

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 659**

[Docket No. 92–D]

RIN 2132-AA39

Rail Fixed Guideway Systems; State Safety Oversight**AGENCY:** Federal Transit Administration, DOT.**ACTION:** Final rule.

SUMMARY: As required by the Intermodal Surface Transportation Efficiency Act of 1991, the Federal Transit Administration (FTA) issues a rule requiring States to oversee the safety of rail fixed guideway systems not regulated by the Federal Railroad Administration (FRA). This document accordingly sets forth FTA's State safety oversight program, which is intended to improve the safety of rail fixed guideway systems.

EFFECTIVE DATE: This regulation is effective January 26, 1996. The incorporation by reference of certain documents in the regulation is approved by the Director of the Federal Register as of January 26, 1996.

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I. Background

The Intermodal Surface Transportation Efficiency Act of 1991 (Pub. L. 102-240), enacted into law on December 18, 1991, added section 28 to the Federal Transit Act (recently codified at 49 U.S.C. 5330 (1994)), which requires the Federal Transit Administration to issue regulations creating a State oversight program. On June 25, 1992, FTA issued an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public comment on a range of issues to be addressed in drafting a Notice of Proposed Rulemaking (NPRM). 57 FR 28572. The agency held hearings on the ANPRM in Los Angeles, California; Portland, Oregon; and Washington, DC. Thirty-five entities either submitted comments to the docket or testified at one of the three hearings, including fifteen transit authorities, three utility commissions, eight States, one engineering firm, two transit associations, one labor union, one Federal agency, one transit supplier, two representatives from the people mover industry, and one transportation consultant.

On December 9, 1993, FTA published its NPRM (58 FR 64855) and today publishes its final rule, which requires States to oversee the safety of rail fixed guideway systems.

A. 49 U.S.C. 5330

In general, section 5330 applies only to those States in which a rail fixed guideway system operates that is not regulated by the Federal Railroad Administration, and requires any such State to designate a State oversight agency to be responsible for overseeing the rail fixed guideway system's safety practices. FTA is required to issue a rule implementing the program and may withhold Federal funds if a State fails to implement the rule.

More specifically, the statute describes the responsibilities of the State and the agency the State designates to provide oversight, which in most instances will be an agency of the State because most rail fixed guideway systems operate in only one State. When a rail fixed guideway system operates in more than one State, however, the statute permits the affected States to designate any entity, other than the transit agency itself, to oversee that rail fixed guideway system.

Whether the oversight agency is a State agency or some other entity, it must require each affected transit agency to create a system safety program plan, which the oversight agency must review and approve. The oversight agency must also investigate accidents

and hazardous conditions. Once a hazardous condition has been discovered, the oversight agency must require the transit agency to correct or eliminate it.

If a State has not met these requirements or has not made adequate efforts to comply with them, the Secretary may withhold up to five percent of a fiscal year's apportionment under FTA's formula program for urbanized areas (formerly section 9) attributable to the State or an affected urbanized area in the State.

B. Summary of the Final Rule

The rule delineates the responsibilities of the State, the oversight agency, the transit agency, and the FTA.

The State

Under the rule, the primary responsibility of the State is to designate an entity or entities to oversee the safety of a rail fixed guideway system. When the rail fixed guideway system operates only within a single State, that entity or entities must be an agency of the State; when it operates in more than one State, the affected States may designate a single entity to oversee that system. In neither case may the State designate the transit agency as the oversight agency.

To ensure the oversight agency's candid assessment of the probable cause of a particular accident or unacceptable hazardous condition, the rule allows the State to enact legislation prohibiting the disclosure of oversight agency investigation reports.

The Oversight Agency

The rule directs the oversight agency, or an entity acting on its behalf, to develop a system safety program standard, a document that establishes the relationship between the oversight and transit agencies and specifies the procedures that the transit agency must follow. The system safety program standard must, at a minimum, comply with the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans" ("APTA Guidelines"), a manual widely used throughout the transit industry and available from the American Public Transit Association (APTA), 1201 New York Avenue, N.W., Washington, D.C. 20005-3917, or the Federal Transit Administration, Office of Safety and Security, 400 7th Street, S.W., Washington, D.C. 20590. The APTA Guidelines assist in developing safety practices to reduce the likelihood of unintentional events that may lead to death, injury, or property damage. In

addition, the system safety program standard must include specific provisions addressing "security" matters, intentional wrongful or criminal acts, such as muggings, rapes, murders, assaults, or terrorist activities. To develop this portion of the system safety program plan, we suggest that the oversight agency use FTA's "Transit Security Procedures Guide" and "Transit System Security Program Planning Guide," available from the FTA at the address above.

