute (a) requires that the matters be withheld from the public in such manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

(Authority: 5 U.S.C. 552b)

[42 FR 13284, Mar. 10, 1977]

§ 801.54 Interagency and intra-agency exchanges.

(a) Any record prepared by a Board employee for internal Government use is within the statutory exemption to the extent that it contains—

(1) Opinions made in the course of developing official action by the Board but not actually made a part of that official action, or

(2) Information concerning any pending Board proceeding, or similar matter, including any claim or other dispute to be resolved before a court of law, administrative board, hearing officer, or contracting officer.

(b) The purpose of this section is to protect the full and frank exchange of ideas, views, and opinions necessary for the effective functioning of the Government. These resources must be fully and readily available to those officials upon whom the responsibility rests to take official Board action. Its purpose is also to protect against the premature disclosure of material that is in the developmental stage, if premature disclosure would be detrimental to the authorized and appropriate purposes for which the material is being used, or if, because of its tentative nature, the material is likely to be revised or modified before it is officially presented to the public.

(c) Examples of materials covered by this section include staff papers containing advice, opinions, or suggestions preliminary to a decision or action; advance information on such things as proposed plans to procure, lease, or otherwise hire and dispose of materials, real estate, or facilities; documents exchanged preparatory to anticipated legal proceedings; material intended for public release at a specified future time, if premature disclosure would be detrimental to orderly processes of the Board; records of inspections, investigations, and surveys pertaining to internal management of the Board; and matters that would not be routinely disclosed in litigation but which are likely to be the subject of litigation.

§ 801.55 Unwarranted invasion of personal privacy.

Any personal, medical, or similar file is within the statutory exemption if its disclosure would harm the individual concerned or would be a clearly unwarranted invasion of his personal privacy. This also applies to financial statements furnished by Board Members and employees and to commercial or financial information customarily subjected to an attorney-client or similar privilege.

§ 801.56 Records compiled for law enforcement purposes.

This exemption from public disclosure applies to records compiled for law enforcement, but only to the extent that disclosure would interfere with enforcement, would be an unwarranted invasion of privacy, would disclose the identity of a confidential source, would disclose investigative procedures and practices, or would endanger the life or security of law enforcement personnel.

§ 801.57 Records for regulation of financial institutions.

Records compiled for agencies regulating or supervising financial institutions are exempt from public disclosure.

§ 801.58 Geological records.

Records concerning geological wells are exempt from public disclosure.

§ 801.59 Trade secrets and commercial or financial information.

Trade secrets and commercial or financial information obtained from a person and privileged or confidential are exempt from public disclosure.

[42 FR 13284, Mar. 10, 1977]

APPENDIX TO PART 801—FEE SCHEDULE

1. Fees (pursuant to 31 U.S.C. 483a). Upon request, services relating to public documents are available at the following fees:

A. Publications

(1) The response to public requests for the following NTSB publications are handled by the National Technical Information Service (NTIS). The following publications are available through single copies or annual subscriptions and may be purchased in paper copy or 98 page per film microfiche (fees are subject to change by NTIS):

	Single copies	Calendar year subscription	Microfiche
PB84–910400 Aircraft Accident Reports	$5.00	$55.00	(1)
PB84–916200 Highway Accident Reports	(1)	50.00	(1)
PB84–916300 Railroad Accident Reports	(1)	55.00	(1)
PB84–916400 Marine Accident Reports	(1)	60.00	(1)
PB84–916500 Pipeline Accident Reports	(1)	45.00	(1)
PB84–916900 Aviation Accident Briefs	(1)	160.00	(1)
PB84–917100 Highway Accident Briefs	12.50	(2)	(1)
PB84–917200 Railroad Accident Briefs	12.50	(2)	(1)
PB84–917300 Marine Accident Briefs	10.00	(2)	(1)
PB84–917400 Pipeline Accident Briefs	10.00	(2)	(1)
PB84–916600 Transportation Safety Recommendations	(1)	55.00	(1)
PB84–916700 Transportation Initial Decisions and Orders and Board Opinions & Orders	(1)	200.00	(1)
PB84–917000 Transportation Special Reports [3]	(1)	50.00	(1)

[1] Variable prices based on number of pages; contact NTIS for price quote.

[2] Highway, Railroad, Marine and Pipeline brief subscriptions are available by standing order only and require an NTIS deposit account (they are issued at irregular intervals, and charges at single copy rates will be made only as reports are distributed).

[3] Transportation Special Reports [this category includes all forms of Safety Studies (formerly titled Special Studies, and Safety Effectiveness Evaluations), Special Investigation Reports, and Railroad/Highway Accident Reports].

(2) Send publication orders for the above documents to the National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161, identifying each subscription by the NTSB Report Number or the NTIS accession number. Telephone (703) 487–4630 (annual subscriptions) or (703) 487–4650 (single copies or microfiche). The NTSB Report Number and the NTIS accession number can be obtained from the NTSB Public Inquiries Section.

B. Access to transportation accident files (all modes). All files dated prior to January 1, 1978, are in hard copy form and are maintained in the Federal Records Center. Files dated January 1, 1978, to present are maintained in microfiche at the NTSB headquarters. All documents in the Board's public files may be examined, without charge, in the Board's public reference room, located in the Public Inquiries Section, Room 805F, 800 Independence Avenue, SW., Washington, DC, telephone (202) 382–6735. A self-service duplicator in the reference room is available for use by the public at a nominal cost. Usually, two weeks' time is required to service a request for reproduction. Filling any request for reproduction of a file that must be retrieved from the Federal Records Center will require two additional weeks.

(1) Availability of accident files. All transportation mode accident files are retained in accordance with the following schedule:

a. Air carrier accident files and all public hearing files are retained for a period of fifteen (15) years and then destroyed.

b. All other transportation accident files are retained for a period of seven (7) years and then destroyed.

(2) Reproduction of accident files. Reproduction of accident files (statements, photographs, hearing transcripts, and other material contained in the Board's accident investigation files) is provided by commercial contractor. Reproduction of printed matter and photographs are made from the best copy available. Requests must be forwarded to the Public Inquiries Section, National Transportation Safety Board, Washington, DC 20594. The contractor may bill and/or require full payment before duplicating the requested documents. Fees are subject to change depending upon the terms of the Board's annual contract.

Current fees are:

a. Microfiche Duplicate, $1.65
b. Microfiche Blowback, .11
c. Aperture Card Blowback, 1.40
d. Photographs (from aperture card):
8″x10″ B&W Glossy Print, 1.65
8″x10″ Color Prints, 2.75
5″x7″ Color Prints, 2.47
3½″x5″ Color Prints, 2.47

e. Hardcopy Reproduction:
8½″x11″ .14
8½″x14″ .10
10″x14″ .05
Oversized Pages (Larger than 10″x14″), .03/sq. in.
f. Photographs (from prints):
8″x10″ B&W Glossy Prints, 1.65
8″x10″ Color Prints, 2.75
5″x7″ Color Prints, 2.47
3½″x5″ Color Prints, 2.47
2″x2″ Color Slides, 2.47
g. Minimum Order Complete File, 1.00
h. Preliminary Report (only), 1.35
i. Probable Cause (only), 1.35

C. Request for other Board information. Requests for any other Board information such as files on safety recommendations, safety studies, Board orders, Board opinions and orders, and initial decisions are available at a cost of 14 cents per page(s) ($1.00 minimum charge). These services are provided by a public contractor who may prebill or require full payment before duplicating the requested documents. Requests must be forwarded to the Public Inquiries Section, National Transportation Safety Board, Washington, DC 20594.

D. Reproduction services through the commercial contractor are handled as follows:

Step 1: Requestor places written or telephone order with the Board's Public Inquiries Section for desired documents.

Step 2: The Public Inquiries Section identifies the documents and forwards the request to the contractor.

Step 3: The contractor provides the requestor with an invoice showing the actual costs for the service requested plus postage.

Step 4: Requestor returns a copy of the contractor's invoice with full payment enclosed. Requestor has the option of opening a charge account with the contractor, and contractor will accept major credit cards. (Contractor must respond to request within five working days after receipt of payment.)

Step 5: Contractor reproduces documents and mails them directly to the requestor.

E. Expedited service. A $2.25 surcharge will be made for expedited service which will be provided within 2 working days commencing when the contractor receives advance payment or other arrangements have been made with the contractor.

F. A fee of $4.00 will be charged for certification of documents under the Board's seal.

G. Computer tapes and services for aviation accidents. The duplication of computer tapes (or a portion thereof) will be made on requestor supplied magnetic tape for a fee of $40.00. The requestor must provide a 2,400-foot magnetic tape certified to at least 1,600 bits per inch. Computer tape requests should be addressed to the Public Inquiries Section, National Transportation Safety Board, Washington, DC 20594.

H. The basic fees set forth provide for ordinary first-class postage prepaid. If registered, certified, air, or special delivery mail is requested, postal fees therefor will be added to the basic fee. Also, if special handling or packaging is required, the cost will be added to the basic fee.

2. Services available free of charge.

A. The following documents are available without commercial reproduction cost until limited supplies are exhausted:

(1) Press releases,

(2) Safety Board regulations (chapter VIII of title 49, Code of Federal Regulations),

(3) Indexes to initial decisions, Board orders, opinion and orders, and staff manuals and instructions,

(4) Safety recommendations, and

(5) NTSB Annual Report.

B. NTSB News Digest. The News Digest describes NTSB activities and summarizes certain publications. The News Digest is free, and anyone who is interested in being added to this mailing list should contact the Public Inquiries Section, National Transportation Safety Board, Washington, DC 20594.

3. Documents search fee—The Board has determined that it is in the public interest to eliminate fees for the first hour of search time. For all time expended in locating documents beyond the initial hour, the fee is $5.00 per hour.

4. Publication, reproduction, and search fees are waived for qualifying foreign countries, international organizations, nonprofit public safety entities, State and Federal transportation agencies, and colleges and universities, after approval by the Director, Bureau of Administration. In addition, fees may be waived or reduced for other requestors not in any of the foregoing categories, when it is determined by the Director, Bureau of Administration that a waiver is appropriate and would contribute to the Board's programs.

(5 U.S.C. 552, 31 U.S.C. 483a, and 49 U.S.C. 1901 et seq.)

[49 FR 4496, Feb. 7, 1984]

PART 802—RULES IMPLEMENTING THE PRIVACY ACT OF 1974

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AUTHORITY: Privacy Act of 1974, Pub. L. 93–579, 88 Stat. 1896 (5 U.S.C. 552a); Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.); and Freedom of Information Act, Pub. L. 93–502, November 21, 1974, amending 5 U.S.C. 552.

SOURCE: 41 FR 22358, June 3, 1976, unless otherwise noted.

Subpart A—Applicability and Policy

§ 802.1 Purpose and scope.

The purpose of this part is to implement the provisions of 5 U.S.C. 552a with respect to the availability to an individual of records of the National Transportation Safety Board (NTSB) maintained on individuals. NTSB policy encompasses the safeguarding of individual privacy from any misuse of Federal records and the provision of access to individuals to NTSB records concerning them, except where such access is in conflict with the Freedom of Information Act, or other statute.

[41 FR 39758, Sept. 16, 1976]

§ 802.2 Definitions.

In this part:

Board means the five Members of the National Transportation Safety Board, or a quorum thereof;

Individual means a citizen of the United States or an alien lawfully admitted for permanent residence;

National Transportation Safety Board (NTSB) means the agency set up under the Independent Safety Board Act of 1974;

Record means any item, collection, or grouping of information about an individual that is maintained under the control of the NTSB pursuant to Federal law or in connection with the transaction of public business, including, but not limited to, education, financial transactions, medical history, and criminal or employment history, and that contains a name, or an identifying number, symbol, or other identifying particular assigned to an individual, such as a finger or voice imprint or photograph;

Routine use means the use of such record for a purpose compatible with the purpose for which it was collected, including, but not limited to, referral to law enforcement agencies of violations of the law and for discovery purposes ordered by a court referral to potential employers, and for security clearance;

Statistical record means a record in a system of records maintained for statistical research or reporting purposes only and which is not used wholly or partially in any determination concerning an identifiable individual;

System Manager means the agency official who is responsible for the policies and practices of his particular system or systems of record, as specified in the NTSB notices of systems or records; and

System of records means a group of any records under the control of the NTSB from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual, whether presently in existence or set up in the future.

Subpart B—Initial Procedures and Requirements

§ 802.5 Procedures for requests pertaining to individual records in a record system.

The NTSB may not disclose any record to any person or other agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, provided the record under the control of the NTSB is maintained in a system of records from which information is retrieved by the name of the individual or by some identifying number, symbol, or other particular assigned to such individual. Written consent is not required if the disclosure is:

(a) To officers or employees of the NTSB who require the information in the official performance of their duties;

(b) Required under 5 U.S.C. 552, Freedom of Information Act;

(c) For a routine use compatible with the purpose for which it was collected;

(d) To the Bureau of the Census for uses pursuant to title 13, U.S.C.;

(e) To a recipient who has provided the NTSB with advance adequate assurance that the record will be used solely as a statistical research or reporting record and that it is to be transferred in a form not individually identifiable; or

(f) Pursuant to the order of a court of competent jurisdiction.

§ 802.6 Types of requests and specification of records.

(a) *Types of requests.* An individual may make the following request respecting records about himself maintained by NTSB in any system of records subject to the Act:

(1) Whether information concerning himself is contained in any system of records.

(2) Access to a record concerning himself. Such request may include a request to review the record and/or obtain a copy of all or any portion thereof.

(3) Correction or amendment of a record concerning himself.

(4) Accounting of disclosure to any other person or Government agency of any record concerning himself contained in any system of records controlled by NTSB, except: (i) Disclosures made pursuant to the FOIA; (ii) disclosures made within the NTSB; (iii) disclosures made to another Government agency or instrumentality for an authorized law enforcement activity pursuant to subsection (b)(7) of the Act; and (iv) disclosures expressly exempted by NTSB from the requirements of subsection (c)(3) of the Act, pursuant to subsection (k) thereof.

(b) *Specification of records.* All requests for access to records must reasonably describe the system of records and the individual's record within the system of records in sufficient detail to permit identification of the requested record. Specific information regarding the system name, the individual's full name, and other information helpful in identifying the record or records shall be included. Requests for correction or amendment of records shall, in addition, specify the particular record involved, state the nature of the correction or amendment sought, and furnish justification for the correction or amendment.

(c) *Inadequate identification of record.* Requests which do not contain information sufficient to identify the record requested will be returned promptly to the requester, with a notice indicating what information is lacking. Individuals making requests in person will be informed of any deficiency in the specification of the records at the time the request is made. Individuals making requests in writing will be notified of any such deficiency when their request is acknowledged.

§ 802.7 Requests: How, where, and when presented; verification of identity of individuals making requests; accompanying persons; and procedures for acknowledgment of requests.

(a) *Requests—general.* Requests may be made in person or in writing. Assistance regarding requests or other matters relating to the Act may be obtained by writing to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. The Director, Bureau of Administration, or his designee, on request, will aid an individual in preparing an

amendment to the record or to an appeal following denial of a request to amend the record, pursuant to subsection (f)(4) of the Act.

(b) *Written requests.* Written requests shall be made to the Director, Bureau of Administration at the address given above, and shall clearly state on the envelope and on the request itself, ''Privacy Act Request,'' ''Privacy Act Statement of Disagreement,'' ''Privacy Act Disclosure Accounting Request,'' ''Appeal from Privacy Act Adverse Determination,'' or ''Privacy Act Correction Request,'' as the case may be. Actual receipt by the Director, Bureau of Administration, or his designee, shall constitute receipt.

(c) *Requests made in person.* Requests may be made in person during official working hours of the NTSB at the office where the record is located, as listed in the ''Notice of Systems of Records'' for the system in which the record is contained.

(d) *Verification of identity of requester.* (1) For written requests, the requester's identity must be verified before the release of any record, unless exempted under the FOIA. This may be accomplished by adequate proof of identity in the form of a driver's license or other acceptable item of the same type.

(2) For requests in person, the requester's identity may be established by a single document bearing a photograph (such as a passport or identification badge) or by two items of identification containing name, address, and signature (such as a driver's license or credit card).

(3) Where a request is made for reproduced records which are to be delivered by mail, the request must include a notarized statement verifying the requester's identity.

(e) *Inability to provide requisite documentation of identity.* A requester who cannot provide the necessary documentation of identity may provide a notarized statement, swearing or affirming his identity and the fact that he is aware of the penalties for false statement imposed pursuant to 18 U.S.C. 1001, and subsection (i)(3) of the Act. Where requested, the Director, Bureau of Administration, or his designee, will assist the requester in formulating the necessary document.

(f) *Accompanying persons.* A requester may wish to have a person of his choice accompany him to review the requested record. Prior to the release of the record, the NTSB will require the requester to furnish the Director, Bureau of Administration or his designee, with a written statement authorizing disclosure of the record in the accompanying person's presence.

(g) *Acknowledgment of requests.* Written requests to verify the existence of, to obtain access to, or to correct or amend records about the requester maintained by NTSB in any system of records subject to the Act, shall be acknowledged in writing by the Director, Bureau of Administration, or his designee, within 3 working days after the date of actual receipt of the request by the Director, Bureau of Administration, or his designee. The acknowledgment shall advise the requester of the need for any additional information to process the request. Wherever practicable, the acknowledgment shall notify the individual whether his request has been granted or denied. When a request is made in person, every effort will be made to determine immediately whether the request will be granted. If such decision cannot be made, the request will be processed in the same manner as a written request. Records will be made available for immediate inspection whenever possible.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart C—Initial Determinations

§ 802.8 Disclosure of requested information.

(a) The System Manager may initially determine that the request be granted. If so, the individual making the request shall be notified orally, or in writing, and the notice shall include:

(1) A brief description of the information to be made available;

(2) The time and place where the record may be inspected, or alternatively, the procedure for delivery by mail to the requesting party;

(3) The estimated cost for furnishing copies of the record;

(4) The requirements for verification of identity;

(5) The requirements for authorizing discussion of the record in the presence of an accompanying person; and

(6) Any additional requirements needed to grant access to a specific system of records or record.

(b) Within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, in appropriate cases, the requester will be informed:

(1) That the request does not reasonably describe the system of records or record sought to permit its identification, and shall set forth the additional information needed to clarify the request; or

(2) That the system of records identified does not include a record retrievable by the requester's name or other identifying particulars.

(c) The System Manager shall advise the requester within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, that the request for access has been denied, and the reason for the denial, or that the determination has been made to grant the request, either in whole or in part, in which case the relevant information will be provided.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart D—Correction or Amending the Record

§ 802.10 Request for correction or amendment to record.

All requests for correcting or amending records shall be made in writing to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue., SW., Washington, DC 20594, and shall be deemed received upon actual receipt by the Director, Bureau of Administration. The request shall clearly be marked on the envelope and in the letter with the legend that it is a ''Privacy Act Correction Request.'' The request must reasonably set forth the portion of the record which the individual contends is not accurate, relevant, timely, or complete.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

§ 802.11 Agency review of requests for correction or amendment of record.

Within 10 working days after actual receipt of the request by the Director, Bureau of Administration, or his designee, to correct or amend the record, the System Manager shall either make the correction in whole or in part, or inform the individual of the refusal to correct or amend the record as requested, and shall present the reasons for any denials.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

§ 802.12 Initial adverse agency determination on correction or amendment.

If the System Manager determines that the record should not be corrected or amended in whole or in part, he will forthwith make such finding in writing, after consulting with the General Counsel, or his designee. The requester shall be notified of the refusal to correct or amend the record. The notification shall be in writing, signed by the System Manager, and shall include—

(a) The reason for the denial;

(b) The name and title or position of each person responsible for the denial of the request;

(c) The appeal procedures for the individual for a review of the denial; and

(d) Notice that the denial from the System Manager is appealable within 30 days from the receipt thereof by the requester to the Board.

The System Manager is allotted 10 working days (or within such extended period as is provided in the section concerning ''unusual circumstances'' *infra*) to respond to the request for review. If the requester does not receive an answer within such time, the delay shall constitute a denial of the request and shall permit the requester immediately to appeal to the Board, or to a district court.

Subpart E—Review of Initial Adverse Determination

§ 802.14 Review procedure and judicial review.

(a) A requester may appeal from any adverse determination within 30 days after actual receipt of a denial from the System Manager. The appeal must be in writing addressed to the Chairman, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594, and shall contain a statement on the envelope and in the appeal: ''Appeal from Privacy Act Adverse Determination.''

(b) The Board shall make a determination with respect to the appeal within 30 working days after the actual receipt of the appeal by the Chairman, except as provided for in ''unusual circumstances'' infra.

(c)(1) *Review of denial of access.* If the appeal upholds the denial of access to records, the Board shall: Notify the requester in writing, explaining the Board's determination; state that the denial is a final agency action and that judicial review is available in a district court of the United States in the district where the requester resides or has his principal place of business, or where the agency records are located, or in the District of Columbia; and request a filing with the Board of a concise statement enumerating the reasons for the requester's disagreement with the denial, pursuant to subsection (g) of the Act.

(2) *Review of denial of correction or amendment.* If the appeal upholds the denial in whole or in part for correction or amendment of the record, the same notification and judicial review privileges described in paragraph (c)(1) of this section shall apply.

(d) If the denial is reversed on appeal, the Board shall notify the requester in writing of the reversal. The notice shall include a brief statement outlining those portions of the individual's record which were not accurate, relevant, timely, or complete, and corrections of the record which were made, and shall provide the individual with a courtesy copy of the corrected record.

(e) Copies of all appeals and written determinations will be furnished by the System Manager to the Board.

(f) In unusual circumstances, time limits may be extended by not more than 10 working days by written notice to the individual making the request. The notice shall include the reasons for the extension and the date on which a determination is expected to be forthcoming. ''Unusual circumstances'' as used in this section shall include circumstances where a search and collection of the requested records from field offices or other establishments are required, cases where a voluminous amount of data is involved, and cases where consultations are required with other agencies or with others having a substantial interest in the determination of the request.

(g) *Statements of Disagreement.* (1) Written Statements of Disagreement may be furnished by the individual within 30 working days of the date of actual receipt of the final adverse determination of the Board. They shall be addressed to the Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594, and shall be clearly marked, both on the statement and on the envelope, ''Privacy Act Statement of Disagreement.''

(2) The Director, Bureau of Administration, or his designee, shall be responsible for ensuring that:

(i) The Statement of Disagreement is included in the system of records in which the disputed item of information is maintained; and

(ii) The original record is marked to indicate the information disputed, the existence of the Statement of Disagreement, and its location within the relevant system of records.

(3) The Director, Bureau of Administration, or his designee, may, if he deems it appropriate, prepare a concise Statement of Explanation indicating why the requested amendments or corrections were not made. Such Statement of Explanation shall be included in the system of records in the same manner as the Statement of Disagreement. Courtesy copies of the NTSB Statement of Explanation and the notation of dispute, as marked on the original record, shall be furnished to the individual who requested correction or amendment of the record.

(h) *Notices of correction and/or amendment, or dispute.* After a record has been corrected or a Statement of Disagreement has been filed, the Director, Bureau of Administration, or his designee, shall within 30 working days thereof, advise all previous recipients of the affected record as to the correction or the filing of the Statement of Disagreement. The identity of such recipients shall be determined pursuant to an accounting of disclosures required by the Act or any other accounting previously made. Any disclosure of disputed information occurring after a Statement of Disagreement has been filed shall clearly identify the specific information disputed and shall be accompanied by a copy of the Statement of Disagreement and a copy of any NTSB Statement of Explanation.