The oversight agency must require the transit agency to develop a system safety program plan that complies with the oversight agency's system safety program standard. By January 1, 1997, the oversight agency must review and approve, in writing, the transit agency's system safety program plan; however, the "security" provisions of the system safety program plan must be approved initially by the oversight agency by January 1, 1998. After the initial approvals, the oversight agency must review, as necessary, the transit agency's system safety program plan and determine whether it should be updated. All oversight agency approvals must be in writing.

The rule allows the oversight agency to prohibit the transit agency from publicly releasing the "security" provisions in the system safety program plan.

The oversight agency must require the transit agency to conduct safety audits according to the Internal Safety Audit Process detailed in checklist number 9 of the APTA Guidelines. Once a year the transit agency must compile and submit an audit report to the oversight agency or an entity acting on its behalf for review.

Aside from reviewing the transit agency's safety audit reports, the oversight agency must conduct on-site safety reviews every three years. In a safety review, the oversight agency must assess whether the transit agency's actual safety practices and procedures comply with its system safety program plan. Once this review is completed, the oversight agency must prepare a report containing its findings and recommendations, an analysis of the efficacy of the transit agency's system safety program plan, and a determination of whether the system safety program plan should be updated.

The oversight agency must require the transit agency to report the occurrence of accidents and unacceptable hazardous conditions within a period of time specified by the oversight agency. The oversight agency must investigate such reports in accordance with procedures it has established. The

oversight agency may conduct its own investigation, use a contractor to conduct an investigation, or rely on the investigation conducted by the transit agency or the National Transportation Safety Board (NTSB).

After the oversight agency has investigated an accident or unacceptable hazardous condition, it must require the transit agency to minimize, control, correct, or eliminate it, in accordance with a corrective action plan drafted by the transit agency and approved by the oversight agency.

The oversight agency must submit three kinds of reports to FTA: an initial submission, an annual submission, and a periodic submission. In the initial submission, the oversight agency lists the names and addresses of the rail fixed guideway systems it oversees. This report must be updated only when that information changes. In the annual submissions, the oversight agency must submit to FTA a publicly available report summarizing its oversight activities for the past year. Periodically, an oversight agency must submit to FTA status reports of accidents, hazardous conditions, and corrective action plans. The oversight agency must submit these reports only if FTA so requests.

The Transit Agency

The transit agency must develop a system safety program plan that complies with the oversight agency's system safety program standard. It must conduct safety audits that comply with the Internal Safety Audit Process, APTA Guidelines, checklist number 9, and draft and submit to the oversight agency a report summarizing the results of the safety audit. The transit agency must classify hazardous conditions according to the APTA Guidelines' Hazard Resolution Matrix. The transit agency must report, within the timeframe specified by the oversight agency, any accident or unacceptable hazardous condition that has occurred on the rail fixed guideway system. The transit agency may, if the oversight agency so chooses, conduct investigations on behalf of the oversight agency. Once an investigation has been completed, the transit agency must obtain the oversight agency's approval of a corrective action plan and then implement the plan so as to minimize, control, correct, or eliminate the particular unacceptable hazardous condition or condition that has caused an accident.

The Federal Transit Administration

The FTA assesses whether the State has complied with the rule or has made adequate efforts to comply with it. If the FTA determines that the State is not in

compliance or has not made adequate efforts to comply, it may withhold up to five percent of the amount apportioned for use in the State or affected urbanized areas under FTA's formula program for urbanized areas (formerly section 9). Also, FTA receives reports from the oversight agency.

C. Overview of the Comments

The FTA received 60 comments in response to the NPRM. FTA considered all comments filed in a timely manner as well as all statements and material presented at the public hearings on the rule. The breakdown among commenter categories is as follows:

Transit Agencies	27
State DOTs	9
Public Utilities	6
Cities.....	1
Federal Agencies.....	2
Independent Consultants.....	8
Trade Associations	2
Safety Societies/Associations.....	5

In Section II below, we discuss in detail the public comments addressing issues raised in the NPRM. One such issue, how the term "rail fixed guideway system" should be defined, affects the scope of the rule. Another key issue, how the system safety program standard should be developed and what it should include, will directly affect the relationship between the oversight and transit agencies. Most important, we examine whether the oversight agency should use the APTA Guidelines or Military Standard 882B or 882C (MIL-STD 882B or 882C) to develop its system safety program standard. We also examine whether the system safety program standard should cover the planning, design, and construction phases of a rail fixed guideway system's life cycle; EPA and OSHA-type matters; "security"; and other issues.

Also, we discuss the oversight agency's role in investigating accidents and unacceptable hazardous conditions. A related issue concerns whether investigation reports should be kept confidential.

For additional discussion on individual issues, see also the Section-By-Section Analysis below in Section III.