(i) *Disclosure to others of records concerning individuals.* Neither the Board nor other NTSB personnel shall disclose any record which is contained in a system of records maintained by NTSB, by any means of communication, including oral communication, to any person, or to another Government agency, except pursuant to a written request by, or with the prior written consent, of the individual to whom the record pertains, unless disclosure of the record is:

(1) To the Board and NTSB personnel who have a need for the record in the performance of their duties;

(2) Required under the FOIA;

(3) For a routine use published in the FEDERAL REGISTER;

(4) To the Bureau of the Census for purposes of planning or carrying out a census or survey, or related activity pursuant to the provisions of title 13 of the U.S.C.;

(5) To a recipient who has provided NTSB with adequate advance written assurance that the record will be used solely as a statistical research or reporting record and that the record is transferred in a form that is not identifiable with respect to individuals;[1]

(6) To the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or to the Administrator of the General Services Administration, or his designee, for evaluation to determine whether the record has such value;

(7) To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to NTSB specifying the particular portion of the record desired and the law enforcement activity for which the record is sought;[2]

(8) To any person upon a showing of compelling circumstances affecting the health or safety of any individual;

(9) To either House of Congress or, to the extent of matter within its jurisdiction, to any committee, or subcommittee thereof, or to any joint committee of the Congress, or to any subcommittee of such joint committee;

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) Pursuant to the order of a court of competent jurisdiction.

(j) *Notices of subpoenas.* When records concerning an individual are subpoenaed or otherwise disclosed pursuant to court order, the NTSB officer or employee served with the subpoena shall be responsible for assuring that the individual is notified of the disclosure within 5 days after such subpoena or other order becomes a matter of public record. The notice shall be mailed to

[1] The advance written statement of assurance shall state the purpose for which the record is requested and certify that it will be used only for statistical purposes. Prior to release under this paragraph, the record shall be stripped of all personally identifiable information and reviewed to ensure that the identity of any individual cannot reasonably be determined by combining two or more statistical records.

[2] A record may be disclosed to a law enforcement agency at the initiative of NTSB if criminal conduct is suspected, provided that such disclosure has been established as a routine use by publication in the FEDERAL REGISTER, and the instance of misconduct is directly related to the purpose for which the record is maintained.

the last known address of the individual and shall contain the following information: (1) The date the subpoena is returnable; (2) the court in which it is returnable; (3) the name and number of the case or proceeding; and (4) the nature of the information sought.

(k) *Notices of emergency disclosures.* When information concerning an individual has been disclosed to any person under compelling circumstances affecting health or safety, the NTSB officer or employee who made or authorized the disclosure shall notify the individual at his last known address within 5 days of the disclosure. The notice shall contain the following information: (1) The nature of the information disclosed; (2) the person or agency to whom the information was disclosed; (3) the date of the disclosure; and (4) the compelling circumstances justifying the disclosure.

[41 FR 22358, June 3, 1976, as amended at 41 FR 43154, Sept. 30, 1976]

Subpart F—Fees

§ 802.15 Fees.

No fees shall be charged for providing the first copy of a record, or any portion thereof, to individuals to whom the record pertains. The fee schedule for other records is the same as that appearing in the appendix to part 801 of this chapter, implementing the FOIA, as amended from time to time, except that the cost of any search for and review of the record shall not be included in any fee under this Act, pursuant to subsection (f)(5) of the Act.

Subpart G—Penalties

§ 802.18 Penalties.

(a) An individual may bring a civil action against the NTSB to correct or amend the record, or where there is a refusal to comply with an individual request or failure to maintain any record with accuracy, relevance, timeliness and completeness, so as to guarantee fairness, or failure to comply with any other provision of 5 U.S.C. 552a. The court may order the correction or amendment. It may assess against the United States reasonable attorney fees and other costs, or may enjoin the NTSB from withholding the records and order the production to the complainant, and it may assess attorney fees and costs.

(b) Where it is determined that the action was willful or intentional with respect to 5 U.S.C. 552(g)(1) (c) or (d), the United States shall be liable for the actual damages sustained, but in no case less than the sum of $1,000 and the costs of the action with attorney fees.

(c) Criminal penalties may be imposed against an officer or employee of the NTSB who fully discloses material which he knows is prohibited from disclosure, or who willfully maintains a system of records without meeting the notice requirements, or who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses. These offenses shall be misdemeanors with a fine not to exceed $5,000.

Subpart H—Specific Exemptions

§ 802.20 Security records.

Pursuant to, and limited by, 5 U.S.C. 552a(k)(5), the NTSB's system of records, which contains the Security Records of NTSB employees, prospective employees, and potential contractors, shall be exempt from disclosure of the material and the NTSB's handling thereof under subsections (d), (e)(1) and (e)(4) (H) and (I) of 5 U.S.C. 552a.

PART 803—OFFICIAL SEAL

Sec.
803.1 Description.
803.3 Authority to affix Seal.
803.5 Use of the Seal.

AUTHORITY: Sec. 303(c)(2), Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2168 (49 U.S.C. 1902(c)(2)).

§ 803.1 Description.

The official seal of the National Transportation Safety Board is described as follows: An American bald eagle with wings displayed, holding in his dexter (right) talon an olive branch and in his sinister (left) talon, a bundle of 13 arrows; above his head is a scroll inscribed ''E Pluribus Unum,'' bearing a shield with vertical stripes of alternating white and red, crowned by a field of blue, all within an encircling

inscription ''National Transportation Safety Board.'' When illustrated in color, the background is white. The wings, the body, and the upper portion of the legs of the eagle are shades of brown; the head, neck, and tail are white; the beak, feet, and lower portion of the legs are gold. The inscription on the scroll is black. The encircling inscription is the same shade of gold as the eagle's beak. The arrows and the olive branch are a lighter shade of gold. The red and blue of the shield are national flag red and blue. The official seal of the Board, in black and white, appears below:

[43 FR 36454, Aug. 17, 1978]

§ 803.3 Authority to affix Seal.

(a) The Seal shall be in the custody and control of the Director, Bureau of Administration of the Board.

(b) The Director, Bureau of Administration may delegate and authorize redelegations of this authority.

[40 FR 30238, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 803.5 Use of the Seal.

(a) The Seal is the official emblem of the Board and its use is therefore permitted only as provided in this part.

(b) Use by any person or organization outside of the Board may be made only with the Board's prior written approval.

(c) Requests by any person or organization outside of the Board for permission to use the Seal must be made in writing to Director, Bureau of Administration, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. The request must specify in detail the exact use to be made. Any permission granted shall apply only to the specific use for which it was granted.

(d) Use of the Seal shall be essentially for informational purposes. The Seal may not be used on any article or in any manner which may discredit the Seal or reflect unfavorably upon the Board, or which implies Board endorsement of commercial products or services, or of the user's or users' policies or activities. Specifically, permission may not be granted under this section for nonofficial use—

(1) On souvenir or novelty items of an expendable nature;

(2) On toys, gifts, or premiums;

(3) As a letterhead design;

(4) On menus, matchbook covers, calendars, or similar items;

(5) To adorn civilian clothing; or

(6) On athletic clothing or equipment.

(e) Where necessary to avoid any prohibited implication or confusion as to the Board's association with the user or users, an appropriate legend will be prescribed by the Board for prominent display in connection with the permitted use.

(f) Falsely making, forging, counterfeiting, mutilating, or altering the Seal, or knowingly using or possessing with fraudulent intent any altered Seal is punishable under section 506 of Title 18, U.S.C.

[40 FR 30238, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

PART 804—RULES IMPLEMENTING THE GOVERNMENT IN THE SUNSHINE ACT

Sec.

804.1 Applicability.
804.2 Policy.
804.3 Definitions.
804.4 Open meetings requirement.
804.5 Grounds on which meetings may be closed or information may be withheld.
804.6 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.
804.7 Procedures for public announcement of meetings.

804.8 Changes following public announcement.
804.9 Transcripts, recordings, or minutes of closed meetings.
804.10 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

AUTHORITY: Government in the Sunshine Act, Pub. L. 94–409, 90 Stat. 1241 (5 U.S.C. 552b); Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 et seq.).

SOURCE: 42 FR 13284, Mar. 10, 1977, unless otherwise noted.

§ 804.1 Applicability.

(a) This part implements the provisions of the Government in the Sunshine Act (5 U.S.C. 552b). These procedures apply to meetings, as defined herein, of the Members of the National Transportation Safety Board (NTSB).

(b) Requests for all documents other than the transcripts, recordings, and minutes described in §804.9 shall continue to be governed by part 801 of the NTSB regulations (49 CFR part 801).

§ 804.2 Policy.

It is the policy of the NTSB to provide the public with the fullest practicable information regarding the decisionmaking processes of the Board, while protecting the rights of individuals and the ability of the Board to discharge its statutory functions and responsibilities. The public is invited to attend but not to participate in open meetings.

§ 804.3 Definitions.

As used in this part: *Meeting* means the deliberations of three or more Members where such deliberations determine or result in the joint conduct or disposition of official NTSB business, and includes conference telephone calls otherwise coming within the definition. A meeting does not include:

(a) Notation voting or similar consideration of business, whether by circulation of material to the Members individually in writing or by a polling of the Members individually by telephone.

(b) Deliberations by three or more Members (1) to open or to close a meeting or to release or to withhold information pursuant to §804.6, (2) to call a meeting on less than seven days' notice as permitted by §804.7(b), or (3) to change the subject matter or the determination to open or to close a publicly announced meeting under §804.8(b).

(c) An internal session attended by three or more Members for which the sole purpose is to have the staff brief the Board concerning an accident, incident, or safety problem.

Member means an individual duly appointed and confirmed to the collegial body, known as ''the Board,'' which heads the NTSB.

National Transportation Safety Board (*NTSB*) means the agency set up under the Independent Safety Board Act of 1974.

[42 FR 13284, Mar. 10, 1977, as amended at 42 FR 31794, June 23, 1977]

§ 804.4 Open meetings requirement.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part. Except as provided in §804.5, every portion of every meeting of the Board shall be open to public observation.

§ 804.5 Grounds on which meetings may be closed or information may be withheld.

Except in a case where the Board finds that the public interest requires otherwise, a meeting may be closed and information pertinent to such meeting otherwise required by §§804.6, 804.7, and 804.8 to be disclosed to the public may be withheld if the Board properly determines that such meeting or portion thereof or the disclosure of such information is likely to:

(a) Disclose matters that are (1) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy, and (2) are in fact properly classified pursuant to such Executive Order;

(b) Relate solely to the internal personnel rules and practices of the NTSB;

(c) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552): *Provided*, That such statute (1) requires that the matters be withheld from the public in such a manner as to leave no discretion

on the issue, or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(d) Disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(e) Involve accusing any person of a crime, or formally censuring any person;

(f) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(g) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(1) Interfere with enforcement proceedings;

(2) Deprive a person of a right to a fair trial or an impartial adjudication;

(3) Constitute an unwarranted invasion of personal privacy;

(4) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(5) Disclose investigative techniques and procedures; or

(6) Endanger the life or physical safety of law enforcement personnel;

(h) Disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) Disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed action of the NTSB: *Provided*, That the NTSB has not already disclosed to the public the content or nature of its proposed action or is not required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

(j) Specifically concern the Board's issuance of a subpoena, or the NTSB's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the NTSB of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

§ 804.6 Procedures for closing meetings, or withholding information, and requests by affected persons to close a meeting.

(a) A meeting shall not be closed, or information pertaining thereto withheld, unless a majority of all Members votes to take such action. A separate vote shall be taken with respect to any action under § 804.5. A single vote is permitted with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular subject matters and is scheduled to be held no more than thirty days after the initial meeting in such series. Each Member's vote under this paragraph shall be recorded and proxies are not permitted.

(b) Any person whose interest may be directly affected if a portion of a meeting is open may request the Board to close that portion on any of the grounds referred to in § 804.5 (e), (f), or (g). Requests, with reasons in support thereof, should be submitted to the General Counsel, National Transportation Safety Board, 800 Independence Avenue, SW., Washington, DC 20594. On motion of any Member, the Board shall determine by recorded vote whether to grant the request.

(c) Within one working day of any vote taken pursuant to this section, the NTSB shall make available a written copy of such vote reflecting the vote of each Member on the question and, if a portion of a meeting is to be closed to the public a full written explanation of its action closing the meeting and a list of all persons expected to attend and their affiliation.

(d) Before every closed meeting, the General Counsel of the NTSB shall publicly certify that, in his or her opinion,

the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement of the presiding officer setting forth the time and place of the meeting and the persons present, shall be retained by the NTSB as part of the transcript, recording, or minutes required by §804.9.

§804.7 Procedures for public announcement of meetings.

(a) For each meeting, the NTSB shall make public announcement, at least one week before the meeting, of the:

(1) Time of the meeting;

(2) Place of the meeting;

(3) Subject matter of the meeting;

(4) Whether the meeting is to be open or closed; and

(5) The name and business telephone number of the official designated by the NTSB to respond to requests for information about the meeting.

(b) The one week advance notice required by paragraph (a) of this section may be reduced only if:

(1) A majority of all Members determines by recorded vote that NTSB business requires that such meeting be scheduled in less than seven days; and

(2) The public announcement required by paragraph (a) of this section be made at the earliest practicable time.

(c) Immediately following each public announcement required by this section, or by §804.8, the NTSB shall submit a notice of public announcement for publication in the FEDERAL REGISTER.

§804.8 Changes following public announcement.

(a) The time or place of a meeting may be changed following the public announcement only if the NTSB publicly announces such change at the earliest practicable time. Members need not approve such change.

(b) The subject matter of a meeting or the determination of the Board to open or to close a meeting, or a portion thereof, to the public may be changed following public announcement only if:

(1) A majority of all Members determines by recorded vote that NTSB business so requires and that no earlier announcement of the change was possible; and

(2) The NTSB publicly announces such change and the vote of each Member thereon at the earliest practicable time.

§804.9 Transcripts, recordings, or minutes of closed meetings.

Along with the General Counsel's certification and presiding officer's statement referred to in §804.6(d), the NTSB shall maintain a complete transcript of electronic recording adequate to record fully the proceedings of each meeting, or a portion thereof, closed to the public. The NTSB may maintain a set of minutes in lieu of such transcript or recording for meetings closed pursuant to §804.5 (h) or (j). Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote. All documents considered in connection with any actions shall be identified in such minutes.

§804.10 Availability and retention of transcripts, recordings, and minutes, and applicable fees.

The NTSB shall make promptly available to the public the transcript, electronic recording, or minutes of the discussion of any item on the agenda or of any testimony received at the meeting, except for such item, or items, of discussion or testimony as determined by the NTSB to contain matters which may be withheld under the exemptive provisions of §804.5. Copies of the nonexempt portions of the transcript or minutes, or transcription of such recordings disclosing the identity of each speaker, shall be furnished to any person at the actual cost of transcription or duplication. the NTSB shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or a portion thereof, closed to the public for at least two years after such meeting, or until one year after the conclusion of any NTSB proceeding with respect to which the

meeting, or a portion thereof, was held, whichever occurs later.

PART 805—EMPLOYEE RESPONSIBILITIES AND CONDUCT

Sec.
805.735–1 Purpose.
805.735–2 Definitions.
805.735–3 Policy.
805.735–4 Financial interests of Members and employees.
805.735–5 Receipt of gifts, entertainment, and favors by Members or employees.
805.735–6 Misuse of information by Members and employees.
805.735–7 Outside activities of Members and employees.
805.735–8 Employment of family members in transportation and related enterprises.
805.735–9 Use of Government property.
805.735–10 Member and employee indebtedness.
805.735–11 Gambling, betting, and lotteries.
805.735–12 Coercion.
805.735–13 Conduct prejudicial to the Government.
805.735–14 Specific regulations for special Government employees.
805.735–15 Miscellaneous statutory provisions.
805.735–16 Statements of employment and financial interests.
805.735–17 Supplementary statements.
805.735–18 Interests of employees' relatives.
805.735–19 Information not known by employees.
805.735–20 Information not required of employees.
805.735–21 Confidentiality of statements.
805.735–22 Effect of statements on other requirements.
805.735–23 Submission of statements by special Government employees.
805.735–24 Review of financial statements.
805.735–25 Publication and interpretation.
805.735–26 Employee's complaint on filing requirements.
805.735–27 Disciplinary or remedial action.
APPENDIX I TO PART 805—MISCELLANEOUS STATUTORY PROVISIONS
APPENDIX II TO PART 805—EMPLOYEES REQUIRED TO SUBMIT STATEMENTS

AUTHORITY: E.O. 11222 of May 8, 1965, 30 FR 6469, 3 CFR 1965 Supp.; 5 CFR 735.101 *et seq.*, and 5 CFR 735.404.

SOURCE: 40 FR 30239, July 17, 1975, unless otherwise noted.

§ 805.735–1 Purpose.

This part sets forth the standards of ethical and other conduct required of all Board Members and employees, in implementation of Executive Order 11222, May 8, 1965 (30 FR 6469), and part 735 of the Civil Service Commission Regulations adopted pursuant thereto (5 CFR part 735). It also contains references to the several applicable statutes governing employee conduct, particularly Pub. L. 87–849, 76 Stat. 119 (18 U.S.C. 201 *et seq.),* and the ''Code of Ethics for Government Service,'' House Concurrent Resolution 175, 85th Congress, 2d Session (72 Stat. B12).

§ 805.735–2 Definitions.

As used in this part.

Executive order means Executive Order 11222 of May 8, 1965 (30 FR 6469).

Members and employees means the Board Members and employees of the National Transportation Safety Board (Board) and active duty officers or enlisted members of the Armed Forces detailed to the Board, but does not include special Government employees.

Person means an individual, a corporation, a company, an association, a firm, a partnership, a society, a joint stock company, or any other organization or institution.

Special Government employee means an employee of the Board who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 120 days during any period of 365 consecutive days, on either a full-time or intermittent basis.

[54 FR 10332, Mar. 13, 1989]

§ 805.735–3 Policy.

(a) The maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by its Members and employees and special Government employees is essential to assure the proper performance of the Board's business and the maintenance of confidence by citizens in their Government. Therefore, the Board requires that its Members and employees and special Government employees adhere strictly to the highest standard of ethical conduct in all of their social, business, political and other off-the-job activities, relationships, and interests, as well as in their official actions.

(b) All Members and employees and special Government employees shall avoid situations which might result in

actual or apparent misconduct or conflicts of interest.

(c) Members and employees shall avoid any action, whether or not specifically prohibited by the regulations in this part which might result in, or create the appearance of:

(1) Using public office for private gain;

(2) Giving preferential treatment to any person;

(3) Impeding Government efficiency or economy;

(4) Losing complete independence or impartiality;

(5) Making a Government decision outside official channels; or

(6) Affecting adversely the confidence of the public in the integrity of the Government.

§ 805.735–4 Financial interests of Members and employees.

(a) A Member or employee shall not:

(1) Have direct or indirect financial interests which conflict, or appear to conflict, with his assigned duties and responsibilities within the Board; or

(2) Engage in, directly or indirectly, a financial transaction as a result of, or primarily relying on, information obtained through his employment by the Board.

(b) This section does not preclude a Member or an employee from having a financial interest or engaging in financial transactions to the same extent as a private citizen not employed by the Government, so long as it is not prohibited by law, the Executive Order, 5 CFR part 735, or the regulations in this part.

§ 805.735–5 Receipt of gifts, entertainment, and favors by Members or employees.

(a) Except as provided in paragraphs (b) and (g) of this section, a Member or employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the Board;

(2) Conducts operations or activities that are subject to Board jurisdiction; or

(3) Has interests that may be substantially affected by the performance or nonperformance of his official duty.

(b) The prohibitions of paragraph (a) of this section do not apply to:

(1) Obvious family or personal relationships such as those between the employee and his parents, children, or spouse, when the circumstances make it clear that those relationships rather than the business of the persons concerned are the motivating factors;

(2) Acceptance of food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting, other meetings, or inspection tours where a Member or employee may properly be in attendance;

(3) Acceptance of unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value;

(4) Acceptance of loans from banks or other financial institutions on customary terms to finance proper and usual activities of employees, such as home mortgage loans;

(5) Utilization by Members or employees of the services offered to the public by any of the persons specified in paragraph (a) of this section: *Provided*, That full value, as published in a carrier's tariffs, or as is customarily charged to the public, is paid therefor;

(6) Carriage without charge by a carrier, of Members or employees engaged in official duties, for safety purposes, as provided for in the Civil Aeronautics Board's regulations;

(7) Acceptance of invitations, when approved by the Chairman or the Managing Director, with respect to meals and accommodations when on official business outside the continental United States; where commercial accommodations are unavailable or inappropriate; or where refusal of the offer would be otherwise inappropriate in light of all circumstances involved; and

(8) Acceptance of an invitation addressed to the Board, when approved by the Chairman or the Managing Director, by an employee (including, where applicable, his wife or a member of his immediate family), to participate in an inaugural flight or similar ceremonial event related to transportation, and

accept food, lodging, and entertainment incident thereto.

(c) Members and employees shall not solicit contributions from another Member or employee for a gift, or make a donation as a gift, to a Member or employee in a superior official position.

(d) A Member or an employee in a superior official position shall not accept a gift from an employee or employees receiving less salary than himself. However, paragraph (c) of this section and this paragraph (d) do not prohibit a voluntary gift of nominal value or a donation in a nominal amount made on a special occasion, such as marriage, illness, retirement, or transfer.

(e) Members and employees shall not accept a gift, present, decoration, or other thing from a foreign government unless authorized by Congress as provided by the Constitution and in 5 U.S.C. 7342.

(f) Members and employees may not be directly reimbursed by a person for travel on official business under agency orders. However, reimbursement in the form of a donation may be made to the Board. The Member or employee involved will be paid by the Board in accordance with applicable laws and regulations relating to reimbursement for official travel. If the Member or employee is furnished accommodations, goods, or services in kind they may be treated as a donation to the Board, and either no per diem and other travel expenses will be paid or an appropriate reduction will be made in the per diem or other travel expenses payable, depending upon the extent of the donation. No Member or employee may be reimbursed, or payment made on his behalf, for excessive personal living expenses, gifts, entertainment, or other personal benefits.

(g) Members and employees are not precluded from receiving bona fide reimbursement, unless prohibited by law, for expenses of nonofficial travel and such other necessary subsistence as is compatible with this part for private personal interests for which no Government payment or reimbursement is authorized.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–6 Misuse of information by Members and employees.

For the purpose of furthering private interest, Members and employees shall not, except as provided in § 805.735–7(c), directly or indirectly, use, or allow the use of, official information obtained through or in connection with his employment within the Board which has not been made available to the general public.

§ 805.735–7 Outside activities of Members and employees.

(a) A Member or employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of his duties and responsibilities as an officer or employee of the Board. Before an employee can engage in outside employment or activity for profit, he shall obtain the approval of the Board's Managing Director by requesting written authorization from the Managing Director prior to engaging in such activity. Board Members desiring to engage in outside employment or activity for profit may request prior written authorization from the Chairman. Should such authorization be granted, the Member or employee has a continuing responsibility to confine himself to the scope of the authorization. If the circumstances change so as to involve a possible incompatible activity, the Member or employee must seek further authorization in order to continue in his outside employment or activity for profit. Authorization granted in specific cases may be deemed subsequently to involve an incompatible activity, and in such cases the Member or employee concerned shall be notified in writing of the cancellation of the authorization with instructions to modify or terminate the outside activity at the earliest practicable time.

(b) Incompatible activities by Members or employees include, but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in circumstances in which acceptance may result in, or create the appearance of, a conflict of interest; or

(2) Outside employment or activity which tends to impair his mental or

physical capacity to perform in an acceptable manner his duties and responsibilities within the Board.