II. Discussion of the Comments

A. Rail Fixed Guideway System

The first issue is the definition of "rail fixed guideway system." Statutes give us limited guidance in this regard; section 5330, the authority for this rulemaking, states that it applies "only to States that have rail fixed guideway mass transportation systems not subject

to regulation by the Federal Railroad Administration." Another provision, 49 U.S.C. § 5302, defines "mass transportation" as "transportation by a conveyance that provides regular and continuing general or special transportation to the public * * *." Finally, 49 U.S.C. § 20102(1), which defines railroads subject to regulation by the FRA, specifically excludes "rapid transit operations within an urban area that are not connected to the general railroad system of transportation." Of mass transportation systems, generally, only commuter railroads are regulated by the FRA. Therefore, we asked in both the ANPRM and the NPRM whether we should adopt a narrow definition and include only light and heavy rail systems or a broad definition and include other rail systems, such as monorails, inclined planes, trolley systems, and funiculars, as well.

Many commenters to the ANPRM did not address this issue. Those that responded directed their comments to specific issues; for instance, six commenters discussed including people movers, while only two commenters proposed a definition for FTA's consideration. In the NPRM, FTA proposed to define "rail fixed guideway system" as

Any public transportation facility not regulated by the Federal Railroad Administration, which occupies a separate right-of-way exclusively for public transportation or uses a steel-wheeled catenary or other rail system sharing a right-of-way with other forms of transportation and, which is included in the calculation of fixed guideway route miles under section 9 of the FT Act.

As we explained in the preamble to the NPRM, this definition would cover light and heavy rail, cable cars, trolleys, people movers, and inclined planes so long as their mileage is included in the calculation of fixed guideway route miles under section 9 of the FT Act. We further noted that the Morgantown People Mover, which is not used in the calculation of route miles under the section 9 formula program, would not be covered by the proposed rule, while the Detroit People Mover, which is used in the calculation of the section 9 formula would be covered. We further noted that the definition also would not cover rubber-wheeled trolley buses that use a catenary system, as they are subject to motor vehicle regulations.

Many of the commenters to the NPRM urged FTA to adopt the narrow definition, with most of them suggesting that the definition be limited to light and heavy rail systems only. In support of their contention, some of these commenters noted that in the past,

NTSB had recommended that FTA oversee the safety of rapid rail transit systems only, although these commenters stated that light rail systems should be covered by the rule as well. Concerning people movers, inclined planes, amusement rides, funiculars, historical trolleys, cable cars, and other rail transit systems, these commenters opposed their inclusion, opining that they do not present the same level of risk to public safety as posed by heavy and light rail systems.

NTSB also commented on this issue by stating that although it had no accident investigation experience with people movers or incline planes that would provide a basis to determine if these systems should be covered by the FTA's regulations, the Board believe[s] that the safety of any system that regularly transports people should be monitored by an appropriate State or local agency. Limiting the definition of a rail fixed guideway system to those systems used by an urbanized area in the calculation of fixed guideway route miles under Section 9 of the Federal Transit Act would apparently exclude some of these systems from the proposed regulation. Further, it is possible that an urbanized area could not count in the statutory formula to determine Section 9 Federal funds the rail route miles of a particular system to avoid having the system covered by the proposed oversight regulation. In short, the Safety Board questions the need for the Section 9 limitation to the definition.

FTA Response. Although most commenters recommended that we cover only light and heavy rail systems, we agree with the NTSB that "any system that regularly transports people should be monitored by an appropriate State or local agency." Hence, the rule covers inclined planes, monorails, trolleys, automated guideways, and funiculars along with light, rapid, and heavy rail systems. We did, however, change the definition to clarify that guided busways are not covered.

We also made another change in light of NTSB's assertions that the proposed definition may exclude some systems that are not used to calculate fixed guideway route miles under FTA's formula grant program for urbanized areas. We do not believe this would be the case because FTA's grant program is based, in part, on the amount of "fixed guideway route miles" within an urbanized area. It is therefore in the urbanized area's interest to include as many systems as possible. Moreover, in most instances, a system that receives Federal funding under FTA's formula grant program for urbanized areas would have its mileage included in the calculation. The opposite, however, is not true; there are systems whose mileage is used in the calculation that do not receive funding under FTA's

formula grant program for urbanized areas. That is why we proposed covering those systems that are used in the calculation instead of just certain recipients of FTA funding; it is actually a broader category. Nevertheless, we have added a provision to cover any system that receives funding under FTA's formula grant program for urbanized areas or is used in the calculation of "fixed guideway route miles." This definition should cover most rail mass transit systems not regulated by the FTA.

B. System Safety Program Standard

Section 5330 requires FTA to issue regulations that direct the State oversight agency to develop "a safety program plan for each [rail] fixed guideway mass transportation system in the State." In the NPRM, we proposed to require the oversight agency to adopt a system safety program standard, which a transit agency would then use to develop its system safety program plan, the document used by the transit agency to ensure that it uses proper safety practices and procedures.