(c) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, the Executive order, 5 CFR part 735, or the regulations in this part. However, an employee shall not, either for or without compensation, engage in teaching, lecturing, or writing, including teaching, lecturing, or writing for the purpose of the special preparation of a person or class of persons for an examination of the Civil Service Commission or Board of Examiners for the Foreign Service, that is dependent on information obtained as a result of his employment by the Board, except when that information has been made available to the general public or will be made available on request, or when the Chairman gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(d) Board Members, as Presidential appointees covered by section 401(a) of the Executive order, are specifically precluded by 5 CFR 735.203(c) from receiving compensation or anything of monetary value for any consultation, lecture, discussion, writing, or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of their agency, or which draws substantially on official data or ideas which have not become part of the body of public information.

(e) If an activity covered by paragraphs (c) and (d) of this section is to be undertaken as official duty, expenses will be borne by the Board, and the Member or employee may not accept compensation or allow his expenses to be paid for by the person or group under whose auspices the activity is being performed. If it is determined that the activity is to be undertaken in a private capacity, the Member or employee may not use duty hours or Government facilities, but he may accept compensation, and he may use his official title if he makes it clear that he does not represent the Board.

(f) Members and employees shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Board (18 U.S.C. 209).

(g) This section does not preclude a Member or employee from:

(1) Participating in the activities of national or State political parties not prohibited by law;

(2) Participating in the affairs of or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, nonprofit educational or recreational, public service, or civic organization.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–8 Employment of family members in transportation and related enterprises.

(a) No individual will be employed or retained in employment by the Board if a member of his immediate family (blood relations who are residents of the employee's household) is employed by a carrier, a person or firm representing a carrier, or a transportation trade association.

(b) Members and employees may request a waiver, modification, or postponement of the implementation of this prohibition from the Chairman and Managing Director, respectively, on the grounds of undue hardship to himself or the family member involved. The request must contain an agreement to forego any privilege to which the Board Member or employee would be entitled as a relative of the family member.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–9 Use of Government property.

Members and employees shall not, directly or indirectly, use, or allow the use of, Board property of any kind, including property leased to the Board, for other than officially approved activities. A Member or employee has a positive duty to protect and conserve Board property, including equipment, supplies, and other property entrusted to or issued to him.

§ 805.735–10 Member and employee indebtedness.

Members and employees shall pay each just financial obligation in a proper and timely manner, especially one imposed by law, such as Federal, State, or local taxes. For the purpose of this section, a ''just financial obligation'' means one acknowledged by the employee or one reduced to judgment by a court, and ''in a proper and timely manner'' means in a manner which the Board determines does not, under the circumstances, reflect adversely on the Board as his employer.

§ 805.735–11 Gambling, betting, and lotteries.

Members and employees shall not participate, while on Board-owned or leased property or while on duty for the Board, in any gambling activity, including the operation of a gambling device, conducting a lottery or pool, a game for money or property, or in selling or purchasing a numbers slip or ticket. However, this section does not preclude activities regarding solicitations conducted by an employee recreation and welfare organization among its members, for organizational support, or for benefit or welfare funds for its members, these activities having been approved under section 3 of Executive Order 10927, dated March 18, 1961.

§ 805.735–12 Coercion.

Members and employees shall not use their employment by the Board to coerce, or give the appearance of coercing, a person to provide financial benefit to themselves or another person, particularly one with whom they have family, business, or financial ties.

§ 805.735–13 Conduct prejudicial to the Government.

Members and employees shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Board or to the Government.

§ 805.735–14 Specific regulations for special Government employees.

(a) *Use of Board affiliation.* A special Government employee of the Board shall not use his Government employment for a purpose that is, or gives the appearance of being, motivated by the desire for private gain for himself or another person, particularly one with whom he has family, business, or financial ties.

(b) *Use of inside information.* (1) A special Government employee shall not use inside information obtained as a result of his employment by the Board for private gain for himself or another person, either by direct action on his part or by counsel, recommendation, or suggestion to another person, particularly one with whom he has family, business, or financial ties. For this purpose of this section, ''inside information'' means information obtained under Government authority which has not become part of the body of public information.

(2) Special Government employees may teach, lecture, or write in a manner not inconsistent with § 805.735–7(c) for employees.

(c) *Receipt of gifts, entertainment, and favors.* (1) A special Government employee, while employed by the Board or in connection with his employment, shall not receive or solicit from a person having business with the Board, anything of value such as a gift, gratuity, loan, entertainment, or favor for himself or another person, particularly one with whom he has family, business, or financial ties.

(2) The exception as set forth in § 805.735–5(b) for employees will apply with equivalent force and effect to special Government employees with regard to the prohibitions of paragraph (a) of this section.

(d) *Applicability of other provisions.* The provisions of § 805.735–9 (Use of Government property), § 805.735–11 (Gambling, betting, and lotteries), § 805.735–12 (Coercion), § 805.735–13 (Conduct prejudicial to the Government) and § 805.735–15 (Miscellaneous statutory provisions) apply to special Government employees in the same manner as to employees.

§ 805.735–15 Miscellaneous statutory provisions.

Each Member and employee shall acquaint himself with the statutory provisions in appendix I, attached hereto and made a part thereof, which relate to his ethical and other conduct as a

Member and employee of the Board and the Government.

§ 805.735–16 Statements of employment and financial interests.

(a) All employees in the positions specified in appendix II, attached hereto and made a part thereof, shall submit a statement of employment and financial interests under the regulations in this part in triplicate to the Personnel Officer not later than:

(1) Ninety days after the effective date of the regulations in this part if he is employed on or before that effective date; or

(2) Thirty days after he becomes subject to the reporting requirements by occupying a position covered under paragraph (a) of this section, if he occupies the position after that effective date.

(b) An employee required to submit a statement of employment and financial interests shall submit that statement in the format prescribed by the Managing Director.

(c) Board Members are subject to separate reporting requests under section 401 of the Executive order, and are not required to file statements pursuant to this section.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–17 Supplementary statements.

Changes in, or additions to, the information contained in an employee's statement of employment and financial interests shall be reported in supplementary statements, in the format prescribed by the Managing Director, as of June 30th of each year. If there are not changes or additions, a negative report is not required. Notwithstanding the filing of the annual report required by this section, each employee shall at all times avoid acquiring a financial interest that could result, or taking an action that would result, in a violation of the conflict-of-interest provisions, 18 U.S.C. 208, or the provisions of this part.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–18 Interests of employees' relatives.

The interest of a spouse, minor child, or other members of an employee's immediate household is considered to be an interest of the employee. For the purpose of this section, ''member of an employee's household'' means those blood relations who are residents of the employee's household.

§ 805.735–19 Information not known by employees.

If any information required to be included on a statement of employment and financial interests or supplementary statement, including holdings placed in trust, is not known to the employee but is known to another person, the employee shall require that other person to submit information in his behalf.

§ 805.735–20 Information not required of employees.

An employee is not required to submit on a statement of employment and financial interests or supplementary statement, any information relating to the employee's connection with, or interest in, a professional society or a charitable, religious, social, fraternal, recreational, public service, civic, or political organization, or a similar organization not conducted as a business enterprise. For the purpose of this section, educational and other institutions doing research and development or related work, involving grants of money from or contracts with the Government, are deemed ''business enterprises'' and are required to be included in an employee's statement of employment and financial interests.

§ 805.735–21 Confidentiality of statements.

Subject to the provisions of § 805.735–24 concerning review of employee statements, each statement of employment and financial interests, and each supplementary statement, shall be held in confidence. The Personnel Officer is personally responsible for the retention of employee statements in confidence and may not disclose information from a statement or allow access to a statement, except to carry out the purpose of this part, or as the Civil Service

Commission or the Chairman may determine for good cause shown.

§ 805.735–22 Effect of statements on other requirements.

The statements of employment and financial interests and supplementary statements required of employees are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, order, or regulation. The submission of a statement or supplementary statement by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, order, or regulation.

§ 805.735–23 Submission of statements by special Government employees.

(a) A special Government employee shall submit a statement of employment and financial interests which reports:

(1) All other employment; and

(2) The financial interests of the special Government employee which the Chairman determines are relevant in the light of the duties he is to perform.

(b) A special Government employee who is a consultant or expert shall submit a statement of employment and financial interests to the Personnel Officer, in the format prescribed by the Managing Director, at the time of his employment, and shall keep his statement current throughout his period of employment by submission of supplementary statements.

(c) The Chairman may waive the requirement in paragraph (a) of this section for the submission of a statement of employment and financial interests in the case of a special Government employee who is not a consultant or an expert when it has been determined that the duties of the position held by the special Government employee are of a nature, and at such a level of responsibility, that the submission of the statement by the incumbent is not necessary to protect the integrity of the Board. For the purpose of paragraphs (b) and (c) of this section, the following are examples of special Government employees who are not consultants and experts;

(1) A physician, dentist, or allied medical specialist whose services are procured to provide care and service to patients; or

(2) A veterinarian whose services are procured to provide care and service to animals.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§ 805.735–24 Review of financial statements.

(a) The Personnel Officer shall review each statement of employment and financial interests submitted under the regulations in this part (other than his own, which is reviewed by the Managing Director) to determine whether conflicts of interest or apparent conflicts of interest exist. If the review, or other information from other sources, indicates a conflict between the interests of an employee or special Government employee and the performance of his services for the Board, the Personnel Officer shall forward the statement, together with a position description of the employee involved, to the General Counsel of the Board.

(b) The employee or special Government employee whose statement has been referred under the provisions of paragraph (a) of this section will receive, from the General Counsel, advice and guidance regarding the matters questioned by the Personnel Officer. He will be afforded an opportunity to explain the conflict or appearance of conflict. It is expected that most problems will be settled at this informal stage. However, if an agreement cannot be reached after consultation, the matter shall be reported by the General Counsel, after consulting with the Managing Director, to the Chairman for resolution.

(c) The Chairman may provide the employee or special Government employee concerned with an additional opportunity to explain the conflict or appearance of conflict. If the matter cannot be resolved, the Chairman may invoke the disciplinary provisions of § 805.735–27, or may decide that remedial steps shall be taken with regard to such employee or special Government employee. When the questions of conflict of interest are resolved at one of

the stages of review, the reviewing official shall sign and date a copy of the employee's statement to evidence his clearance, and this statement shall thereafter be kept as provided in §805.735–21.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

§805.735–25 Publication and interpretation.

(a) The Personnel Officer of the Board shall be responsible for making the regulations in this part and all revisions thereof, and the formats for statements of employment and financial interests available to:

(1) Each Member, employee, and special Government employee at the time of issuance and at least annually thereafter;

(2) Each new Member, employee, and special Government employee of the Board at the time of his entrance on duty; and

(3) Each Member, employee, and special Government employee of the Board at such other times as circumstances warrant.

(b) The Personnel Officer shall have available for review by Members, employees, and special Government employees of the Board, copies of such laws, Executive orders, Civil Service Commission regulations and instructions, and Board regulations as may currently appertain to their standards of ethical and other conduct.

(c) The General Counsel of the Board is designated to provide counseling and assistance to interpret the regulations in this part and matters relating to ethical conduct, particularly matters subject to the provisions of the conflict-of-interest laws and other matters covered by the Executive order. These counseling services are available to all Members, employees, and special Government employees at the General Counsel's office, by appointment for consultation or by written communication.

§805.735–26 Employee's complaint on filing requirements.

An employee who believes that his position has been improperly included under the regulations in this part, as one requiring the submission of a statement of employment and financial interests, may request review through the Board's grievance procedure.

§805.735–27 Disciplinary or remedial action.

(a) A violation of the regulations in this part by an employee or special Government employee may be cause for disciplinary action in addition to any penalty prescribed by Federal statute or regulation, except for active duty officers or enlisted members of the Armed Forces detailed to the Board in which cases disciplinary actions may be effected against such military personnel by the parent military service. Disciplinary action may take the form of a warning, suspension, demotion, or removal, depending upon the gravity of the offense.

(b) Any employee or special Government employee who is charged with a violation of the regulations in this part shall be provided an opportunity to explain the violation, or appearance of violation, to the charging authority. The charging authority shall be the Managing Director of the Board.

(c) When, after consideration of the explanation, the charging authority decides that disciplinary action is not required, he may take appropriate remedial action. Remedial action may include, but is not limited to:

(1) Changes in assigned duties;

(2) Divestment by the employee or special Government employee of any financial interest that conflicts, or appears to conflict, with the performance of his official duties; or

(3) Disqualification for a particular assignment.

(d) Remedial or disciplinary action shall be effected in accordance with any applicable laws, Executive orders, and regulations.

[40 FR 30239, July 17, 1975, as amended at 41 FR 39758, Sept. 16, 1976]

APPENDIX I TO PART 805—MISCELLANEOUS STATUTORY PROVISIONS

Each Member and employee and each special Government employee has a positive duty to acquaint himself with each statute which relates to his ethical and other conduct as an officer or employee of the National Transportation Safety Board and of the Government. Therefore, each Member

and employee and each special Government employee shall acquaint himself with the following statutory and nonstatutory provisions which relate to his ethical and other conduct:

(a) House Concurrent Resolution 175, 85th Congress, 2d Session (72 Stat. B12), the ''Code of Ethics for Government Service.''

(b) Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interest (18 U.S.C. 201 through 209).

(c) The prohibition against lobbying with appropriate funds (18 U.S.C. 1913).

(d) The prohibitions against disloyalty and striking (5 U.S.C. 7311, 18 U.S.C. 1918).

(e) The prohibition against the employment of a member of a Communist organization (50 U.S.C. 784).

(f) The prohibition against:

(1) The disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783); and

(2) The disclosure of confidential information (18 U.S.C. 1905, 49 U.S.C. 1472(f)).

(g) The provision relating to the habitual use of intoxicants to excess (5 U.S.C. 8352).

(h) The prohibition against the misuse of a Government vehicle (31 U.S.C. 638a(c)).

(i) The prohibition against the misuse of the franking privilege (18 U.S.C. 1719).

(j) The prohibition against the use of deceit in an examination or personnel action in connection with Government employment (18 U.S.C. 1917).

(k) The prohibition against fraud or false statements in a Government matter (18 U.S.C. 1001).

(l) The prohibition against mutilating or destroying a public record (18 U.S.C. 2071).

(m) The prohibition against counterfeiting and forging transportation requests (18 U.S.C. 508).

(n) The prohibition against:

(1) Embezzlement of Government money or property (18 U.S.C. 641);

(2) Failing to account for public money (18 U.S.C. 643); and

(3) Embezzlement of the money or property of another person in the possession of an employee by reason of his employment (18 U.S.C. 654).

(o) The prohibition against unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

(p) The prohibition against political activities in subchapter III of chapter 73 of title 5, U.S.C., and 18 U.S.C. 602, 603, 607, and 608.

(q) The prohibition against an employee's acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

APPENDIX II TO PART 805—EMPLOYEES REQUIRED TO SUBMIT STATEMENTS

Statements of employment and financial interests are required of the following:

(a) Employees in grades GS–16 or above, or in positions not subject to the Classification Act paid at a rate at or above the entrance rate for GS–16.

(b) Special assistants to the members.

(c) Office of the managing director:

(1) Legislative affairs officer.

(2) Program analysis officer.

(d) Attorneys in grade GS–15.

(e) Office of public affairs:

(1) Director.

(2) Deputy director.

(f) Bureau of administration:

(1) Director.

(2) Deputy director—personnel officer.

(3) Chief, operations and facilities division.

(4) Contracting specialist.

(5) Comptroller.

(6) Budget officer.

(7) Accounting officer.

(g) Division and branch chiefs within the bureaus of accident investigation, technology, and plans and programs.

(h) Chief or senior investigators, field offices.

[41 FR 39758, Sept. 16, 1976]

NOTE: The above regulation and its appendices were approved by the Civil Service Commission (OPM) on July 16, 1968, and September 13, 1972, respectively, prior to submission to the Office of the Federal Register.

PART 806—NATIONAL SECURITY INFORMATION POLICY AND GUIDELINES, IMPLEMENTING REGULATIONS

Sec.

806.1 General policy.
806.2 Applicability.
806.3 Definitions.
806.4 Mandatory review for declassification.

AUTHORITY: Sec. 304, Independent Safety Board Act of 1974, 88 Stat. 2168 (49 U.S.C. 1903). E.O. 12065, 43 FR 28949, July 3, 1978.

SOURCE: 45 FR 20104, Mar. 27, 1980, unless otherwise noted.

§ 806.1 General policy.

(a) The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

(b) Within the Federal Government there is some official information and

material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

§ 806.2 Applicability.

This rule supplements Executive Order 12065 within the Board with regard to national security information. It establishes general policies and certain procedures for the classification and declassification of information which is generated, processed, and/or stored by the Board. In this connection, the Board does not have any original classification authority but infrequently does receive classified information from other agencies.

§ 806.3 Definitions.

(a) Classified information. Information or material, herein collectively termed information, that is owned by, produced for or by, or under the control of, the United States Government and that has been determined pursuant to Executive Order 12065, or prior orders, to require protection against unauthorized disclosure and that is so designated. One of the following classifications will be shown:

(1) *Top secret* means information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

(2) *Secret* means information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to national security.

(3) *Confidential* means information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

(b) *Foreign government information* means either: (1) Information provided to the United States by a foreign government or international organization of governments in the expectation, express or implied, that the information is to be kept in confidence; or (2) information produced by the United States pursuant to a written joint arrangement with a foreign government or international organization of governments requiring that either the information or the arrangements or both, be kept in confidence.

(c) *National security* means the national defense and foreign relations of the United States.

(d) *Declassification event* means an event which would eliminate the need for continued classification.

§ 806.4 Mandatory review for declassification.

(a) Requests for mandatory review for declassification under section 3–501 of E.O. 12065 must be in writing and should be addressed to: National Security Oversight Officer, National Transportation Safety Board, Washington, DC 20594.

(b) The requester shall be informed of the date of receipt of the request at the Board. This date will be the basis for the time limits specified by section 3–501 of E.O. 12065. If the request does not reasonably describe the information sought, the requester shall be notified that, unless additional information is provided or the request is made more specific, no further action will be taken.

(c) When the Board receives a request for information in a document which is in its custody but which was classified by another agency, it shall refer the request to the appropriate agency for review, together with a copy of the document containing the information requested, where practicable. The Board shall also notify the requester of the referral, unless the association of the reviewing agency with the information requires protection. The reviewing agency shall review the document in coordination with any other agency involved or which had a direct interest in the classification of the subject matter. The reviewing agency shall respond directly to the requester in accordance with the pertinent procedures described above and, if requested, shall notify the Board of its determination.

PART 807—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE NATIONAL TRANSPORTATION SAFETY BOARD

Sec.
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807.170 Compliance procedures.

AUTHORITY: 29 U.S.C. 794.

SOURCE: 51 FR 4578, Feb. 5, 1986, unless otherwise noted.

§ 807.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 807.102 Application.

This part applies to all programs or activities conducted by the agency.

§ 807.103 Definitions.

For purposes of this part, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, telecommunications devices and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Handicapped person means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one of more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited

to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified handicapped person means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 807.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§§ 807.104–807.109 [Reserved]

§ 807.110 Self-evaluation.

(a) The agency shall, by April 9, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the self-evaluation, maintain on file and make available for public inspections:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 807.111 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 807.112–807.129 [Reserved]

§ 807.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to handicapped persons.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

§§ 807.131–807.139 [Reserved]

§ 807.140 Employment.

No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 807.141–807.148 [Reserved]

§ 807.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 807.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 807.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 807.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is nor required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by June 6, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by April 7, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by October 7, 1986, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[51 FR 4579, Feb. 5, 1986; 51 FR 7543, Mar. 5, 1986]

§ 807.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 807.152–807.159 [Reserved]

§ 807.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford a handicapped person an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the handicapped person.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 807.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 807.161–807.169 [Reserved]

§ 807.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity

Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Director, Bureau of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director, Bureau of Administration, 800 Independence Ave., SW., Room 802, Washington, DC 20594.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), or section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 792), is not readily accessible to and usable by handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found;

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §807.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[51 FR 4579, Feb. 5, 1986, as amended at 51 FR 4579, Feb. 5, 1986]

PART 821—RULES OF PRACTICE IN AIR SAFETY PROCEEDINGS

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AUTHORITY: 49 U.S.C. 1101–1155, 44701–44723, 46301; unless otherwise noted.

SOURCE: 68 FR 22625, Apr. 29, 2003, unless otherwise noted.

Subpart A—General Provisions

§ 821.1 Definitions.

(a) As used in this part:

Administrator means the Administrator of the Federal Aviation Administration (FAA);

Airman certificate means any certificate issued by the FAA to an airman, and shall include medical certificates required for airmen;

Appeal from an initial decision means a request to the Board to review a law judge's decision;

Appeal to the Board means a request to the Board for the review by a law judge of an order of the Administrator;

Appealable order means an order of a law judge that has the effect of terminating the proceeding, such as one granting a motion to dismiss in lieu of an answer, as provided in §821.17, or one granting a motion for judgment on the pleadings or summary judgment. *Appealable order* does not include an order granting in part a motion to dismiss and requiring an answer to any remaining allegation or allegations, an order granting in part judgment on the pleadings or summary judgment, or a ruling on an interlocutory matter;

Board means the National Transportation Safety Board;

Case Manager means the officer of the Board's Office of Administrative Law Judges responsible for the processing of cases within that office;

Certificate means any certificate issued by the Administrator under 49 U.S.C. Chapter 447;

Chief Law Judge means the administrative law judge in charge of the adjudicative function of the Board's Office of Administrative Law Judges;

Complaint means an order of the Administrator, reissued for pleading purposes, from which an appeal to the Board has been taken pursuant to sections 49 U.S.C. 44106, 44709 or 46301;

Emergency order means an order of the Administrator issued pursuant to 49 U.S.C. 44709, which recites that an emergency exists and that safety in air commerce or air transportation and the public interest require the immediate effectiveness of such order;

Flight engineer means a person who holds a flight engineer certificate

issued under Part 63 of Title 14 of the Code of Federal Regulations;

Initial decision means the law judge's decision on the issue or issues remaining for disposition at the close of a hearing;

Law judge means the administrative law judge assigned to hear and preside over the respective proceeding;

Mechanic means a person who holds a mechanic certificate issued under Part 65 of Title 14 of the Code of Federal Regulations;

Order means the document (sometimes also termed the complaint) by which the Administrator seeks to amend, modify, suspend or revoke a certificate, or impose a civil penalty;

Petition for review means a petition filed pursuant to 49 U.S.C. 44703 for review of the Administrator's denial of an application for issuance or renewal of an airman certificate;

Petitioner means a person who has filed a petition for review;

Pilot means a person who holds a pilot certificate issued under Part 61 of Title 14 of the Code of Federal Regulations;

Repairman means a person who holds a repairman certificate issued under Part 65 of Title 14 of the Code of Federal Regulations;

Respondent means the holder of a certificate who has appealed to the Board from an order of the Administrator amending, modifying, suspending or revoking a certificate, or imposing a civil penalty.

(b) Terms defined in 49 U.S.C. Chapters 11, 447 and 463 are used as so defined.

§ 821.2 Applicability and description of part.

The provisions of this part govern all air safety proceedings, including proceedings before a law judge on petition for review of the denial of any airman certificate (including a medical certificate), or on appeal from any order of the Administrator amending, modifying, suspending or revoking a certificate. The provisions of this part also govern all proceedings on appeal from an order of the Administrator imposing a civil penalty on a flight engineer, mechanic, pilot or repairman, or a person acting in such capacity. All proceedings on appeal to the Board from any initial decision or order of a law judge are also governed by this part.

§ 821.3 Description of docket numbering system.

In addition to sequential numbering of cases as received, each case formally handled by the Board will receive a letter prefix. These letter prefixes reflect the case type: ''SE'' for safety enforcement (certificate suspension/revocation) cases; ''SM'' (safety medical) for cases involving denials of medical certification; ''CD'' for cases involving non-medical certificate denials; ''SR'' for cases involving safety registration issues under 49 U.S.C. 44101 *et seq.*; ''CP'' for cases involving the imposition of civil penalties; ''NA'' for cases in which a petition for review or appeal is not accepted because of a patent procedural deficiency; and ''EAJA'' for cases involving applications for fees and expenses under the Equal Access to Justice Act, governed by Part 826.

Subpart B—General Rules Applicable to Petitions for Review, Appeals to the Board, and Appeals From Law Judges Initial Decisions and Appealable Orders

§ 821.6 Appearances and rights of witnesses.

(a) Any party to a proceeding may appear and be heard in person, or by an attorney or other representative designated by that party. Upon hearing, and for good cause shown, the Board may suspend or bar any person from practicing before it.

(b) Any person appearing in person in any proceeding governed by this part may be accompanied, represented and advised, and may be examined by, his or her own counsel or representative.

(c) Any person who submits data or evidence in a proceeding governed by this part may, by timely request, procure a copy of any document submitted by him or her, or a copy of any transcript made of his or her testimony, on payment of reasonable costs. Original documents, data or evidence may be retained by a party upon permission of

the law judge or the Board, upon substitution of a copy thereof.

(d) Any party to a proceeding who is represented by an attorney or representative shall notify the Board of the name, address and telephone number of that attorney or representative. In the event of a change in representation, the party shall notify the Board (in the manner provided in §821.7) and the other parties to the proceeding (pursuant to §821.8) before the new attorney or representative may participate in the proceeding in any way.

§ 821.7 Filing of documents with the Board.

(a) *Filing address, method and date of filing.* (1) Except as provided in paragraph (a)(2) of this section, documents are to be filed with the Office of Administrative Law Judges, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Room 4704, Washington, DC 20594, and addressed to the assigned law judge, if any. If the proceeding has not yet been assigned to a law judge, documents shall be addressed to the Case Manager.

(2) Subsequent to the filing of a notice of appeal from a law judge's initial decision or appealable order, the issuance of a decision permitting an interlocutory appeal, or the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, all documents are to be filed with the Office of General Counsel, National Transportation Safety Board, 490 L'Enfant Plaza East, SW., Room 6401, Washington, DC 20594.

(3) Documents shall be filed by personal delivery, by U.S. Postal Service first-class mail or by overnight delivery service. Except as specifically provided in Subpart I (governing emergency proceedings), facsimile filing is limited. Documents to be filed with a law judge or the Case Manager may be transmitted by facsimile, but such filing must be followed, no later than the next business day, by transmission of the original by personal delivery, first-class mail or overnight delivery service. Facsimile filing of documents to be filed with the Office of General Counsel is not permitted unless specifically authorized under Subpart I or requested by that office.

(4) Documents shall be deemed filed on the date of personal delivery; on the send date shown on the facsimile (where facsimile service is permitted under paragraph (a)(3) of this section or Subpart I); and, for mail delivery service, on the mailing date shown on the certificate of service, on the date shown on the postmark if there is no certificate of service, or on the mailing date shown by other evidence if there is no certificate of service and no postmark. Where the document bears a postmark that cannot reasonably be reconciled with the mailing date shown on the certificate of service, the document will be deemed filed on the date of the postmark.

(b) *Number of copies.* Service on the Board of petitions for review, appeals from orders of the Administrator, and notices of appeal from law judges' initial decisions and appealable orders shall be by executed original and 3 copies. Service of all other documents shall be by executed original and one copy. Copies need not be signed, but the name of the person signing the original shall be shown thereon.

(c) *Form.* (1) Petitions for review, appeals to the Board from orders of the Administrator, and notices of appeal from law judges' initial decisions and appealable orders may be in the form of a letter signed by the petitioner or appealing party, and shall be typewritten or in legible handwriting.

(2) Documents filed with the Board consisting of more than one page may be affixed only in the upper left-hand corner by staple or clip, and shall not be bound or hole-punched. Any document failing to comply with this requirement is subject to being returned to the filing party.

(d) *Content.* Each document filed with the Board shall contain a concise and complete statement of the facts relied upon, and the relief sought, by the filing party.

(e) *Subscription.* The original of every document filed shall be signed by the filing party, or by that party's attorney or other representative.

(f) *Designation of person to receive service.* The initial document filed by a party in a proceeding governed by this

part shall show on the first page the name, address and telephone number of the person or persons who may be served with documents on that party's behalf.

(g) *To whom directed.* All motions, requests and documents submitted in connection with petitions for review and appeals to the Board from orders of the Administrator shall designate, and be addressed to, the law judge to whom the proceeding has been assigned, if any. If the proceeding has not yet been assigned to a law judge, the document shall bear the designation ''unassigned,'' and shall be addressed to the Case Manager. All motions, requests and documents submitted subsequent to the filing of a notice of appeal from a law judge's initial decision or appealable order, or a decision permitting an interlocutory appeal, or after the expiration of the period within which an appeal from the law judge's initial decision or appealable order may be filed, shall be addressed to the Board's General Counsel.

§ 821.8 Service of documents.

(a) *Who must be served.* (1) Copies of all documents filed with the Board must be served on (*i.e.,* sent to) all other parties to the proceeding, on the date of filing, by the person filing them. A certificate of service shall be a part of each document and any copy or copies thereof tendered for filing, and shall certify concurrent service on the Board and the parties. A certificate of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [specify document] on the following party's counsel or designated representatives [or party, if without counsel or representative], at the address indicated, by [specify the method of service (*e.g.,* first-class mail, personal service, etc.)]

[List names and addresses of all persons served]

Dated at ___, this _____day of ____ 20____

(Signature) _____

For (on behalf of) _____

(2) Service shall be made on the person designated in accordance with § 821.7(f) to receive service. If no such person has been designated, service shall be made directly on the party.

(b) *Method of service.* (1) Service of documents by any party on any other party shall be accomplished by the method prescribed in § 821.7(a)(3) for the filing of documents with the Board.

(2) Notices of hearing, written initial decisions, law judges' appealable orders and Board orders on appeal shall be served by the Board on parties other than the Administrator by certified mail. Such documents may be served on the Administrator by first-class mail or facsimile. The Board may serve all other documents on the parties by first-class mail or facsimile.

(c) *Where service shall be made.* Except for personal service, parties shall be served at the address appearing in the official record. If no address for service on the Administrator is designated in the record, documents shall be addressed for service to the Office of Chief Counsel, 800 Independence Avenue, SW., Washington, DC 20591. In the case of an agent designated by an air carrier under 49 U.S.C. 46103, service may be accomplished only at the agent's office or usual place of residence.

(d) *Presumption of service.* There shall be a presumption of lawful service:

(1) When receipt has been acknowledged by a person who customarily or in the ordinary course of business receives mail at the residence or principal place of business of the party or of the person designated under § 821.7(f); or

(2) When a properly addressed envelope, sent to the most current address in the official record, by regular, registered or certified mail, has been returned as unclaimed or refused.

(e) *Date of service.* The date of service shall be determined in the same manner as the filing date is determined under § 821.7(a)(4).

§ 821.9 Intervention and amicus appearance.

(a) *Intervention.* Any person may move for leave to intervene in a proceeding, and may become a party thereto, if it is found that such person has a property, financial or other legitimate interest that will not be adequately represented by the existing parties, and that such intervention will not unduly broaden the issues or delay

the proceeding. Except for good cause shown, no motion for leave to intervene will be entertained if filed less than 15 days prior to the hearing. The extent to which an intervenor may participate in the proceeding is wholly within the law judge's discretion.

(b) *Amicus curiae briefs.* A brief of amicus curiae in a matter on appeal from a law judge's initial decision or appealable order may be filed, if accompanied by written consent of all the parties, or by leave of the General Counsel if, in his or her opinion, the brief will not unduly broaden the matters at issue or prejudice any party to the proceeding. A brief may be conditionally filed with motion for leave. The motion for leave shall identify the interest of the movant and shall state the reasons why a brief of amicus curiae is desirable. Such brief and motion shall be filed within the briefing time allowed the party whose position the brief would support, unless good cause for late filing is shown, in which event the General Counsel may provide an opportunity for response in determining whether to accept the amicus brief.

§ 821.10 Computation of time.

In computing any period of time prescribed or allowed by this part, by notice or order of a law judge or the Board, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included in the computation. The last day of the period so computed is to be included unless it is a Saturday, Sunday or legal holiday for the Board, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. In all cases, Saturdays, Sundays and legal holidays for the Board shall be included in the computation of time, except they shall not be included in computations of time respecting petitions for review of determinations as to the existence of emergencies under § 821.54.

§ 821.11 Extensions of time.

(a) On written request filed with the Board and served on all other parties, or oral request with any extension granted confirmed in writing and served on all other parties by the requestor, and for good cause shown, the law judge or the Board may grant an extension of time to file any document; however, no extension of time will be granted for the filing of a document to which a statutory time limit applies.

(b) Extensions of time to file petitions for reconsideration shall not be granted upon a showing of good cause, but only in extraordinary circumstances.

(c) The General Counsel is authorized to grant unopposed extensions of time on timely oral request without a showing of good cause in cases on appeal to the Board from a law judge's initial decision or appealable order. Written confirmation of such a grant of extension of time must promptly be sent by the requesting party to the Board and served on all other parties to the proceeding.

§ 821.12 Amendment and withdrawal of pleadings.

(a) *Amendment.* At any time more than 15 days prior to the hearing, a party may amend its pleadings by filing an amended pleading with the Board and serving copies thereof on all other parties. After that time, amendment shall be allowed only at the discretion of the law judge. In the case of amendment of an answerable pleading, the law judge shall allow any adverse party a reasonable time to object or answer. Amendments to complaints shall be consistent with the requirements of 49 U.S.C. 44709(c) and 44710(c).

(b) *Withdrawal.* Except in the case of a petition for review, an appeal to the Board, a complaint, or an appeal from a law judge's initial decision or appealable order, pleadings may be withdrawn only upon approval of the law judge or the Board.

§ 821.13 Waivers.

Waivers of any rights provided by statute or regulation shall either be in writing or by stipulation made at the hearing and entered into the record, and shall set forth the precise terms and conditions of the waiver.

§ 821.14 Motions.

(a) *General.* Any application to a law judge or to the Board for an order or

ruling not otherwise provided for in this part shall be by motion. Prior to the assignment of the proceeding to a law judge, all motions shall be addressed to the Case Manager. Thereafter, and prior to the expiration of the period within which an appeal from the law judge's initial decision may be filed, all motions shall be addressed to the law judge. At all other times, motions shall be addressed to the General Counsel.

(b) *Form and content.* Unless made during a hearing, motions shall be made in writing, shall state with particularity the grounds for the relief requested, and shall be accompanied by affidavits or other evidence relied upon. Motions introduced during a hearing may be made orally on the record, unless the law judge directs otherwise.

(c) *Replies to motions.* Except when a motion is made during a hearing, any party may file a reply, accompanied by such affidavits or other evidence as that party desires to rely upon, within 15 days after the date of service of the motion on that party. Upon notice to the parties, the law judge or the Board may, where appropriate, set a shorter time for filing a reply. Where a motion is made during a hearing, the reply may be made at the hearing, or orally or in writing within such time as the law judge may fix.

(d) *Oral argument; briefs.* No oral argument will be heard on a motion unless the law judge or the Board directs otherwise.

(e) *Effect of pendency of motions.* Except as provided in §§821.17(a) and 821.18(a), the filing or pendency of a motion shall not automatically alter or extend the time fixed in this part (or any extension thereof previously granted) for the parties to take any actions.

§ 821.15 Motion to disqualify a Board Member.

A motion requesting that a Board Member disqualify himself or herself from participating in a proceeding under this part shall be filed in writing with the Board.

§ 821.16 Interlocutory appeals from law judges' rulings on motions.

Rulings of law judges on motions which are not dispositive of the proceeding as a whole may not be appealed to the Board prior to its consideration of the entire proceeding, except in extraordinary circumstances and with the consent of the law judge who made the ruling. Interlocutory appeals shall be disallowed unless the law judge finds, either orally on the record or in writing, that to allow such an appeal is necessary to prevent substantial detriment to the public interest or undue prejudice to a party. If an interlocutory appeal is allowed, any party may file a brief with the Board within such time as the law judge directs. No oral argument will be heard unless the Board directs otherwise.

§ 821.17 Motions to dismiss, for judgment on the pleadings and for summary judgment.

(a) *Motions to dismiss petition for review or complaint.* A motion to dismiss a petition for review or a complaint may be filed in lieu of an answer, within the time limit for filing an answer set forth in §821.24(c) or §821.31(b). If such motion is not granted in its entirety, the answer shall be filed within 10 days after service of the law judge's order on the motion.

(b) *Motions to dismiss for lack of jurisdiction.* A motion to dismiss on the ground that the Board lacks jurisdiction may be made by any party at any time.

(c) *Motions for judgment on the pleadings.* A party may file a motion for judgment on the pleadings on the basis that no answer has been filed, or that the pleadings disclose that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law.

(d) *Motions for summary judgment.* A party may file a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved and that party is entitled to judgment as a matter of law.

(e) *Appeals of dismissal, judgment on the pleadings and summary judgment orders.* When a law judge grants a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment, and terminates the proceeding without a hearing, an appeal of such order to the Board may be filed pursuant to the provisions of §821.47. When a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment is granted in part, §821.16 applies.

§ 821.18 Motion for a more definite statement.

(a) A party may, in lieu of an answer, file a motion requesting that the petitioner's statement of reasons and supporting facts in a petition for review or the Administrator's allegations of fact in a complaint be made more definite and certain. The motion shall cite the defects complained of and the details sought. If the motion is granted and the law judge's order is not complied with within 15 days after service thereof, the law judge shall strike the portion or portions of the petition for review or complaint to which the motion is directed. If the motion is denied, the moving party shall file an answer within 10 days after service of the law judge's order on the motion.

(b) A party may file a motion to clarify an answer in the event that the answer fails to respond clearly to the petition for review or the complaint.

§ 821.19 Depositions and other discovery.

(a) *Depositions.* After a petition for review or a complaint is filed, any party may take the testimony of any person, including a party, by deposition, upon oral examination or written questions, without seeking prior Board approval. Reasonable notice shall be given in writing to the other parties, stating the name of the witness and the time and place of the taking of the deposition. A copy of any notice of deposition shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In other respects, the taking of any deposition shall be in compliance with the provisions of 49 U.S.C. 46104(c).

(b) *Exchange of information by the parties.* At any time before the hearing, at the request of any party, the parties may exchange information, such as witness lists, exhibit lists, curricula vitae and bibliographies of expert witnesses, and other pertinent data. Any party may also use written interrogatories, requests for admissions and other discovery tools. The requesting party shall set the time for compliance with the request, which shall be reasonable and give due consideration to the closeness of the hearing, especially in emergency proceedings governed by Subpart I. Copies of discovery requests and responses shall be served on the law judge to whom the proceeding has been assigned or, if no law judge has been assigned, on the Case Manager. In the event of a dispute, either the assigned law judge or another law judge delegated this responsibility (if a law judge has not yet been assigned or if the assigned law judge is unavailable) may issue an appropriate order, including an order directing compliance with any ruling previously made with respect to discovery.

(c) *Use of the Federal Rules of Civil Procedure.* Those portions of the Federal Rules of Civil Procedure that pertain to depositions and discovery may be used as a general guide for discovery practice in proceedings before the Board, where appropriate. The Federal Rules and the case law that construes them shall be considered by the Board and its law judges as instructive, rather than controlling.

(d) *Failure to provide or preserve evidence.* The failure of any party to comply with a law judge's order compelling discovery, or to cooperate with a timely request for the preservation of evidence, may result in a negative inference against that party with respect to the matter sought and not provided or preserved, a preclusion order, dismissal or other relief deemed appropriate by the law judge.

§ 821.20 Subpoenas, witness fees, and appearances of Board Members, officers and employees.

(a) *Subpoenas.* Except as provided in paragraph (c) of this section, subpoenas requiring the attendance of witnesses, or the production of documentary or

tangible evidence, for the purpose of taking depositions or at a hearing, may be issued by the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) upon application by any party. The application shall show the general relevance and reasonable scope of the evidence sought. Any person upon whom a subpoena is served may, within 7 days after service of the subpoena, but in any event prior to the return date thereof, file with the law judge who issued the subpoena a motion to quash or modify the subpoena, and such filing shall stay the effectiveness of the subpoena pending final action by the law judge on the motion.

(b) *Witness fees.* Witnesses shall be entitled to the same fees and expenses for mileage as are paid to witnesses in the courts of the United States. The fees and expenses shall be paid by the party at whose request the witness is subpoenaed or appears. The Board may decline to process a proceeding further should a party fail to compensate a witness pursuant to this paragraph.

(c) *Board Members, officers and employees.* In order to encourage a free flow of information to the Board's accident investigators, the Board disfavors the use of its personnel in enforcement proceedings. Therefore, the provisions of paragraph (a) of this section are not applicable to Board Members, officers and employees, or the production of documents in their custody. Applications for subpoenas requiring the attendance of such persons, or the production of such documents, must be addressed to the General Counsel, and shall set forth the need of the moving party for the testimony or documents sought, and a showing that such material is not now, and was not otherwise, reasonably available from other sources. Only upon the General Counsel's written approval for the issuance of a subpoena requiring a Board Member, officer or employee to provide testimony and/or to produce documents in connection with discovery or at a hearing may a law judge issue such a subpoena. The law judge shall not permit the testimony or documentary evidence provided by a Board Member, officer or employee to include any expression of opinion, or any account of statements of a party made during the Board's investigation of any accident.

§ 821.21 Official notice.

Where a law judge or the Board intends to take official notice of a material fact not appearing in the evidence in the record, notice shall be given to all parties, who may within 10 days file a petition disputing that fact.

Subpart C—Special Rules Applicable to Proceedings Under 49 U.S.C. 44703

§ 821.24 Initiation of proceeding.

(a) *Petition for review.* Where the Administrator has denied an application for the issuance or renewal of an airman certificate, the applicant may file with the Board a petition for review of the Administrator's denial. The petition must be filed with the Board within 60 days after the date on which notice of the Administrator's denial was served on the petitioner.

(b) *Form and content of petition.* The petition may be in letter form. It shall identify the Administrator's certificate denial action, and contain a complete but concise statement of the reasons why the petitioner believes the certificate denial was erroneous.

(c) *Answer to petition.* The Administrator shall file an answer to the petition for review within 20 days after the date of service of the petition. The answer shall specifically address each of the reasons set forth in the petition as to why the petitioner believes the certificate denial was erroneous.

(d) *Stay of proceeding pending request for special issuance (restricted) medical certificate.* The Board lacks the authority to review requests for special issuance (restricted) medical certificates, or to direct that they be issued. Where a request for a special issuance certificate has been filed with the Administrator pursuant to the Federal Aviation Regulations, the Board will, upon the petitioner's written request, hold a petition for review of a denial of an unrestricted medical certificate in abeyance pending final action by the Administrator on the special issuance request, but for no longer than 180 days

after the date on which the unrestricted medical certificate denial was issued.

(e) *New evidence.* Where review of a denial of an unrestricted medical certificate is at issue, if the petitioner has undergone medical testing or evaluation in addition to that already submitted or known to the Administrator, and wishes to introduce the results into the record, such new medical evidence must be served on the Administrator at least 30 days prior to the hearing. Absent good cause, failure to so timely serve the new medical evidence on the Administrator will result in the exclusion of such evidence from the record. The Administrator may amend his or her answer to respond to such new medical evidence within 10 days after the date on which he or she was served therewith.

§ 821.25 Burden of proof.

In proceedings under 49 U.S.C. 44703, the burden of proof shall be upon the petitioner.

§ 821.26 Motion to dismiss petition for review for lack of standing.

Upon motion by the Administrator within the time limit for filing an answer, a petition for review shall be dismissed for lack of standing in either of the following instances:

(a) If the petition seeks the issuance of the same type of certificate that was under an order of suspension on the date of the denial; or

(b) If the petition seeks the issuance of the same type of certificate that had been revoked within one year of the date of the denial, unless the order revoking such certificate provides otherwise.

Subpart D—Special Rules Applicable to Proceedings Under 49 U.S.C. 44709

§ 821.30 Initiation of proceeding.

(a) *Appeal.* Where the Administrator has issued an order amending, modifying, suspending or revoking a certificate, the affected certificate holder (respondent) may file with the Board an appeal from the Administrator's order. The respondent shall simultaneously serve a copy of the appeal on the Administrator. The appeal must be filed with the Board within 20 days after the date on which the Administrator's order was served on the respondent, except as provided with respect to emergency and other immediately effective orders under § 821.53(a).

(b) *Form and content of appeal.* The appeal may be in letter form. It shall identify the certificate or certificates affected and the Administrator's action from which the appeal is sought.

(c) *Effect of filing timely appeal with the Board.* Timely filing with the Board of an appeal from an order of the Administrator shall postpone the effective date of the order until final disposition of the appeal by the law judge or the Board, except where the order appealed from is an emergency or other immediately effective order, in which case the effectiveness of the order will not be so stayed during the pendency of the appeal.

§ 821.31 Complaint procedure.

(a) *Filing, time of filing and service on respondent.* The order of the Administrator from which an appeal has been taken shall serve as the complaint. The Administrator shall (except as provided in § 821.55(a) with respect to emergency proceedings) file the complaint with the Board within 10 days after the date on which he or she was served with the appeal by the respondent, and shall simultaneously serve a copy of the complaint on the respondent. If the Administrator has determined that the respondent lacks qualification to be a certificate holder, the order filed as the complaint, or an accompanying statement, shall identify the pleaded factual allegations on which this determination is based.

(b) *Answer to complaint.* The respondent shall (except as provided in § 821.55(b) with respect to emergency proceedings) file with the Board an answer to the complaint within 20 days after the date on which the complaint was served by the Administrator, and shall simultaneously serve a copy of the answer on the Administrator. Failure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation

or allegations not answered. The answer shall also identify any affirmative defenses that the respondent intends to raise at the hearing. The answer may be amended to include affirmative defenses in accordance with the provisions of § 821.12(a).

§ 821.32 Burden of proof.

In proceedings under 49 U.S.C. 44709, the burden of proof shall be upon the Administrator.

§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising the respondent as to reasons for proposed action under 49 U.S.C. 44709(c), the respondent may move to dismiss such allegations as stale pursuant to the following provisions:

(a) In those cases where the complaint does not allege lack of qualification of the respondent:

(1) The Administrator shall be required to show, by reply filed within 15 days after the date of service of the respondent's motion, that good cause existed for the delay in providing such advice, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay, or for the imposition of a sanction in the public interest notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate the remaining portion of the complaint, if any.

(b) In those cases where the complaint alleges lack of qualification of the respondent, the law judge shall first determine whether an issue of lack of qualification would be presented if all of the allegations, stale and timely, are assumed to be true. If so, the law judge shall deny the respondent's motion. If not, the law judge shall proceed as in paragraph (a) of this section.

Subpart E—Law Judges

§ 821.35 Assignment, duties and powers.

(a) *Assignment of law judge and duration of assignment.* The chief law judge shall assign a law judge to preside over each proceeding. Until such assignment, motions, requests and documents shall be addressed to the Case Manager for handling by the chief law judge, who may handle these matters personally or delegate them to other law judges for decision. After assignment of a proceeding to a law judge, all motions, requests and documents shall be addressed to that law judge. The authority of the assigned law judge shall terminate upon the expiration of the period within which appeals from initial decisions or appealable orders may be filed, or upon the law judge's withdrawal from the proceeding.

(b) *Powers of law judge.* Law judges shall have the following powers:

(1) To give notice of, and to hold, prehearing conferences and hearings, and to consolidate proceedings which involve a common question of law or fact;

(2) To hold conferences, before or during the hearing, for the settlement or simplification of issues;

(3) To issue subpoenas, and to take depositions or cause depositions to be taken;

(4) To dispose of procedural requests or similar matters;

(5) To rule on motions;

(6) To regulate the conduct of hearings;

(7) To administer oaths and affirmations;

(8) To examine witnesses;

(9) To receive evidence and rule upon objections and offers of proof; and

(10) To issue initial decisions.

(c) *Disqualification.* A law judge shall withdraw from a proceeding if, at any time, he or she deems himself or herself disqualified. If the law judge does not withdraw, and if an appeal from the law judge's initial decision is filed, the Board will, on motion of a party, determine whether the law judge should have withdrawn and, if so, order appropriate relief.

Subpart F—Hearing

§ 821.37 Notice of hearing.

(a) *Time and location of hearing.* The law judge to whom the proceeding is assigned (or the chief judge) shall set a reasonable date, time and place for the hearing. Except as provided with respect to emergency proceedings in § 821.56(a), a written notice of hearing shall be served on the parties at least 30 days in advance of the hearing. The law judge may set the hearing for a date fewer than 30 days after the date of the issuance of the notice of hearing if all of the parties consent to an earlier hearing date. In setting the date of the hearing, due regard shall be given to the parties' discovery needs. In setting the place of the hearing, due regard shall be given to the location of the subject incident, the convenience of the parties and their witnesses, and the conservation of Board funds. Another relevant factor in determining the place of the hearing is the convenience of the hearing site to scheduled transportation service. Only in the most extraordinary circumstances may consideration be given to locating a hearing in a foreign country.

(b) *Hearing in several sessions.* Where appropriate, the law judge may hold a hearing in more than one session, at the same or different locations.

§ 821.38 Evidence.

Each party shall have the right to present a case-in-chief, or defense, by oral and documentary evidence, to submit evidence in rebuttal, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Hearsay evidence (including hearsay within hearsay, where there are acceptable circumstantial indicia of trustworthiness) shall be admissible. All material and relevant evidence should be admitted, but the law judge may exclude unduly repetitious evidence.

§ 821.39 Argument and submissions.

At the hearing, the law judge shall give the parties adequate opportunity for the presentation of arguments in support of, or in opposition to, motions, objections and proposed rulings. Prior to the issuance of the initial decision, the parties shall be afforded a reasonable opportunity to submit for consideration proposed findings and conclusions, and supporting reasons therefor.

§ 821.40 Record.

The transcript of testimony and exhibits, together with all papers, requests and rulings filed in the proceeding before the law judge, shall constitute the exclusive record of the proceeding. Copies of the transcript may be obtained by any party upon payment of the reasonable cost thereof. A copy of the transcript may be examined at the National Transportation Safety Board, Office of Administrative Law Judges, Public Docket Section.

Subpart G—Initial Decision

§ 821.42 Initial decision by law judge.

(a) *Written or oral decision.* The law judge may render his or her initial decision orally at the close of the hearing, or in writing at a later date, except as provided with respect to emergency proceedings in § 821.56(c).

(b) *Content.* The initial decision shall include findings and conclusions upon all material issues of fact, credibility of witnesses, law and discretion presented on the record, together with a statement of the reasons therefor.

(c) *Furnishing parties with, and issuance date of, oral decision.* If the initial decision is rendered orally, a copy thereof, excerpted from the hearing transcript, shall be furnished to the parties by the Office of Administrative Law Judges. Irrespective of the date on which the copy of the decision is transmitted to the parties, the issuance date of the decision shall be the date on which it was orally rendered.

§ 821.43 Effect of law judge's initial decision or appealable order and appeal therefrom.

If no appeal from the law judge's initial decision or appealable order is timely filed, the initial decision or order shall become final with respect to the parties, but shall not be binding precedent for the Board. The filing of a timely notice of appeal with the Board shall stay the effectiveness of the law judge's initial decision or order, unless

the basis for the decision or order is that the Board lacks jurisdiction.

Subpart H—Appeal From Initial Decision

§ 821.47 Notice of appeal.

(a) *Time within which to file notice of appeal.* A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 10 days after the date on which the oral initial decision was rendered or the written initial decision or appealable order was served (except as provided in § 821.57(a) with respect to emergency proceedings). At any time before the time limit for filing an appeal from an initial decision or appealable order has passed, the law judge may, for good cause, reopen the matter on notice to the parties.

(b) *Request for reconsideration of law judge's initial decision or order.* A law judge may not reconsider an initial decision or appealable order after the time for appealing to the Board from the decision or order has expired, or after an appeal has been filed with the Board. However, a timely request for reconsideration by the law judge of the initial decision or appealable order, filed before an appeal to the Board is taken, will stay the deadline for filing an appeal until 10 days after the date on which the law judge serves his or her decision on the reconsideration request. For the purpose of this paragraph, if a request for reconsideration and a notice of appeal are filed on the same day, the reconsideration request will be deemed to have been filed first.

§ 821.48 Briefs and oral argument.

(a) *Appeal brief.* Except as provided in § 821.57(b) with respect to emergency proceedings, each appeal must be perfected, within 50 days after the date on which the oral initial decision was rendered, or 30 days after the date on which the written initial decision or appealable order was served, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. An appeal may be dismissed by the Board, either on its own initiative or on motion of another party, where a party who has filed a notice of appeal fails to perfect the appeal by filing a timely appeal brief.

(b) *Form and content of appeal brief.* (1) In addition to the general form requirements for documents set forth in § 821.7(c)(2), the appeal brief must be typewritten, double-spaced, on 8½-by-11 inch paper. The appeal brief shall set forth the name, address and telephone number of the party, or the attorney or other representative filing the brief on the party's behalf. No appeal brief may contain more than 35 pages of text without prior leave of the General Counsel, upon a showing of good cause.

(2) The appeal brief shall enumerate the appealing party's objections to the law judge's initial decision or appealable order, and shall state the reasons for such objections, including any legal precedent relied upon in support thereof.

(3) Any error contained in the initial decision which is not objected to in the appeal brief may be deemed waived.

(c) *Reply brief.* Any other party to the proceeding may file a brief in reply to the appeal brief within 30 days after the date on which the appeal brief was served on that party (except as provided in § 821.57(b) with respect to emergency proceedings). A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. The form requirements governing the appeal brief set forth in paragraph (b)(1) also apply to the reply brief.

(d) *Other filings.* Subsequent to the filing of the appeal and reply briefs, the parties may file citations to supplemental authorities. This procedure may be used only for identifying new and relevant legal authority, and not to correct omissions in briefing or to respond to a reply brief. No argument may be included with such a filing. Such filing shall include a reference to the page of the brief to which the cited legal authority pertains. Any response shall be filed within 10 days of the date of service of the supplemental filing, and shall be similarly limited in scope. With these exceptions, the parties may make no other submissions, except by leave of the Board, upon on a showing of good cause.

(e) *Oral argument.* Oral argument before the Board will not be held in proceedings under this part unless the Board, on motion of a party or on its own initiative, determines that oral argument is needed.

§ 821.49 Issues on appeal.

(a) On appeal, the Board will consider only the following issues:

(1) Are the findings of fact each supported by a preponderance of reliable, probative and substantial evidence?

(2) Are conclusions made in accordance with law, precedent and policy?

(3) Are the questions on appeal substantial?

(4) Have any prejudicial errors occurred?

(b) If the Board determines that the law judge erred in any respect, or that his or her initial decision or order should be changed, the Board may make any necessary findings and may issue an order in lieu of the law judge's initial decision or order, or may remand the proceeding for any such purpose as the Board may deem necessary.

§ 821.50 Petition for rehearing, reargument, reconsideration or modification of an order of the Board.

(a) *General.* Any party to a proceeding may petition the Board for rehearing, reargument, reconsideration or modification of a Board order on appeal from a law judge's initial decision or order. An initial decision or appealable order of a law judge that has become final because no timely appeal was taken therefrom may not be the subject of a petition under this section.

(b) *Timing and service.* The petition must be filed with the Board, and simultaneously served on the other parties, within 30 days after the date of service of the Board's order on appeal from the law judge's initial decision or order.

(c) *Content.* The petition shall state briefly and specifically the matters of record alleged to have been erroneously decided, and the ground or grounds relied upon. If the petition is based, in whole or in part, upon new matter, it shall set forth such new matter and shall contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable, and shall explain why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

(d) *Repetitious petitions.* Repetitious petitions will not be entertained by the Board, and will be summarily dismissed.

(e) *Reply to petition.* Any other party to the proceeding may file a reply to the petition within 15 days after the date on which the petition was served on that party. A copy of such reply shall simultaneously be served on the petitioner and any other parties to the proceeding.

(f) *Stay of effective date of Board's order.* The filing of a petition under this section shall operate to stay the effective date of the Board's order, unless the Board directs otherwise.

Subpart I—Special Rules Applicable to Proceedings Involving Emergency and Other Immediately Effective Orders

§ 821.52 General.

(a) *Applicability.* This subpart shall apply to any order issued by the Administrator under 49 U.S.C. 44709 as an emergency order, as an order not designated as an emergency order but later amended to be an emergency order, and any order designated as immediately effective or effective immediately.

(b) *Effective date of emergency.* The procedure set forth herein shall apply as of the date on which written advice of the emergency character of the Administrator's order is received and docketed by the Board.

(c) *Computation of time.* Time shall be computed in accordance with the provisions of § 821.10.

(d) *Waiver.* Except as provided in § 821.54(f), or where the law judge or the Board determines that it would unduly burden another party or the Board, a certificate holder (respondent) affected by an emergency or other immediately effective order of the Administrator may, at any time after filing an appeal from such an order, waive the applicability of the accelerated time limits of this subpart; however, such a waiver

shall not serve to lengthen any period of time for doing an act prescribed by this subpart which expired before the date on which the waiver was made.

§ 821.53 Appeal.

(a) *Time within which to file appeal.* An appeal from an emergency or other immediately effective order of the Administrator must be filed within 10 days after the date on which the Administrator's order was served on the respondent. The respondent shall simultaneously serve a copy of the appeal on the Administrator.

(b) *Form and content of appeal.* The appeal may be in letter form. It shall identify the certificate or certificates affected and indicate that an emergency or other immediately effective order of the Administrator is being appealed.

§ 821.54 Petition for review of Administrator's determination of emergency.

(a) *Time within which to file petition.* A respondent may, within 2 days after the date of receipt of an emergency or other immediately effective order of the Administrator, file with the Board a petition for review of the Administrator's determination that an emergency, requiring the order to be effective immediately, exists. This 2-day time limit is statutory and the Board has no authority to extend it. If the respondent has not previously filed an appeal from the Administrator's emergency or other immediately effective order, the petition shall also be considered a simultaneously filed appeal from the order under § 821.53.

(b) *Form, content and service of petition.* The petition may be in letter form. A copy of the Administrator's order, from which review of the emergency determination is sought, must be attached to the petition. If a copy of the order is not attached, the petition will be dismissed. While the petition need only request that the Board review the Administrator's determination as to the existence of an emergency requiring the order be effective immediately, it may also enumerate the respondent's reasons for believing that the Administrator's emergency determination is not warranted in the interest of aviation safety. The petition must be filed with the Board by overnight delivery service or facsimile and simultaneously served on the Administrator by the same means.

(c) *Reply to petition.* If the petition enumerates the respondent's reasons for believing that the Administrator's emergency determination is unwarranted, the Administrator may, within 2 days after the date of service of the petition, file a reply, which shall be strictly limited to matters of rebuttal. Such reply must be filed with the Board by overnight delivery service or facsimile and simultaneously served on the respondent by the same means. No submissions other than the respondent's petition and the Administrator's reply in rebuttal will be accepted, except in accordance with paragraph (d) of this section.

(d) *Hearing.* No hearing shall be held on a petition for review of an emergency determination. However, the law judge may, on his or her own initiative, and strictly in keeping with the prohibition on ex parte communications set forth in § 821.61, solicit from the parties additional information to supplement that previously provided by the parties.

(e) *Disposition.* Within 5 days after the Board's receipt of the petition, the chief law judge (or, if the case has been assigned to a law judge, the law judge to whom the case is assigned) shall dispose of the petition by written order, and, in so doing, shall consider whether, based on the acts and omissions alleged in the Administrator's order, and assuming the truth of such factual allegations, the Administrator's emergency determination was appropriate under the circumstances, in that it supports a finding that aviation safety would likely be compromised by a stay of the effectiveness of the order during the pendency of the respondent's appeal.

(f) *Effect of law judge's ruling.* If the law judge grants the petition, the effectiveness of the Administrator's order shall be stayed until final disposition of the respondent's appeal by a law judge or by the Board. In such cases, the remaining provisions of this subpart (§§ 821.55–821.57) shall continue to apply, unless the respondent, with the

Administrator's consent, waives their applicability. If the petition is denied, the Administrator's order shall remain in effect, and the remaining provisions of this subpart shall continue to apply, unless their applicability is waived by the respondent. The law judge's ruling on the petition shall be final, and is not appealable to the Board. However, in the event of an appeal to the Board from a law judge's decision on the merits of the emergency or other immediately effective order, the Board may, at its discretion, note, in its order disposing of the appeal, its views on the law judge's ruling on the petition, and such views shall serve as binding precedent in all future cases.

§ 821.55 Complaint, answer to complaint, motions and discovery.

(a) *Complaint.* In proceedings governed by this subpart, the Administrator's complaint shall be filed by overnight delivery service or facsimile, and simultaneously served on the respondent by the same means, within 3 days after the date on which the Administrator received the respondent's appeal, or within 3 days after the date of service of an order disposing of a petition for review of an emergency determination, whichever is later.

(b) *Answer to complaint.* The respondent shall file with the Board an answer to the complaint within 5 days after the date on which the complaint was served by the Administrator, and shall simultaneously serve a copy of the answer on the Administrator. Failure by the respondent to deny the truth of any allegation or allegations in the complaint may be deemed an admission of the truth of the allegation or allegations not answered. The answer shall also identify any affirmative defenses that the respondent intends to raise at the hearing.

(c) *Motion to dismiss and motion for more definite statement.* In proceedings governed by this subpart, no motion to dismiss the complaint or for a more definite statement of the complaint's allegations shall be made, but the substance thereof may be stated in the respondent's answer. The law judge may permit or require a more definite statement or other amendment to any pleading at the hearing, upon good cause shown and upon just and reasonable terms.

(d) *Discovery.* Discovery is authorized in proceedings governed by this subpart. Given the short time available for discovery, the parties shall cooperate to ensure timely completion of the discovery process prior to the hearing. Discovery requests shall be served by the parties as soon as possible. A motion to compel discovery should be expeditiously filed where any dispute arises, and the law judge shall promptly rule on such a motion. Time limits for compliance with discovery requests shall be set by the parties so as to accommodate, and not conflict with, the accelerated adjudication schedule set forth in this subpart. The provisions of § 821.19 shall apply, modified as necessary to meet the exigencies of this subpart's accelerated timeframes.

§ 821.56 Hearing and initial decision or appealable order of law judge.

(a) *Notice of hearing.* Within 3 days after the date on which the Board receives the Administrator's complaint, or immediately upon the issuance of a law judge's order disposing of a petition for review of the Administrator's emergency determination, if later, the parties shall be served with a written notice of hearing, setting forth the date, time and place of the hearing. The hearing shall be set for a date no later than 30 days after the date on which the respondent's appeal was received and docketed. To the extent that they are not inconsistent with this section, the provisions of § 821.37(a) shall also apply.

(b) *Conduct of hearing.* The provisions of §§ 821.38, 821.39 and 821.40, concerning the taking of evidence, argument and submissions by the parties, and the composition of the hearing record, shall apply to proceedings governed by this subpart.

(c) *Initial decision and effect of initial decision or appealable order.* The law judge's initial decision shall be made orally on the record at the termination of the hearing. The provisions of § 821.42, concerning the content of the initial decision, the furnishing of copies of the initial decision to the parties and the issuance date of the initial decision, and the provisions of § 821.43,

concerning the effect of the law judge's initial decision or appealable order and any appeal therefrom, shall apply to proceedings governed by this subpart.

§ 821.57 Procedure on appeal.

(a) *Time within which to file notice of appeal.* A party may appeal from a law judge's initial decision or appealable order by filing with the Board, and simultaneously serving on the other parties, a notice of appeal, within 2 days after the date on which the initial decision was orally rendered or the appealable order was served. The time limitations for the filing of documents respecting appeals governed by this subpart will not be extended by reason of the unavailability of the hearing transcript.

(b) *Briefs and oral argument.* Each appeal in proceedings governed by this subpart must be perfected, within 5 days after the date on which the notice of appeal was filed, by the filing, and simultaneous service on the other parties, of a brief in support of the appeal. Any other party to the proceeding may file a brief in reply to the appeal brief within 7 days after the date on which the appeal brief was served on that party. A copy of the reply brief shall simultaneously be served on the appealing party and any other parties to the proceeding. Unless otherwise authorized by the Board, all briefs in connection with appeals governed by this subpart must be filed and served by overnight delivery service, or by facsimile confirmed by personal or first-class mail delivery of the original. Aside from the time limits and methods of filing and service specifically mandated by this paragraph, the provisions of § 821.48 shall apply.

(c) *Issues on appeal.* The provisions of § 821.49(a) shall apply in proceedings governed by this subpart.

(d) *Petition for rehearing, reargument, reconsideration or modification of order.* The only petitions for rehearing, reargument, reconsideration or modification of an order which the Board will entertain in proceedings governed by this subpart are those based on the ground that new matter has been discovered. Such petitions must:

(1) Set forth the new matter;

(2) Contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and

(3) Contain a statement explaining why such new matter could not have been discovered in the exercise of due diligence prior to the date on which the evidentiary record closed.

Subpart J—Ex Parte Communications

AUTHORITY: Sec. 4, Pub. L. 94–409, 5 U.S.C. 556(d) and 557; 49 U.S.C. 1101–1155, 44701–44723, 46301.

§ 821.60 Definitions.

As used in this subpart:

Board decisional employee means a Board Member, law judge or other employee who is, or who may reasonably be expected to be, involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports on any matter or proceeding covered by this part.

§ 821.61 Prohibited ex parte communications.

(a) The prohibitions of this section shall apply from the time a petition for review or an appeal is filed unless the person responsible for the communication has knowledge that a petition for review or an appeal will be filed, in which case the prohibitions shall apply at the time of the acquisition of such knowledge. Such prohibitions shall continue until the time of the Board's final disposition of the petition, appeal and any ancillary matters, such as the adjudication of a claim for fees and expenses under the Equal Access to Justice Act.

(b) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board decisional employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board decisional employee shall make or knowingly cause to be

made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding. Ex parte communications solely relating to matters of Board procedure or practice are not prohibited by this section.

§ 821.62 Procedures for handling ex parte communications.

A Board decisional employee who receives, makes or knowingly causes to be made a communication prohibited by §821.61 shall place in the public record of the proceeding:

(a) All such written communications;

(b) Memoranda stating the substance of all such oral communications; and

(c) All written responses, and memoranda stating the substance of all oral responses, to the communications described in paragraphs (a) and (b) of this section.

§ 821.63 Requirement to show cause and imposition of sanction.

(a) Upon receipt of a communication made or knowingly caused to be made by a party in violation of §821.61, the presiding law judge (or the chief law judge, if the proceeding has not been assigned to a law judge) or the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes it administers, require the party to show cause why its claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of such violation.

(b) The Board may, to the extent consistent with the interest of justice and the policy of the underlying statutes it administers, consider a violation of §821.61 sufficient grounds for a decision adverse to a party who has knowingly committed or knowingly caused such a violation to occur. Alternatively, the Board may impose a sanction on the party's attorney or representative, including suspending or barring the attorney or representative from practicing before it, where such action would be appropriate and penalizing the party represented would not be in the interest of justice.

Subpart K—Judicial Review of Board Orders

§ 821.64 Judicial review.

(a) *General.* Judicial review of a final order of the Board may be sought as provided in 49 U.S.C. 1153 and 46110 by the filing of a petition for review with the appropriate United States Court of Appeals within 60 days of the date of entry (*i.e.*, service date) of the Board's order. Under the applicable statutes, any party may appeal the Board's decision. The Board is not a party in interest in such appellate proceedings and, accordingly, does not typically participate in the judicial review of its decisions. In matters appealed by the Administrator, the other parties should anticipate the need to make their own defense.

(b) *Stay pending judicial review.* No request for a stay pending judicial review will be entertained if it is received by the Board after the effective date of the Board's order (*see* §821.50(b)). If a stay action is to be timely, any request must be filed sufficiently in advance of the effective date of the Board's order to allow for a reply and Board review.

PART 825—RULES OF PROCEDURE FOR MERCHANT MARINE APPEALS FROM DECISIONS OF THE COMMANDANT, U.S. COAST GUARD

Sec.

825.1 Applicability.
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AUTHORITY: Sec. 304(a)(9)(B), Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2169 (49 U.S.C. 1903(a)(9)(B)).

SOURCE: 40 FR 30248, July 17, 1975, unless otherwise noted.

§ 825.1 Applicability.

The provisions of this part govern all proceedings before the National Transportation Safety Board (Board) on appeals taken from decisions, on or after April 1, 1975, of the Commandant, U.S.

Coast Guard, sustaining orders of an administrative law judge, revoking, suspending, or denying a license, certificate, document, or register in proceedings under:

(a) R.S. 4450, as amended (46 U.S.C. 239);

(b) Act of July 15, 1954 (46 U.S.C. 239a–b); or

(c) Section 4, Great Lakes Pilotage Act (46 U.S.C. 216(b)).

§ 825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision sustaining an order of revocation, suspension, or denial of a license, certificate, document, or register in proceedings described in § 825.1, by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended.

(b) Notice of appeal shall be addressed to the Docket Clerk, National Transportation Safety Board, Washington, DC 20594. At the same time, a copy shall be served on the Commandant (GL), U.S. Coast Guard, Washington, DC 20590.

(c) The notice of appeal shall state the name of the party, the number of the Commandant's decision, and, in brief, the grounds for the appeal.

§ 825.10 Referral of record.

Upon receipt of a notice of appeal, the Commandant shall immediately transmit to the Board the complete record of the hearing upon which his decision was based. This includes the charges, the transcript of testimony, and hearing proceedings (including exhibits), briefs filed by the party, the decision of the administrative law judge, and the Commandant's decision on appeal. It does not include intra-agency staff memoranda provided as advice to the Commandant to aid in his decision.

§ 825.15 Issues on appeal.

The only issues that may be considered on appeal are:

(a) A finding of a material fact is erroneous;

(b) A necessary legal conclusion is without governing precedent or is a departure from or contrary to law or precedent;

(c) A substantial and important question of law, policy, or discretion is involved; or

(d) A prejudicial procedural error has occurred.

§ 825.20 Briefs in support of appeal.

(a) Within 20 days after the filing of a notice of appeal, the appellant must file, in the same manner as prescribed for the notice in § 825.5, a brief in support of the appeal.

(b) This document shall set forth:

(1) The name and address of the appellant;

(2) The number and a description of the license, certificate, document, or register involved;

(3) A summary of the charges affirmed by the Commandant as proved;

(4) Fact findings by the Commandant disputed by the appellant;

(5) Specific statements of errors of laws asserted;

(6) Specific statements of any abuse of discretion asserted; and

(7) The relief requested.

(c) Objection based upon evidence of record need not be considered unless the appeal contains specific record citation to the pertinent evidence.

(d) When a brief has been filed by appellant under this section, the Coast Guard may, within 15 days of service of the brief on the Commandant, submit to the Board a reply brief.

(e) If a party who has filed a notice of appeal does not perfect the appeal by the timely filing of an appeal brief, the Board may dismiss the appeal on its own initiative or on motion of the Coast Guard.

§ 825.25 Oral argument.

(a) If any party desires to argue a case orally before the Board, he should request leave to make such argument in his brief filed pursuant to § 825.20.

(b) Oral argument before the Board will normally not be granted unless the Board finds good cause for such argument. If granted, the parties will be advised of the date.

§ 825.30 Action by the Board.

(a) On review by the Board, if no reversible error is found in the Commandant's decision on appeal, that decision will be affirmed.

(b) On review by the Board, if reversible error is found in the Commandant's decision on appeal, the Board may:

(1) Set aside the entire decision and dismiss the charges if it finds the error incurable; or

(2) Set aside the order, or conclusions, or findings of the Commandant and remand the case to him for further consideration if it finds the error curable.

(c) When a matter has been remanded to the Commandant under paragraph (b) of this section, the Commandant may act in accordance with the terms of the order of remand, or he may, as appropriate, further remand the matter to the administrative law judge of the Coast Guard who heard the case, or to another administrative law judge of the Coast Guard, with appropriate directions.

§ 825.35 Action after remand.

When a case has been remanded under §825.30, a party shall retain all rights of review under 46 CFR part 5 and this part, as applicable.

§ 825.40 Ex parte communications.

(a) As used in this section:

Board decisional employee means a Board Member or employee who is or who may reasonably be expected to be involved in the decisional process of the proceeding;

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this part.

(b) The prohibition of paragraph (c) of this section shall apply from the time a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibition shall apply at the time of the acquisition of such knowledge.

(c) Except to the extent required for the disposition of ex parte matters as authorized by law:

(1) No interested person outside the Board shall make or knowingly cause to be made to any Board employee an ex parte communication relevant to the merits of the proceeding;

(2) No Board employee shall make or knowingly cause to be made to any interested person outside the Board an ex parte communication relevant to the merits of the proceeding.

Ex parte communications regarding solely matters of Board procedure or practice are not prohibited by this paragraph.

(d) A Board employee who receives or who makes or knowingly causes to be made a communication prohibited by paragraph (c) of this section, shall place on the public record of the proceeding:

(1) All such written communications;

(2) Memoranda stating the substance of all such oral communication; and

(3) All written responses, and memoranda stating the substance of all oral responses, to materials described in paragraphs (d) (1) and (2) of this section.

(e) Upon receipt of a communication knowingly made or caused to be made in violation of paragraph (c) of this section, the Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his or her interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(f) The Board may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Board, consider a violation of this section sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

(Authority: Sec. 4, Government in the Sunshine Act, Pub. L. 94–409, amending 5 U.S.C. 556 (d) and 5 U.S.C. 557; Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.*))

[42 FR 21614, Apr. 28, 1977]

PART 826—RULES IMPLEMENTING THE EQUAL ACCESS TO JUSTICE ACT OF 1980

Subpart A—General Provisions

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AUTHORITY: Section 203(a)(1) Pub. L. 99–80, 99 Stat. 186 (5 U.S.C. 504).

SOURCE: 46 FR 48209, Oct. 1, 1981, unless otherwise noted.

Subpart A—General Provisions

§ 826.1 Purpose of these rules.

The Equal Access to Justice Act, 5 U.S.C. 504 (the Act), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain administrative proceedings (adversary adjudications) before the National Transportation Safety Board (Board). An eligible party may receive an award when it prevails over the Federal Aviation Administration (FAA), unless the Government agency's position in the proceeding was substantially justified or special circumstances make an award unjust. The rules in this part describe the parties eligible for awards and the proceedings that are covered. They also explain how to apply for awards, and the procedures and standards that this Board will use to make them. As used hereinafter, the term ''agency'' applies to the FAA.

§ 826.2 When the Act applies.

The Act applies to any adversary adjudication identified in §826.3 as covered under the Act.

[59 FR 30531, June 14, 1994]

§ 826.3 Proceedings covered.

(a) The Act applies to certain adversary adjudications conducted by the Board. These are adjudications under 5 U.S.C. 554 in which the position of the FAA is presented by an attorney or other representative who enters an appearance and participates in the proceedings. Proceedings to grant or renew certificates or documents, hereafter referred to as ''licenses,'' are excluded, but proceedings to modify, suspend, or revoke licenses or to impose a civil penalty on a flight engineer, mechanic, pilot, or repairman (or person acting in that capacity) are covered if they are otherwise ''adversary adjudications.'' For the Board, the type of proceeding covered includes (but may not be limited to) aviation enforcement cases appealed to the Board under sections 501, 609, 611 and 901 of the Federal Aviation Act (49 U.S.C. 44101 *et seq.*, 44720–44711, 44715, 46301).

(b) The Board may also designate a proceeding not listed in paragraph (a) as an adversary adjudication for purposes of the Act by so stating in an order initiating the proceeding or designating the matter for hearing. The Board's failure to designate a proceeding as an adversary adjudication shall not preclude the filing of an application by a party who believes the proceeding is covered by the Act; whether the procedure is covered will then be an issue for resolution in proceedings on the application.

(c) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage,

any award made will include only fees and expenses related to covered issues.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 59054, Nov. 15, 1994]

§ 826.4 Eligibility of applicants.

(a) To be eligible for an award of attorney fees and other expenses under the Act, the applicant must be a party to the adversary adjudication for which it seeks an award. The term ''party'' is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) The sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.

(d) An applicant who owns an unincorporated business will be considered an ''individual'' rather than a ''sole owner of an unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between the affiliated entities. In addition, the administrative law judge may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 48209, Oct. 1, 1981, as amended at 54 FR 10332, Mar. 13, 1989]

§ 826.5 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of the agency over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible prevailing applicant is on the agency counsel, who may avoid an award by showing that the agency's position was reasonable in law and fact.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

§ 826.6 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents, and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b)(1) No award for the fee of an attorney or agent under these rules may exceed $75 indexed as follows:

$$\frac{X}{\$75/\text{hr}} = \frac{\text{CPI_New}}{\text{CPI_1981}}$$

The CPI to be used is the annual average CPI, All Urban Consumers, U.S. City Average, All Items, except where a local, All Item index is available. Where a local index is available, but results in a manifest inequity vis-a-vis the U.S. City Average, the U.S. City Average may be used. The numerator of that equation is the yearly average for the year(s) the services were provided, with each year calculated separately. If an annual average CPI for a particular year is not yet available, the prior year's annual average CPI shall be used. This formula increases the $75 statutory cap by indexing it to reflect cost of living increases, as authorized in 5 U.S.C. 504(b)(1)(A)(ii). Application of these increased rate caps requires affirmative findings under §821.6(c) of this chapter. For ease of application, available U.S. City figures are reproduced as follows:

1981	90.9
1982	96.5
1983	99.6
1984	103.9
1985	107.6
1986	109.6
1987	113.6
1988	118.3
1989	124.0
1990	130.7
1991	136.2
1992	140.3
1993	144.5

(2) No award to compensate an expert witness may exceed the highest rate at which the agency pays expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the administrative law judge shall consider the following:

(1) If the attorney, agent, or witness is in private practice, his or her customary fee for similar services, or if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant;

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and

(5) Such other factors as may bear on the value of the services provided.

(d) The reasonable cost of any study, analysis, engineering report, test, project, or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[46 FR 48209, Oct. 1, 1981, as amended at 58 FR 21544, Apr. 22, 1993; 59 FR 30531, June 14, 1994]

§ 826.7 Rulemaking on maximum rates for attorney fees.

(a) In addition to increases based on cost of living (*see* §826.6), attorney fees in some or all of the proceedings covered by this part may also be increased beyond the statutory cap of $75 if warranted by special factors (such as limited availability of attorneys qualified to handle certain types of proceedings). The Board will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act.

(b) Any person may file with the Board a petition for rulemaking to increase the maximum rate for attorney fees by demonstrating that a special factor(s) justifies a higher fee. The petition shall identify the rate the petitioner believes the Board should establish and the proceeding(s) or types of proceedings in which the rate should be used. It should also explain fully the reasons why the higher rate is warranted. The Board will respond to the petition within 60 days after it is filed, by initiating a rulemaking proceeding,

denying the petition, or taking other appropriate action.

[58 FR 21545, Apr. 22, 1993]

§ 826.8 Awards against the Federal Aviation Administration.

When an applicant is entitled to an award because it prevails over an agency of the United States that participates in a proceeding before the Board and takes a position that is not substantially justified, the award shall be made against that agency.

Subpart B—Information Required From Applicants

§ 826.21 Contents of application.

(a) An application for an award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the agency in the proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(b) The application shall also include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)), or in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application shall state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this agency to consider in determining whether and in what amount an award should be made.

(e) The application shall be signed by the applicant or an authorized officer or attorney for the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 30532, June 14, 1994]

§ 826.22 Net worth exhibit.

(a) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 826.4(f) of this part) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The administrative law judge may require an applicant to file additional information to determine the eligibility for an award.

(b) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit and believes there are legal grounds for withholding it from disclosure may submit that portion of the exhibit directly to the administrative law judge in a sealed envelope labeled ''Confidential Financial Information,'' accompanied by a motion to withhold the information from public disclosure. The motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b) (1) through (9), why public disclosure of the information would adversely affect the applicant, and why disclosure is not required in the public interest. The material in question shall be served on counsel representing the agency

against which the applicant seeks an award, but need not be served on any other party to the proceeding. If the administrative law judge finds that the information should not be withheld from disclosure, it shall be placed in the public record of the proceeding. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Board's established procedures under the Freedom of Information Act as inplemented by Part 801 of the Board's rules.

§ 826.23 Documentation of fees and expenses.

The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spend in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The administrative law judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 826.24 When an application may be filed.

(a) An application may be filed whenever the applicant has prevailed in the proceeding, but in no case no later than the 30 days after the Board's final disposition of the proceeding. This 30-day deadline is statutory and the Board has no authority to extend it.

(b) If review or reconsideration is sought or taken of a decision to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.

(c) For purposes of this rule, final disposition means the later of (1) the date on which an unappealed initial decision by an administrative law judge becomes administratively final; (2) issuance of an order disposing of any petitions for reconsideration of the Board's final order in the proceeding; (3) if no petition for reconsideration is filed, the last date on which such a petition could have been filed; or (4) issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.

[46 FR 48209, Oct. 1, 1981, as amended at 59 FR 30532, June 14, 1994]

Subpart C—Procedures for Considering Applications

§ 826.31 Filing and service of documents and general procedures.

The rules contained in 49 CFR part 821 apply to proceedings under the Act, unless they are superseded by or are inconsistent with a provision of this part.

[59 FR 30532, June 14, 1994]

§ 826.32 Answer to application.

(a) Within 30 days after service of an application, counsel representing the agency against which an award is sought may file an answer to the application. Unless agency counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

(b) If agency counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the administrative law judge upon request by agency counsel and the applicant.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of agency counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, agency counsel shall include

with the answer either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.33 Reply.

Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under § 826.36.

§ 826.34 Comments by other parties.

Any party to a proceeding other than the applicant and agency counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the administrative law judge determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.

§ 826.35 Settlement.

The applicant and agency counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded. If a prevailing party and agency counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 826.36 Further proceedings.

(a) Ordinarily the determination of an award will be made on the basis of the written record; however, on request of either the applicant or agency counsel, or on his or her own initiative, the administrative law judge assigned to the matter may order further proceedings, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application and shall be conducted as promptly as possible.

(b) A request that the administrative law judge order further proceedings under this section shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.

§ 826.37 Decision.

The administrative law judge shall issue an initial decision on the application within 60 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

§ 826.38 Board review.

Either the applicant or agency counsel may seek review of the initial decision on the fee application, or the Board may decide to review the decision on its own initiative, in accordance with subpart H of part 821 for FAA safety enforcement matters appealed under section 609 of the Federal Aviation Act. If neither the applicant nor agency counsel seeks review and the Board does not take review on its own initiative, the initial decision on the application shall become a final decision of the Board 30 days after it is issued. Whether to review a decision is a matter within the discretion of the Board. If review is taken, the Board will issue a final decision on the application or remand the application to the administrative law judge who issued the initial fee award determination for further proceedings.

§ 826.39 Judicial review.

Judicial review of final Board decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 826.40 Payment of award.

An applicant seeking payment of an award shall submit to the disbursing

official of the FAA a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. Applications for award grants in cases involving the FAA shall be sent to: The Office of Accounting and Audit, AAA–1, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication has been sought by the applicant or any other party to the proceeding.

PART 830—NOTIFICATION AND REPORTING OF AIRCRAFT ACCIDENTS OR INCIDENTS AND OVERDUE AIRCRAFT, AND PRESERVATION OF AIRCRAFT WRECKAGE, MAIL, CARGO, AND RECORDS

Subpart A—General

Sec.
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AUTHORITY: Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*), and the Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*).

SOURCE: 53 FR 36982, Sept. 23, 1988, unless otherwise noted.

Subpart A—General

§ 830.1 Applicability.

This part contains rules pertaining to:

(a) Initial notification and later reporting of aircraft incidents and accidents and certain other occurrences in the operation of aircraft, wherever they occur, when they involve civil aircraft of the United States; when they involve certain public aircraft, as specified in this part, wherever they occur; and when they involve foreign civil aircraft where the events occur in the United States, its territories, or its possessions.

(b) Preservation of aircraft wreckage, mail, cargo, and records involving all civil and certain public aircraft accidents, as specified in this part, in the United States and its territories or possessions.

[60 FR 40112, Aug. 7, 1995]

§ 830.2 Definitions.

As used in this part the following words or phrases are defined as follows:

Aircraft accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked, and in which any person suffers death or serious injury, or in which the aircraft receives substantial damage.

Civil aircraft means any aircraft other than a public aircraft.

Fatal injury means any injury which results in death within 30 days of the accident.

Incident means an occurrence other than an accident, associated with the operation of an aircraft, which affects or could affect the safety of operations.

Operator means any person who causes or authorizes the operation of an aircraft, such as the owner, lessee, or bailee of an aircraft.

Public aircraft means an aircraft used only for the United States Government, or an aircraft owned and operated (except for commercial purposes) or exclusively leased for at least 90 continuous days by a government other

than the United States Government, including a State, the District of Columbia, a territory or possession of the United States, or a political subdivision of that government. ''Public aircraft'' does not include a government-owned aircraft transporting property for commercial purposes and does not include a government-owned aircraft transporting passengers other than: transporting (for other than commercial purposes) crewmembers or other persons aboard the aircraft whose presence is required to perform, or is associated with the performance of, a governmental function such as firefighting, search and rescue, law enforcement, aeronautical research, or biological or geological resource management; or transporting (for other than commercial purposes) persons aboard the aircraft if the aircraft is operated by the Armed Forces or an intelligence agency of the United States. Notwithstanding any limitation relating to use of the aircraft for commercial purposes, an aircraft shall be considered to be a public aircraft without regard to whether it is operated by a unit of government on behalf of another unit of government pursuant to a cost reimbursement agreement, if the unit of government on whose behalf the operation is conducted certifies to the Administrator of the Federal Aviation Administration that the operation was necessary to respond to a significant and imminent threat to life or property (including natural resources) and that no service by a private operator was reasonably available to meet the threat.

Serious injury means any injury which: (1) Requires hospitalization for more than 48 hours, commencing within 7 days from the date of the injury was received; (2) results in a fracture of any bone (except simple fractures of fingers, toes, or nose); (3) causes severe hemorrhages, nerve, muscle, or tendon damage; (4) involves any internal organ; or (5) involves second- or third-degree burns, or any burns affecting more than 5 percent of the body surface.

Substantial damage means damage or failure which adversely affects the structural strength, performance, or flight characteristics of the aircraft, and which would normally require major repair or replacement of the affected component. Engine failure or damage limited to an engine if only one engine fails or is damaged, bent fairings or cowling, dented skin, small punctured holes in the skin or fabric, ground damage to rotor or propeller blades, and damage to landing gear, wheels, tires, flaps, engine accessories, brakes, or wingtips are not considered ''substantial damage'' for the purpose of this part.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40112, Aug. 7, 1995]

Subpart B—Initial Notification of Aircraft Accidents, Incidents, and Overdue Aircraft

§ 830.5 Immediate notification.

The operator of any civil aircraft, or any public aircraft not operated by the Armed Forces or an intelligence agency of the United States, or any foreign aircraft shall immediately, and by the most expeditious means available, notify the nearest National Transportation Safety Board (Board) field office[1] when:

(a) An aircraft accident or any of the following listed incidents occur:

(1) Flight control system malfunction or failure;

(2) Inability of any required flight crewmember to perform normal flight duties as a result of injury or illness;

(3) Failure of structural components of a turbine engine excluding compressor and turbine blades and vanes;

(4) In-flight fire; or

(5) Aircraft collide in flight.

(6) Damage to property, other than the aircraft, estimated to exceed $25,000 for repair (including materials and labor) or fair market value in the event of total loss, whichever is less.

(7) For large multiengine aircraft (more than 12,500 pounds maximum certificated takeoff weight):

[1] The Board field offices are listed under U.S. Government in the telephone directories of the following cities: Anchorage, AK, Atlanta, GA, West Chicago, IL, Denver, CO, Arlington, TX, Gardena (Los Angeles), CA, Miami, FL, Parsippany, NJ (metropolitan New York, NY), Seattle, WA, and Washington, DC.

(i) In-flight failure of electrical systems which requires the sustained use of an emergency bus powered by a back-up source such as a battery, auxiliary power unit, or air-driven generator to retain flight control or essential instruments;

(ii) In-flight failure of hydraulic systems that results in sustained reliance on the sole remaining hydraulic or mechanical system for movement of flight control surfaces;

(iii) Sustained loss of the power or thrust produced by two or more engines; and

(iv) An evacuation of an aircraft in which an emergency egress system is utilized.

(b) An aircraft is overdue and is believed to have been involved in an accident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995]

§ 830.6 Information to be given in notification.

The notification required in § 830.5 shall contain the following information, if available:

(a) Type, nationality, and registration marks of the aircraft;

(b) Name of owner, and operator of the aircraft;

(c) Name of the pilot-in-command;

(d) Date and time of the accident;

(e) Last point of departure and point of intended landing of the aircraft;

(f) Position of the aircraft with reference to some easily defined geographical point;

(g) Number of persons aboard, number killed, and number seriously injured;

(h) Nature of the accident, the weather and the extent of damage to the aircraft, so far as is known; and

(i) A description of any explosives, radioactive materials, or other dangerous articles carried.

Subpart C—Preservation of Aircraft Wreckage, Mail, Cargo, and Records

§ 830.10 Preservation of aircraft wreckage, mail, cargo, and records.

(a) The operator of an aircraft involved in an accident or incident for which notification must be given is responsible for preserving to the extent possible any aircraft wreckage, cargo, and mail aboard the aircraft, and all records, including all recording mediums of flight, maintenance, and voice recorders, pertaining to the operation and maintenance of the aircraft and to the airmen until the Board takes custody thereof or a release is granted pursuant to § 831.12(b) of this chapter.

(b) Prior to the time the Board or its authorized representative takes custody of aircraft wreckage, mail, or cargo, such wreckage, mail, or cargo may not be disturbed or moved except to the extent necessary:

(1) To remove persons injured or trapped;

(2) To protect the wreckage from further damage; or

(3) To protect the public from injury.

(c) Where it is necessary to move aircraft wreckage, mail or cargo, sketches, descriptive notes, and photographs shall be made, if possible, of the original positions and condition of the wreckage and any significant impact marks.

(d) The operator of an aircraft involved in an accident or incident shall retain all records, reports, internal documents, and memoranda dealing with the accident or incident, until authorized by the Board to the contrary.

Subpart D—Reporting of Aircraft Accidents, Incidents, and Overdue Aircraft

§ 830.15 Reports and statements to be filed.

(a) *Reports.* The operator of a civil, public (as specified in § 830.5), or foreign aircraft shall file a report on Board Form 6120.½ (OMB No. 3147–0001)[2] within 10 days after an accident, or after 7 days if an overdue aircraft is still missing. A report on an incident for which immediate notification is required by § 830.5(a) shall be filed only as requested by an authorized representative of the Board.

[2] Forms are available from the Board field offices (see footnote 1), from Board headquarters in Washington, DC, and from the Federal Aviation Administration Flight Standards District Offices.

(b) *Crewmember statement.* Each crewmember, if physically able at the time the report is submitted, shall attach a statement setting forth the facts, conditions, and circumstances relating to the accident or incident as they appear to him. If the crewmember is incapacitated, he shall submit the statement as soon as he is physically able.

(c) *Where to file the reports.* The operator of an aircraft shall file any report with the field office of the Board nearest the accident or incident.

[53 FR 36982, Sept. 23, 1988, as amended at 60 FR 40113, Aug. 7, 1995]

PART 831—ACCIDENT/INCIDENT INVESTIGATION PROCEDURES

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AUTHORITY: Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*); Federal Aviation Act of 1958, as amended (49 U.S.C. 40101 *et seq.*).

SOURCE: 53 FR 15847, May 4, 1988, unless otherwise noted.

§ 831.1 Applicability of part.

Unless otherwise specifically ordered by the National Transportation Safety Board (Board), the provisions of this part shall govern all accident or incident investigations, conducted under the authority of title VII of the Federal Aviation Act of 1958, as amended, and the Independent Safety Board Act of 1974. Rules applicable to accident hearings and reports are set forth in part 845.

§ 831.2 Responsibility of Board.

(a) *Aviation.* (1) The Board is responsible for the organization, conduct, and control of all accident and incident investigations (see §830.2 of this chapter) within the Untied States, its territories and possessions, where the accident or incident involves any civil aircraft or certain public aircraft (as specified in §830.5 of this chapter), including an investigation involving civil or public aircraft (as specified in §830.5) on the one hand, and an Armed Forces or intelligence agency aircraft on the other hand. It is also responsible for investigating accidents/incidents that occur outside the United States, and which involve civil aircraft and/or certain public aircraft, when the accident/incident is not in the territory of another country (*i.e.*, in international waters).

(2) Certain aviation investigations may be conducted by the Federal Aviation Administration (FAA), pursuant to a ''Request to the Secretary of the Department of Transportation to Investigate Certain Aircraft Accidents,'' effective February 10, 1977 (the text of the request is contained in the appendix to part 800 of this chapter), but the Board determines the probable cause of such accidents or incidents.[1] Under no circumstances are aviation investigations where the portion of the investigation is so delegated to the FAA by the Board considered to be joint investigations in the sense of sharing responsibility. These investigations remain NTSB investigations.

(3) The Board is the agency charged with fulfilling the obligations of the United States under Annex 13 to the Chicago Convention on International Civil Aviation (Eighth Edition, July 1994), and does so consistent with State Department requirements and in coordination with that department. Annex 13 contains specific requirements for the notification, investigation, and reporting of certain incidents and accidents involving international civil aviation. In the case of an accident or incident in a foreign state involving civil aircraft of U.S. registry or manufacture, where the foreign state is a signatory to Annex 13 to the Chicago Convention of the International Civil

[1] The authority of a representative of the FAA during such investigations is the same as that of a Board investigator under this part.

Aviation Organization, the state of occurrence is responsible for the investigation. If the accident or incident occurs in a foreign state not bound by the provisions of Annex 13 to the Chicago Convention, or if the accident or incident involves a public aircraft (Annex 13 applies only to civil aircraft), the conduct of the investigation shall be in consonance with any agreement entered into between the United States and the foreign state.

(b) *Surface.* The Board is responsible for the investigation of: railroad accidents in which there is a fatality, substantial property damage, or which involve a passenger train (see part 840 of this chapter); major marine casualties and marine accidents involving a public and non-public vessel or involving Coast Guard functions (see part 850 of this chapter[2]); highway accidents, including railroad grade-crossing accidents, the investigation of which is selected in cooperation with the States; and pipeline accidents in which there is a fatality, significant injury to the environment, or substantial property damage.

(c) *Other accidents/incidents.* The Board is also responsible for the investigation of an accident/incident that occurs in connection with the transportation of people or property which, in the judgment of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy of the Independent Safety Board Act of 1974. This authority includes, but is not limited to, marine and boating accidents and incidents not covered by part 850 of this chapter, and accidents/incidents selected by the Board involving transportation and/or release of hazardous materials.

[62 FR 3806, Jan. 27, 1997]

§ 831.3 Authority of Directors.

The Directors, Office of Aviation Safety, Office of Railroad Safety, Office of Highway Safety, Office of Marine Safety, and Office of Pipeline and Hazardous Materials Safety, subject to the provisions of § 831.2 and part 800 of this chapter, may order an investigation into any accident or incident.

[63 FR 71606, Dec. 29, 1998]

§ 831.4 Nature of investigation.

Accident and incident investigations are conducted by the Board to determine the facts, conditions, and circumstances relating to an accident or incident and the probable cause(s) thereof. These results are then used to ascertain measures that would best tend to prevent similar accidents or incidents in the future. The investigation includes the field investigation (on-scene at the accident, testing, teardown, etc.), report preparation, and, where ordered, a public hearing. The investigation results in Board conclusions issued in the form of a report or ''brief'' of the incident or accident. Accident/incident investigations are fact-finding proceedings with no formal issues and no adverse parties. They are not subject to the provisions of the Administrative Procedure Act (5 U.S.C. 504 *et seq.*), and are not conducted for the purpose of determining the rights or liabilities of any person.

[62 FR 3806, Jan. 27, 1997]

§ 831.5 Priority of Board investigations.

Any investigation of an accident or incident conducted by the Safety Board directly or pursuant to the appendix to part 800 of this chapter (except major marine investigations conducted under 49 U.S.C. 1131(a)(1)(E)) has priority over all other investigations of such accident or incident conducted by other Federal agencies. The Safety Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that such agencies may not participate in the Safety Board's determination of the probable cause of the accident or incident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident or incident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident or incident, provided they do so without interfering with the Safety Board's investigation. The Safety

[2] Part 850 also governs the conduct of certain investigations in which the Board and the Coast Guard participate jointly.

Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

[62 FR 3807, Jan. 27, 1997]

§ 831.6 Request to withhold information.

(a) *Trade Secrets Act (18 U.S.C. 1905), Exemption 4 of the Freedom of Information Act (5 U.S.C. 552) (FOIA), and The Independent Safety Board Act of 1974, as amended.*

(1) *General.* The Trade Secrets Act provides criminal penalties for unauthorized government disclosure of trade secrets and other specified confidential commercial information. The Freedom of Information Act authorizes withholding of such information; however, the Independent Safety Board Act, at 49 U.S.C. 1114(b), provides that the Board may, under certain circumstances, disclose information related to trade secrets.

(2) *Procedures.* Information submitted to the Board that the submitter believes qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act or FOIA Exemption 4 shall be so identified by the submitter on each and every page of such document. The Board shall give the submitter of any information so identified, or information the Board has substantial reason to believe qualifies as a trade secret or confidential commercial information subject either to the Trade Secrets Act or FOIA Exemption 4, the opportunity to comment on any contemplated disclosure, pursuant to 49 U.S.C. 1114(b). In all instances where the Board determines to disclose pursuant to 49 U.S.C. 1114(b) and/or 5 U.S.C. 552, at least 10 days' notice will be provided the submitter. Notice may not be provided the submitter when disclosure is required by a law other than FOIA if the information is not identified by the submitter as qualifying for withholding, as is required by this paragraph, unless the Board has substantial reason to believe that disclosure would result in competitive harm.

(3) *Voluntarily-provided safety information.* It is the policy of the Safety Board that commercial, safety-related information provided to it voluntarily and not in the context of particular accident/incident investigations will not be disclosed. Reference to such information for the purposes of safety recommendations will be undertaken with consideration for the confidential nature of the underlying database(s).

(b) *Other.* Any person may make written objection to the public disclosure of any other information contained in any report or document filed, or otherwise obtained by the Board, stating the grounds for such objection. The Board, on its own initiative or if such objection is made, may order such information withheld from public disclosure when, in its judgment, the information may be withheld under the provisions of an exemption to the Freedom of Information Act (5 U.S.C. 552, see part 801 of this chapter), and its release is found not to be in the public interest.

[62 FR 3807, Jan. 27, 1997]

§ 831.7 Right to representation.

Any person interviewed by an authorized representative of the Board during the investigation, regardless of the form of the interview (sworn, unsworn, transcribed, not transcribed, etc.), has the right to be accompanied, represented, or advised by an attorney or non-attorney representative.

[62 FR 3807, Jan. 27, 1997]

§ 831.8 Investigator-in-charge.

The designated investigator-in-charge (IIC) organizes, conducts, controls, and manages the field phase of the investigation, regardless of whether a Board Member is also on-scene at the accident or incident site. (The role of the Board member at the scene of an accident investigation is as the official spokesperson for the Safety Board.) The IIC has the responsibility and authority to supervise and coordinate all resources and activities of all personnel, both Board and non-Board, involved in the on-site investigation. The IIC continues to have considerable organizational and management responsibilities throughout later phases of the investigation, up to and including

Board consideration and adoption of a report or brief of probable cause(s).

[62 FR 3807, Jan. 27, 1997]

§ 831.9 Authority of Board representatives.

(a) *General.* Any employee of the Board, upon presenting appropriate credentials, is authorized to enter any property where an accident/incident subject to the Board's jurisdiction has occurred, or wreckage from any such accident/incident is located, and do all things considered necessary for proper investigation. Further, upon demand of an authorized representative of the Board and presentation of credentials, any Government agency, or person having possession or control of any transportation vehicle or component thereof, any facility, equipment, process or controls relevant to the investigation, or any pertinent records or memoranda, including all files, hospital records, and correspondence then or thereafter existing, and kept or required to be kept, shall forthwith permit inspection, photographing, or copying thereof by such authorized representative for the purpose of investigating an accident or incident, or preparing a study, or related to any special investigation pertaining to safety or the prevention of accidents. The Safety Board may issue a subpoena, enforceable in Federal district court, to obtain testimony or other evidence. Authorized representatives of the Board may question any person having knowledge relevant to an accident/incident, study, or special investigation. Authorized representatives of the Board also have exclusive authority, on behalf of the Board, to decide the way in which any testing will be conducted, including decisions on the person that will conduct the test, the type of test that will be conducted, and any individual who will witness the test.

(b) *Aviation.* Any employee of the Board, upon presenting appropriate credentials, is authorized to examine and test to the extent necessary any civil or public aircraft (as specified in § 830.5), aircraft engine, propeller, appliance, or property aboard such aircraft involved in an accident in air commerce.

(c) *Surface.* (1) Any employee of the Board, upon presenting appropriate credentials, is authorized to test or examine any vehicle, vessel, rolling stock, track, pipeline component, or any part of any such item when such examination or testing is determined to be required for purposes of such investigation.

(2) Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, vessel, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accident, consistent with the needs of the investigation and with the cooperation of such owner or operator.

[53 FR 15847, May 4, 1988, as amended at 60 FR 40113, Aug. 7, 1995; 62 FR 3807, Jan. 27, 1997]

§ 831.10 Autopsies.

The Board is authorized to obtain, with or without reimbursement, a copy of the report of autopsy performed by State or local officials on any person who dies as a result of having been involved in a transportation accident within the jurisdiction of the Board. The investigator-in-charge, on behalf of the Board, may order an autopsy or seek other tests of such persons as may be necessary to the investigation, provided that to the extent consistent with the needs of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed.

§ 831.11 Parties to the investigation.

(a) *All Investigations, regardless of mode.* (1) The investigator-in-charge designates parties to participate in the investigation. Parties shall be limited to those persons, government agencies, companies, and associations whose employees, functions, activities, or products were involved in the accident or incident and who can provide suitable qualified technical personnel actively to assist in the investigation. Other than the FAA in aviation cases, no

other entity is afforded the right to participate in Board investigations.

(2) Participants in the investigation (*i.e.*, party representatives, party coordinators, and/or the larger party organization) shall be responsive to the direction of Board representatives and may lose party status if they do not comply with their assigned duties and activity proscriptions or instructions, or if they conduct themselves in a manner prejudicial to the investigation.

(3) No party to the investigation shall be represented in any aspect of the NTSB investigation by any person who also represents claimants or insurers. No party representative may occupy a legal position (see § 845.13 of this chapter). Failure to comply with these provisions may result in sanctions, including loss of status as a party.

(4) Title 49, United States Code § 1132 provides for the appropriate participation of the FAA in Board investigations, and § 1131(a)(2) provides for such participation by other departments, agencies, or instrumentalities. The FAA and those other entities that meet the requirements of paragraph (a)(1) of this section will be parties to the investigation with the same rights and privileges and subject to the same limitations as other parties, provided however that representatives of the FAA need not sign the ''Statement of Party Representatives to NTSB Investigation'' (see paragraph (b) of this section).

(b) *Aviation investigations.* In addition to compliance with the provisions of paragraph (a) of this section, and to assist in ensuring complete understanding of the requirements and limitations of party status, all party representatives in aviation investigations shall sign ''Statement of Party Representatives to NTSB Investigation'' immediately upon attaining party representative status. Failure timely to sign that statement may result in sanctions, including loss of status as a party.

[62 FR 3808, Jan. 27, 1997, as amended at 63 FR 71606, Dec. 29, 1998]

§ 831.12 Access to and release of wreckage, records, mail, and cargo.

(a) Only the Board's accident investigation personnel, and persons authorized by the investigator-in-charge to participate in any particular investigation, examination or testing shall be permitted access to wreckage, records, mail, or cargo in the Board's custody.

(b) Wreckage, records, mail, and cargo in the Board's custody shall be released by an authorized representative of the Board when it is determined that the Board has no further need of such wreckage, mail, cargo, or records. When such material is released, Form 6120.15, ''*Release of Wreckage*,'' will be completed, acknowledging receipt.

[62 FR 3808, Jan. 27, 1997]

§ 831.13 Flow and dissemination of accident or incident information.

(a) Release of information during the field investigation, particularly at the accident scene, shall be limited to factual developments, and shall be made only through the Board Member present at the accident scene, the representative of the Board's Office of Public Affairs, or the investigator-in-charge.

(b) All information concerning the accident or incident obtained by any person or organization participating in the investigation shall be passed to the IIC through appropriate channels before being provided to any individual outside the investigation. Parties to the investigation may relay to their respective organizations information necessary for purposes of prevention or remedial action. However, no information concerning the accident or incident may be released to any person not a party representative to the investigation (including non-party representative employees of the party organization) before initial release by the Safety Board without prior consultation and approval of the IIC.

[53 FR 15847, May 4, 1988, as amended at 62 FR 3808, Jan. 27, 1997]

§ 831.14 Proposed findings.

(a) *General.* Any person, government agency, company, or association whose employees, functions, activities, or products were involved in an accident

or incident under investigation may submit to the Board written proposed findings to be drawn from the evidence produced during the course of the investigation, a proposed probable cause, and/or proposed safety recommendations designed to prevent future accidents.

(b) *Timing of submissions.* To be considered, these submissions must be received before the matter is calendared for consideration at a Board meeting. All written submissions are expected to have been presented to staff in advance of the formal scheduling of the meeting. This procedure ensures orderly and thorough consideration of all views.

(c) *Exception.* This limitation does not apply to safety enforcement cases handled by the Board pursuant to part 821 of this chapter. Separate *ex parte* rules, at part 821, subpart J, apply to those proceedings.

[62 FR 3808, Jan. 27, 1997]

PART 835—TESTIMONY OF BOARD EMPLOYEES

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835.7 Testimony of former Board employees.
835.8 Testimony by current Board employees regarding prior activity.
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835.10 Testimony in Federal, State, or local criminal investigations and other proceedings.
835.11 Obtaining Board accident reports, factual accident reports, and supporting information.

AUTHORITY: 5 U.S.C. 301; Independent Safety Board Act of 1974, as amended (49 U.S.C. 1101 *et seq.*).

§ 835.1 Purpose.

This part prescribes policies and procedures regarding the testimony of employees of the National Transportation Safety Board (Board) in suits or actions for damages and criminal proceedings arising out of transportation accidents when such testimony is in an official capacity and arises out of or is related to accident investigation. The purpose of this part is to ensure that the time of Board employees is used only for official purposes, to avoid embroiling the Board in controversial issues that are not related to its duties, to avoid spending public funds for non-Board purposes, to preserve the impartiality of the Board, and to prohibit the discovery of opinion testimony.

[63 FR 71607, Dec. 29, 1998]

§ 835.2 Definitions.

Accident, for purposes of this part includes ''incident.''

Board accident report means the report containing the Board's determinations, including the probable cause of an accident, issued either as a narrative report or in a computer format (''briefs'' of accidents). Pursuant to section 701(e) of the Federal Aviation Act of 1958 (FA Act), and section 304(c) of the Independent Safety Board Act of 1974 (49 U.S.C. 1154(b)) (Safety Act), no part of a Board accident report may be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports.

Factual accident report means the report containing the results of the investigator's investigation of the accident. The Board does not object to, and there is no statutory bar to, admission in litigation of factual accident reports. In the case of a major investigation, group chairman factual reports are factual accident reports.

[63 FR 71607, Dec. 29, 1998, as amended at 64 FR 5622, Feb. 4, 1999]

§ 835.3 Scope of permissible testimony.

(a) Section 701(e) of the FA Act and section 304(c) of the Safety Act preclude the use or admission into evidence of Board accident reports in any suit or action for damages arising from accidents. These sections reflect Congress' ''strong * * * desire to keep the Board free of the entanglement of such suits.'' Rep. No. 93–1192, 93d Cong., 2d Sess., 44 (1974), and serve to ensure that the Board does not exert an undue influence on litigation. The purposes of

these sections would be defeated if expert opinion testimony of Board employees, which may be reflected in the views of the Board expressed in its reports, were admitted in evidence or used in litigation arising out of an accident. The Board relies heavily upon its investigators' opinions in its deliberations. Furthermore, the use of Board employees as experts to give opinion testimony would impose a significant administrative burden on the Board's investigative staff. Litigants must obtain their expert witnesses from other sources.

(b) For the reasons stated in paragraph (a) of this section and §835.1, Board employees may only testify as to the factual information they obtained during the course of an investigation, including factual evaluations embodied in their factual accident reports. However, they shall decline to testify regarding matters beyond the scope of their investigation, and they shall not give any expert or opinion testimony.

(c) Board employees may testify about the firsthand information they obtained during an investigation that is not reasonably available elsewhere, including observations recorded in their own factual accident reports. Consistent with the principles cited in §835.1 and this section, current Board employees are not authorized to testify regarding other employee's reports, or other types of Board documents, including but not limited to safety recommendations, safety studies, safety proposals, safety accomplishments, reports labeled studies, and analysis reports, as they contain staff analysis and/or Board conclusions.

(d) Briefs of accidents may be released in conjunction with factual accident reports. Nevertheless, they are not part of those reports and are not to be admitted in evidence or used in a deposition approved under this part.

(e) Not all material in a factual accident report may be the subject of testimony. The purpose of the factual accident report, in great part, is to inform the public at large, and as a result the factual accident report may contain information and conclusions for which testimony is prohibited by this part.

(f) No employee may testify in any matter absent advance approval by the General Counsel as provided in this part.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998; 64 FR 5622, Feb. 4, 1999]

§835.4 Use of reports.

(a) As a testimonial aid and to refresh their memories, Board employees may use copies of the factual accident report they prepared, and may refer to and cite from that report during testimony.

(b) Consistent with section 701(e) of the FA Act and section 304(c) of the Safety Act, a Board employee may not use the Board's accident report for any purpose during his testimony.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§835.5 Manner in which testimony is given in civil litigation.

(a) Testimony of Board employees with unique, firsthand information may be made available for use in civil actions or civil suits for damages arising out of accidents through depositions or written interrogatories. Board employees are not permitted to appear and testify in court in such actions.

(b) Normally, depositions will be taken and interrogatories answered at the Board's office to which the employee is assigned, and at a time arranged with the employee reasonably fixed to avoid substantial interference with the performance of his duties.

(c) Board employees are authorized to testify only once in connection with any investigation they have made of an accident. Consequently, when more than one civil lawsuit arises as a result of an accident, it shall be the duty of counsel seeking the employee's deposition to ascertain the identity of all parties to the multiple lawsuits and their counsel, and to advise them of the fact that a deposition has been granted, so that all interested parties may be afforded the opportunity to participate therein.

(d) Upon completion of the deposition of a Board employee, the original of the transcript will be provided the deponent for signature and correction, which the Board does not waive. A copy of the transcript of the testimony and any videotape shall be furnished,

at the expense of the party requesting the deposition, to the Board's General Counsel at Washington, DC headquarters for the Board's files.

[55 FR 41541, Oct. 12, 1990, as amended at 63 FR 71607, Dec. 29, 1998]

§ 835.6 Request for testimony in civil litigation.

(a) A written request for testimony by deposition or interrogatories of a Board employee relating to an accident shall be addressed to the General Counsel, who may approve or deny the request consistent with this part. Such request shall set forth the title of the civil case, the court, the type of accident (aviation, railroad, etc.), the date and place of the accident, the reasons for desiring the testimony, and a showing that the information desired is not reasonably available from other sources.

(b) Where testimony is sought in connection with civil litigation, the General Counsel shall not approve it until the factual accident report is issued (*i.e.,* in the public docket). In the case of major accident investigations where there are multiple factual reports issued and testimony of group chairmen is sought, the General Counsel may approve depositions regarding completed group factual reports at any time after incorporation of the report in the public docket. However, no deposition will be approved prior to the Board's public hearing, where one is scheduled or contemplated. The General Counsel may approve a deposition in the absence of a factual accident report when such a report will not be issued but all staff fact-finding is complete.

(c) The General Counsel shall attach to the approval of any deposition such reasonable conditions as may be deemed appropriate in order that the testimony will be consistent with § 835.1, will be limited to the matters delineated in § 835.3, will not interfere with the performance of the duties of the employee as set forth in § 835.5, and will otherwise conform to the policies of this part.

(d) A subpoena shall not be served upon a Board employee in connection with the taking of a deposition in civil litigation.

[63 FR 71607, Dec. 29, 1998]

§ 835.7 Testimony of former Board employees.

It is not necessary to request Board approval for testimony of a former Board employee, nor is testimony limited to depositions. However, the scope of permissible testimony continues to be constrained by all the limitations set forth in § 835.3 and § 835.4.

[63 FR 71608, Dec. 29, 1998]

§ 835.8 Testimony by current Board employees regarding prior activity.

Any testimony regarding any accident within the Board's jurisdiction, or any expert testimony arising from employment prior to Board service is prohibited absent approval by the General Counsel. Approval shall only be given if testimony will not violate § 835.1 and § 835.3, and is subject to whatever conditions the General Counsel finds necessary to promote the purposes of this part as set forth in § 835.1 and § 835.3.

[63 FR 71608, Dec. 29, 1998]

§ 835.9 Procedure in the event of a subpoena in civil litigation.

(a) If the Board employee has received a subpoena to appear and testify in connection with civil litigation, a request for his deposition shall not be approved until the subpoena has been withdrawn.

(b) Upon receipt of a subpoena, the employee shall immediately notify the General Counsel and provide all information requested by the General Counsel.

(c) The General Counsel shall determine the course of action to be taken and will so advise the employee.

[63 FR 71608, Dec. 29, 1998]

§ 835.10 Testimony in Federal, State, or local criminal investigations and other proceedings.

(a) As with civil litigation, the Board prefers that testimony be taken by deposition if court rules permit, and that testimony await the issuance of the factual accident report. The Board recognizes, however, that in the case of

coroner's inquests and grand jury proceedings this may not be possible. The Board encourages those seeking testimony of Board employees to contact the General Counsel as soon as such testimony is being considered. Whenever the intent to seek such testimony is communicated to the employee, he shall immediately notify the General Counsel.

(b) In any case, Board employees are prohibited from testifying in any civil, criminal, or other matter, either in person or by deposition or interrogatories, absent advance approval of the General Counsel. The Board discourages the serving of a subpoena for testimony but, if issued, it should be served on the General Counsel, rather than the employee.

(c) If permission to testify by deposition or in person is granted, testimony shall be limited as set forth in §835.3. Only factual testimony is authorized; no expert or opinion testimony shall be given.

[63 FR 71608, Dec. 29, 1998]

§ 835.11 Obtaining Board accident reports, factual accident reports, and supporting information.

It is the responsibility of the individual requesting testimony to obtain desired documents. There are a number of ways to obtain Board accident reports, factual accident reports, and accompanying accident docket files. Our rules at parts 801 and 837 of this chapter explain our procedures, as will our web site, at www.ntsb.gov. Or, you may call our Public Inquiries Branch, at (800) 877–6799. Documents will not be supplied by witnesses at depositions, nor will copying services be provided by deponents.

[63 FR 71608, Dec. 29, 1998]

PART 837—PRODUCTION OF RECORDS IN LEGAL PROCEEDINGS

Sec.

837.1 Purpose and scope.
837.2 Applicability.
837.3 Published reports, material contained in the public accident investigation dockets, and accident database data.
837.4 Other material.

AUTHORITY: 49 U.S.C. 1101 *et seq.*; 40101 *et seq.*; 5 U.S.C. 301.

SOURCE: 62 FR 27703, May 21, 1997, unless otherwise noted.

§ 837.1 Purpose and scope.

(a) This part sets forth procedures to be followed when requesting material for use in legal proceedings (including administrative proceedings) in which the National Transportation Safety Board (NTSB or Board) is not a party, and procedures to be followed by the employee upon receipt of a subpoena, order, or other demand (collectively referred to here as a demand) by a court or other competent authority or by a private litigant. ''Material,'' as used in this part, means any type of physical or documentary evidence, including but not limited to paper documents, electronic media, videotapes, audiotapes, etc.

(b) The purposes of this part are to:

(1) Conserve the time of employees for conducting official business;

(2) Minimize the possibility of involving the NTSB in controversial issues not related to its mission;

(3) Maintain the impartiality of the Board among private litigants;

(4) Avoid spending the time and money of the United States for private purposes; and

(5) To protect confidential, sensitive information, and the deliberative processes of the Board.

§ 837.2 Applicability.

This part applies to requests to produce material concerning information acquired in the course of performing official duties or because of the employee's official status. Specifically, this part applies to requests for: material contained in NTSB files; and any information or material acquired by an employee of the NTSB in the performance of official duties or as a result of the employee's status. Two sets of procedures are here established, dependent on the type of material sought. Rules governing requests for employee testimony, as opposed to material production, can be found at 49 CFR part 835. Document production shall not accompany employee testimony, absent compliance with this part and General Counsel approval.

§ 837.3 Published reports, material contained in the public accident investigation dockets, and accident database data.

(a) Demands for material contained in the NTSB's official public docket files of its accident investigations, or its computerized accident database(s) shall be submitted, in writing, to the Public Inquiries Branch. Demands for specific published reports and studies should be submitted to the National Technical Information Service. The Board does not maintain stock of these items. Demands for information collected in particular accident investigations and made a part of the public docket should be submitted to the Public Inquiries Branch or, directly, to our contractor. For information regarding the types of documents routinely issued by the Board, see 49 CFR part 801.

(b) No subpoena shall be issued to obtain materials subject to this paragraph, and any subpoena issued shall be required to be withdrawn prior to release of the requested information. Payment of reproduction fees may be required in advance.

§ 837.4 Other material.

(a) *Production prohibited unless approved.* Except in the case of the material referenced in § 837.3, no employee or former employee of NTSB shall, in response to a demand of a private litigant, court, or other authority, produce any material contained in the files of the NTSB (whether or not agency records under 5 U.S.C. 552) or produce any material acquired as part of the performance of the person's official duties or because of the person's official status, without the prior written approval of the General Counsel.

(b) *Procedures to be followed for the production of material under this paragraph.*

(1) All demands for material shall be submitted to the General Counsel at NTSB headquarters, Washington, DC 20594. If an employee receives a demand, he shall forward it immediately to the General Counsel.

(2) Each demand must contain an affidavit by the party seeking the material or his attorney setting forth the material sought and its relevance to the proceeding, and containing a certification, with support, that the information is not available from other sources, including Board materials described in §§ 837.3 and part 801 of this chapter.

(3) In the absence of General Counsel approval of a demand, the employee is not authorized to comply with the demand.

(4) The General Counsel shall advise the requester of approval or denial of the demand, and may attach whatever conditions to approval considered appropriate or necessary to promote the purposes of this part. The General Counsel may also permit exceptions to any requirement in this part when necessary to prevent a miscarriage of justice, or when the exception is in the best interests of the NSTB and/or the United States.

PART 840—RULES PERTAINING TO NOTIFICATION OF RAILROAD ACCIDENTS

Sec.
840.1 Applicability.
840.2 Definitions.
840.3 Notification of railroad accidents.
840.4 Information to be given in notification.
840.5 Inspection, examination and testing of physical evidence.
840.6 Priority of Board investigations.

AUTHORITY: Sec. 304(a)(1)(c), Independent Safety Board Act of 1974, as amended (49 U.S.C. 1903).

§ 840.1 Applicability.

This part contains the Safety Board's accident notification requirements, and its authority for inspection, examination, and testing of physical evidence, and describes the exercise of the Safety Board's priority accorded to its activities when investigating railroad accidents.

[47 FR 49408, Nov. 1, 1982]

§ 840.2 Definitions.

As used in this part, the following words or phrases are defined as follows:

(a) *Railroad* means any system of surface transportation of persons or property over rails. It includes, but is not limited to, line-haul freight and passenger-carrying railroads, and rapid

transit, commuter, scenic, subway, and elevated railways.

(b) *Accident* means any collision, derailment, or explosion involving railroad trains, locomotives, and cars; or any other loss-causing event involving the operation of such railroad equipment that results in a fatality to a passenger or employee, or the emergency evacuation of persons.

(c) *Joint operations* means rail operations conducted on a track used jointly or in common by two or more railroads subject to this part, or operation of a train, locomotive, or car by one railroad over the track of another railroad.

(d) *Fatality* means the death of a person either at the time an accident occurs or within 24 hours thereafter.

[41 FR 13925, Apr. 1, 1976, as amended at 47 FR 49408, Nov. 1, 1982]

§ 840.3 Notification of railroad accidents.

The operator of a railroad shall notify the Board by telephoning the National Response Center at telephone 800–424–0201 at the earliest practicable time after the occurrence of any one of the following railroad accidents:

(a) No later than 2 hours after an accident which results in:

(1) A passenger or employee fatality or serious injury to two or more crewmembers or passengers requiring admission to a hospital;

(2) The evacuation of a passenger train;

(3) Damage to a tank car or container resulting in release of hazardous materials or involving evacuation of the general public; or

(4) A fatality at a grade crossing.

(b) No later than 4 hours after an accident which does not involve any of the circumstances enumerated in paragraph (a) of this section but which results in:

(1) Damage (based on a preliminary gross estimate) of $150,000 or more for repairs, or the current replacement cost, to railroad and nonrailroad property; or

(2) Damage of $25,000 or more to a passenger train and railroad and nonrailroad property.

(c) Accidents involving joint operations must be reported by the railroad that controls the track and directs the movement of trains where the accident has occurred.

(d) Where an accident for which notification is required by paragraph (a) or (b) of this section occurs in a remote area, the time limits set forth in that paragraph shall commence from the time the first railroad employee who was not at the accident site at the time of its occurrence has received notice thereof.

[53 FR 49152, Dec. 6, 1988]

§ 840.4 Information to be given in notification.

The notice required by § 840.3 shall include the following information:

(a) Name and title of person reporting.

(b) Name of railroad.

(c) Location of accident (relate to nearest city).

(d) Time and date of accident.

(e) Description of accident.

(f) Casualties:

(1) Fatalities.

(2) Injuries.

(g) Property damage (estimate).

(h) Name and telephone number of person from whom additional information may be obtained.

[41 FR 13925, Apr. 1, 1976]

§ 840.5 Inspection, examination and testing of physical evidence.

(a) Any employee of the Safety Board, upon presenting appropriate credentials is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things necessary for proper investigation, including examination or testing of any vehicle, rolling stock, track, or any part of any part of any such item when such examination or testing is determined to be required for purposes of such investigation.

(b) Any examination or testing shall be conducted in such a manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vehicle, rolling stock, or track, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating

to the transportation accident, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection shall be commenced and completed promptly and the results of such inspection, examination, or test made available to the parties.

[47 FR 49408, Nov. 1, 1982]

§ 840.6 Priority of Board investigations.

Any investigation of an accident conducted by the Safety Board shall have priority over all other investigations of such accident conducted by other Federal agencies. The Safety Board shall provide for the appropriate participation by other Federal agencies in any such investigation, except that such agencies may not participate in the Safety Board's determination of the probable cause of the accident. Nothing in this section impairs the authority of other Federal agencies to conduct investigations of an accident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident. The Safety Board and other Federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner.

[47 FR 49408, Nov. 1, 1982]

PART 845—RULES OF PRACTICE IN TRANSPORTATION; ACCIDENT/INCIDENT HEARINGS AND REPORTS

Sec.

845.1 Applicability.
845.2 Nature of hearing.
845.3 Sessions open to the public.

Subpart A—Initial Procedure

845.10 Determination to hold hearing.
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845.12 Notice of hearing.
845.13 Designation of parties.

Subpart B—Conduct of Hearing

845.20 Powers of chairman of board of inquiry.
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Subpart C—Board Reports

845.40 Accident report.
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Subpart D—Public Record

845.50 Public docket.
845.51 Investigation to remain open.

AUTHORITY: Title VII, Federal Aviation Act of 1958, as amended (49 U.S.C. 1441 *et seq.*); and the Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2166 (49 U.S.C. 1901 *et seq.).*

SOURCE: 44 FR 34419, June 14, 1979, unless otherwise noted.

§ 845.1 Applicability.

Unless otherwise specifically ordered by the National Transportation Safety Board (Board), the provisions of this part shall govern all transportation accident investigation hearings conducted under the authority of section 304(b) of the Independent Safety Board Act of 1974 (49 U.S.C. 1903(b)) and accident reports issued by the Board.

§ 845.2 Nature of hearing.

Transportation accident hearings are convened to assist the Board in determining cause or probable cause of an accident, in reporting the facts, conditions, and circumstances of the accident, and in ascertaining measures which will tend to prevent accidents and promote transportation safety. Such hearings are factfinding proceedings with no formal issues and no adverse parties and are not subject to the provisions of the Administrative Procedure Act (Pub. L. 89–554, 80 Stat. 384 (5 U.S.C. 554)).

[44 FR 34419, June 14, 1979; 44 FR 39181, July 5, 1979]

§ 845.3 Sessions open to the public.

(a) All hearings shall normally be open to the public (subject to the provision that any person present shall not be allowed at any time to interfere with the proper and orderly functioning of the board of inquiry).

(b) Sessions shall not be open to the public when evidence of a classified nature or which affects national security is to be received.

Subpart A—Initial Procedure

§ 845.10 Determination to hold hearing.

The Board may order a public hearing as part of an accident investigation whenever such hearing is deemed necessary in the public interest: *Provided*, that if a quorum of the Board is not immediately available in the event of a catastrophic accident, the determination to hold a public hearing may be made by the Chairman of the Board.

§ 845.11 Board of inquiry.

The board of inquiry shall consist of a Member of the Board who shall be chairman of the board of inquiry, and such other employees as may be designated by the chairman of the board of inquiry. Assignment of a Member to serve as the chairman of each board of inquiry shall be determined by the Board. The board of inquiry shall examine witnesses and secure, in the form of a public record, all known facts pertaining to the accident or incident and surrounding circumstances and conditions from which cause or probable cause may be determined and recommendations for corrective action may be formulated.

[49 FR 32853, Aug. 17, 1984]

§ 845.12 Notice of hearing.

The chairman of the board of inquiry shall designate a time and place for the hearing which meets the needs of the Board. Notice to all known interested persons shall be given.

§ 845.13 Designation of parties.

(a) The chairman of the board of inquiry shall designate as parties to the hearing those persons, agencies, companies, and associations whose participation in the hearing is deemed necessary in the public interest and whose special knowledge will contribute to the development of pertinent evidence. Parties shall be represented by suitable qualified technical employees or members who do not occupy legal positions.

(b) No party shall be represented by any person who also represents claimants or insurers. Failure to comply with this provision shall result in loss of status as a party.

[44 FR 34419, June 14, 1979, as amended at 51 FR 7278, Mar. 3, 1986]

Subpart B—Conduct of Hearing

§ 845.20 Powers of chairman of board of inquiry.

The chairman of the board of inquiry, or his designee, shall have the following powers:

(a) To designate parties to the hearing and revoke such designations;

(b) To open, continue, or adjourn the hearing;

(c) To determine the admissibility of and to receive evidence and to regulate the course of the hearing;

(d) To dispose of procedural requests or similar matters; and

(e) To take any other action necessary or incident to the orderly conduct of the hearing.

[44 FR 34419, June 14, 1979; 44 FR 39181, July 5, 1979]

§ 845.21 Hearing officer.

The hearing officer, upon designation by the Chairman of the Board, shall have the following powers:

(a) To give notice concerning the time and place of hearing;

(b) To administer oaths and affirmations to witnesses; and

(c) To issue subpenas requiring the attendance and testimony of witnesses and production of documents.

§ 845.22 Technical panel.

The Director, Bureau of Accident Investigation, or the Director, Bureau of Field Operations, shall designate members of the Board's technical staff to participate in the hearing and initially develop the testimony of witnesses.

[49 FR 32853, Aug. 17, 1984]

§ 845.23 Prehearing conference.

(a) Except as provided in paragraph (d) of this section for expedited hearings, the chairman of the board of inquiry shall hold a prehearing conference with the parties to the hearing at a convenient time and place prior to the hearing. At such prehearing conference, the parties shall be advised of the witnesses to be called at the hearing, the areas in which they will be examined, and the exhibits which will be offered in evidence.

(b) Parties shall submit at the prehearing conference copies of any additional documentary exhibits they desire to offer. (Copies of all exhibits proposed for admission by the board of inquiry and the parties shall be furnished to the board of inquiry and to all parties, insofar as available at that time.)

(c) A party who, at the time of the prehearing conference, fails to advise the chairman of the board of inquiry of additional exhibits he intends to submit, or additional witnesses he desires to examine, shall be precluded from introducing such evidence unless the chairman of the board of inquiry determines for good cause shown that such evidence should be admitted.

(d) *Expedited hearings.* When time permits, the chairman of the board of inquiry may hold a prehearing conference. In the event that an expedited hearing is held, the requirements in paragraphs (b) and (c) of this section concerning the identification of witnesses, exhibits or other evidence may be waived by the chairman of the board of inquiry.

§ 845.24 Right of representation.

Any person who appears to testify at a public hearing shall be accorded the right to be accompanied, represented, or advised by counsel or by any other duly qualified representative.

§ 845.25 Examination of witnesses.

(a) Witnesses shall be initially examined by the board of inquiry or its technical panel. Following such examination, parties to the hearing shall be given the opportunity to examine such witnesses.

(b) Materiality, relevancy, and competency of witness testimony, exhibits, or physical evidence shall not be the subject of objections in the legal sense by a party to the hearing or any other person. Such matters shall be controlled by rulings of the chairman of the board of inquiry on his own motion. If the examination of a witness by a party is interrupted by a ruling of the chairman of the board of inquiry, opportunity shall be given to show materiality, relevancy, or competency of the testimony or evidence sought to be elicited from the witness.

§ 845.26 Evidence.

The chairman of the board of inquiry shall receive all testimony and evidence which may be of aid in determining the cause of accident. He may exclude any testimony or exhibits which are not pertinent to the investigation or are merely cumulative.

§ 845.27 Proposed findings.

Any party may submit proposed findings to be drawn from the testimony and exhibits, a proposed probable cause, and proposed safety recommendations designed to prevent future accidents. The proposals shall be submitted within the time specified by the presiding officer at the close of the hearing, and shall be made a part of the public docket. Parties to the hearing shall serve copies of their proposals on all other parties to the hearing.

[48 FR 52740, Nov. 22, 1983]

§ 845.28 Stenographic transcript.

A verbatim report of the hearing shall be taken. Copies of the transcript may be obtained by any interested person from the Board or from the court reporting firm preparing the transcript upon payment of the fees fixed therefor. (See part 801, Appendix—Fee Schedule.)

§ 845.29 Payment of witnesses.

Any witness subpenaed to attend the hearing under this part shall be paid such fees for his travel and attendance as shall be certified by the hearing officer.

Subpart C—Board Reports

§ 845.40 Accident report.

(a) The Board will issue a detailed narrative accident report in connection with the investigation into those accidents which the Board determines to warrant such a report. The report will set forth the facts, conditions and circumstances relating to the accident and the probable cause thereof, along with any appropriate recommendations formulated on the basis of the investigation.

(b) The probable cause and facts, conditions, and circumstances of all other accidents will be reported in a manner and form prescribed by the Board.

§ 845.41 Petitions for reconsideration or modification.

(a) Petitions for reconsideration or modification of the Board's findings and determination of probable cause filed by a party to an investigation or hearing or other person having a direct interest in the accident investigation will be entertained only if based on the discovery of new evidence or on a showing that the Board's findings are erroneous. The petitions shall be in writing. Petitions which are repetitious of proposed findings submitted pursuant to § 845.27, or of positions previously advanced, and petitions filed by a party to the hearing who failed to submit proposed findings pursuant to § 845.27 will not be entertained. Petitions based on the discovery of new matter shall: identify the new matter; contain affidavits of prospective witnesses, authenticated documents, or both, or an explanation of why such substantiation is unavailable; and state why the new matter was not available prior to Board's adoption of its findings. Petitions based on a claim of erroneous findings shall set forth in detail the grounds relied upon.

(b) When a petition for reconsideration or modification is filed with the Board, copies of the petition and any supporting documentation shall be served on all other parties to the investigation or hearing and proof of service shall be attached to the petition. The other parties may file comments no later than 90 days after service of the petition.

(c) Oral presentation before the Board normally will not form a part of proceedings under this part. However, the Board may permit oral presentation where a party or interested person makes an affirmative showing that the written petition for reconsideration or modification is an insufficient means to present the party's or person's position to the Board. Where oral presentation is allowed, the Board will specify the issues to be addressed and all parties to the investigation or hearing will be given notice and the opportunity to participate.

[48 FR 52740, Nov. 22, 1983]

Subpart D—Public Record

§ 845.50 Public docket.

(a) The public docket shall include all factual information concerning the accident. Proposed findings submitted pursuant to § 831.12 or § 845.27 and petitions for reconsideration and modification submitted pursuant to § 845.41, comments thereon by other parties, and the Board's rulings, shall also be placed in the public docket.

(b) The docket shall be established as soon as practicable following the accident, and material shall be added thereto as it becomes available. Where a hearing is held, the exhibits will be introduced into the record at the hearing.

(c) A copy of the docket shall be made available to any person for review at the Washington office of the Board. Copies of the material in the docket may be obtained, upon payment of the cost of reproduction, from the Public Inquiries Section, Bureau of Administration, National Transportation Safety Board, Washington, DC 20594.

[44 FR 34419, June 14, 1979, as amended at 48 FR 52740, Nov. 22, 1983]

§ 845.51 Investigation to remain open.

Accident investigations are never officially closed but are kept open for the submission of new and pertinent evidence by any interested person. If the Board finds that such evidence is relevant and probative, it shall be made a

part of the docket and, where appropriate, parties will be given an opportunity to examine such evidence and to comment thereon.

PART 850—COAST GUARD—NATIONAL TRANSPORTATION SAFETY BOARD MARINE CASUALTY INVESTIGATIONS

Sec.

850.1 Purpose.
850.3 Relationship to Coast Guard marine investigation regulations and procedures.
850.5 Definitions.
850.10 Preliminary investigation by the Coast Guard.
850.15 Marine casualty investigation by the Board.
850.20 Cause or probable cause determinations from Board investigation.
850.25 Coast Guard marine casualty investigation for the Board.
850.30 Procedures for Coast Guard investigation.
850.35 Records of the Coast Guard and the Board.

AUTHORITY: Sec. 304(a)(1)(E), Independent Safety Board Act of 1974, Pub. L. 93–633, 88 Stat. 2168 (49 U.S.C. 1903).

SOURCE: 42 FR 61204, Dec. 1, 1977, unless otherwise noted.

§ 850.1 Purpose.

This part prescribes the joint regulations of the National Transportation Safety Board and the Coast Guard for the investigation of marine casualties.

[47 FR 46089, Oct. 15, 1982]

§ 850.3 Relationship to Coast Guard marine investigation regulations and procedures.

(a) The Coast Guard's responsibility to investigate marine casualties is not eliminated nor diminished by the regulations in this part.

(b) In those instances where the Board conducts an investigation in which the Coast Guard also has responsibility under R.S. 4450 (46 U.S.C. 239), the proceedings are conducted independently, but so as to avoid duplication as much as possible.

§ 850.5 Definitions.

As used in this part:

(a) *Act* means Title III of Pub. L. 93–633, the Independent Safety Board Act of 1974 (49 U.S.C. 1901, *et seq.*).

(b) *Board* means the National Transportation Safety Board.

(c) *Chairman* means the Chairman of the National Transportation Safety Board.

(d) *Commandant* means the Commandant of the Coast Guard.

(e) *Major marine casualty* means a casualty involving a vessel, other than a public vessel, that results in—

(1) The loss of six or more lives;

(2) The loss of a mechanically propelled vessel of 100 or more gross tons;

(3) Property damage initially estimated as $500,000 or more; or

(4) Serious threat, as determined by the Commandant and concurred in by the Chairman, to life, property, or the environment by hazardous materials.

(f) *Public vessel* means a vessel owned by the United States, except a vessel to which the Act of October 25, 1919, c. 82 (41 Stat. 305, 46 U.S.C. 363) applies.

(g) *Vessel of the United States* means a vessel—

(1) Documented, or required to be documented, under the laws of the United States;

(2) Owned in the United States; or

(3) Owned by a citizen or resident of the United States and not registered under a foreign flag.

§ 850.10 Preliminary investigation by the Coast Guard.

(a) The Coast Guard conducts the preliminary investigation of marine casualties.

(b) The Commandant determines from the preliminary investigation whether:

(1) The casualty is a major marine casualty; or

(2) The casualty involves a public and a nonpublic vessel and at least one fatality or $75,000 in property damage; or

(3) The casualty involves a Coast Guard and a nonpublic vessel and at least one fatality or $75,000 in property damage; or

(4) The casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions, e.g., search and rescue, aids to navigation, vessel traffic systems, commercial vessel safety, etc.

(c) The Commandant notifies the Board of a casualty described in paragraph (b) of this section.

[42 FR 61204, Dec. 1, 1977, as amended at 47 FR 46089, Oct. 15, 1982]

§ 850.15 Marine casualty investigation by the Board.

(a) The Board may conduct an investigation under the Act of any major marine casualty or any casualty involving public and nonpublic vessels. Where the Board determines it will convene a hearing in connection with such an investigation, the Board's rules of practice for transportation accident hearings in 49 CFR part 845 shall apply.

(b) The Board shall conduct an investigation under the Act when:

(1) The casualty involves a Coast Guard and a nonpublic vessel and at least one fatality or $75,000 in property damage; or

(2) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty involves a public and a nonpublic vessel and at least one fatality or $75,000 in property damage; or

(3) The Commandant and the Board agree that the Board shall conduct the investigation, and the casualty is a major marine casualty which involves significant safety issues relating to Coast Guard safety functions.

[47 FR 46090, Oct. 15, 1982]

§ 850.20 Cause or probable cause determinations from Board investigation.

After an investigation conducted by the Board under § 850.15, the Board determines cause or probable cause and issues a report of that determination.

§ 850.25 Coast Guard marine casualty investigation for the Board.

(a) If the Board does not conduct an investigation under § 850.15(a), (b)(2) or (3), the Coast Guard, at the request of the Board, may conduct an investigation under the Act unless there is an allegation of Federal Government misfeasance or nonfeasance.

(b) The Board will request the Coast Guard to conduct an investigation under paragraph (a) of this section within 48 hours of receiving notice under § 850.10(c).

(c) The Coast Guard will advise the Board within 24 hours of receipt of a request under paragraph (b) of this section whether the Coast Guard will conduct an investigation under the Act.

[47 FR 46090, Oct. 15, 1982]

§ 850.30 Procedures for Coast Guard investigation.

(a) The Coast Guard conducts an investigation under § 850.25 using the procedures in 46 CFR 4.01–1 through 4.23–1.

(b) The Board may designate a person or persons to participate in every phase of an investigation, including on-scene investigation, that is conducted under the provisions of § 850.25.

(c) Consistent with Coast Guard responsibility to direct the course of the investigation, the person or persons designated by the Board under paragraph (b) of this section may:

(1) Make recommendations about the scope of the investigation.

(2) Call and examine witnesses.

(3) Submit or request additional evidence.

(d) The Commandant provides a record of the proceedings to the Board of an investigation of a major marine casualty under paragraph (a) of this section.

(e) The Board, under the Act, makes its determination of the facts, conditions, and circumstances, and the cause or probable cause of a major marine casualty, using the record of the proceedings provided by the Commandant under paragraph (d) of this section and any additional evidence the Board may acquire under its own authority.

(f) An investigation by the Coast Guard under this section is both an investigation under the Act and under R.S. 4450 (46 U.S.C. 239).

§ 850.35 Records of the Coast Guard and the Board.

(a) Records of the Coast Guard made under § 850.30 are available to the public under 49 CFR part 7.

(b) Records of the Board made under §§ 850.20 and 850.30 are available to the public under 49 CFR part 801.

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FINDING AIDS

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