The NPRM further proposed that the oversight agency's "system safety program standard" comply, at a minimum, with the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans," ("APTA Guidelines"). In the preamble to the NPRM, we noted that we had considered adopting Military Standard 882B (MIL-STD 882B), which has been subsequently superseded by MIL-STD 882C, but found it unnecessary because APTA had developed its Guidelines by adapting MIL-STD 882B to the transit industry.

While most commenters favored the use of the APTA Guidelines, one commenter strongly favored the use of MIL-STD 882B or 882C to develop the system safety program standard. This commenter noted that:

[T]he discussion of the Proposed Rule indicates that the APTA requirement is equivalent to MIL-STD 882B, and that the APTA standard can therefore be used in place of the MIL-STD. It should be noted that the APTA standard is not equivalent to the military standard. There are significant and important philosophical differences between the two documents. The most important of the differences is that MIL-STD 882 specifies that system safety be started very early in the project, that it must be involved in the design of the system, that a specific order of precedence must be followed to increase safety, and that risk assessments must be based upon probability and severity. The APTA standard emphasizes the use of system safety for operational systems after they have been completed and put into service,

indicates that system safety is mostly concerned with operations and procedures, and implies that safety can be 'audited' into a system. While the APTA Manual does mention that system safety is needed during the design phases, the emphasis is clearly on later phases * * *. Another potential concern with the APTA Manual is that it describes the audit process in terms of determining whether or not the transit agency is following its system safety program, but is silent on the issue of determining whether or not that program can be expected to accomplish its goals. While this is appropriate for an organization such as APTA, it may not be appropriate for an Oversight Agency. It may be important for the Oversight Agency to review the Transit Agencies' plans with an eye toward trying to determine whether or not the plan is likely to result in an effective system safety program * * *.

This commenter also noted that MIL-STD 882C incorporates changes concerning "Software Safety."

FTA Response. This commenter has certainly made a convincing case for the adoption of MIL-STD 882B or 882C, and we emphasize that, although we have adopted the proposal as published in the NPRM, we have not precluded the use of either of those Military Standards. Instead, we have adopted the APTA Guidelines as a minimum standard the oversight agency must meet or exceed; because the APTA Guidelines were derived from MIL-STD 882B, an oversight agency that bases its system safety program standard on either MIL-STD 882B or 882C should meet or exceed the requirements of the APTA Guidelines. Moreover, by adopting the APTA Guidelines as a minimum standard, we accomplish two objectives: establishing a nation-wide baseline standard and giving a State more flexibility and control in developing its own program.

We do, in fact, urge the oversight agency to assess the APTA Guidelines in relation to MIL-STD 882B or 882C and decide which one best addresses its needs. We believe that an oversight agency that uses either MIL-STD 882B or 882C as a basis for its system safety program standard is well served, and we urge an oversight agency to at least consider those Military Standards in developing its own oversight program.

Although we have not mandated the use of MIL-STD 882B or 882C, we have addressed one of the concerns of this commenter, by adding a provision in the rule to require the oversight agency to determine the efficacy of the transit agency's system safety program plan and require the transit agency to update it, if necessary.

This commenter also commented that the MIL-STD 882C's section on

"Software Safety" is "of critical importance to modern transit systems"; we recommend that both the oversight agency and the transit agency assess whether that section meets the safety needs of the "rail fixed guideway system."

C. System Safety Program Plan—the Six Factors.

As mentioned above, under the NPRM the transit agency was to develop a system safety program plan that complied with the oversight agency's system safety program standard. In the preamble to the NPRM, we suggested that the system safety program plan should: (1) be endorsed by top management; (2) establish the safety goals and objectives of the transit agency; (3) identify safety issues; (4) require cooperation within the transit agency to address the identified safety issues; (5) recognize that achieving safety goals and objectives may require the involvement of entities other than the transit agency; and (6) provide a schedule for the implementation and revision of the system safety program plan. We then asked for comment on whether we should require these six factors in the final rule.

Only seven commenters responded to this issue, and none of them opposed the general concept of the six factors. Several of the commenters noted, however, that all six factors are included in the APTA Guidelines, making them unnecessary if FTA incorporates the APTA Guidelines into the final rule.

FTA Response. Since the six factors are included in the APTA Guidelines, which we have incorporated by reference into the final rule, the oversight agency must require the transit agency to address all six factors in its system safety program plan.

D. Planning, Design, and Construction.

In the preamble to the NPRM, we noted that section 5330 may be read

To apply only to the operation of rail fixed guideway systems, which would lead to the conclusion that the NPRM covers only those rail fixed guideway systems already in existence, or other systems only when they commence operations. On the other hand, if we were to interpret section [5330] to apply during the planning, design, and construction phases of a system, we would then have to decide when the State would be required to comply with this proposed rule. This would be especially difficult for those States where systems are in the planning stage, which can be a lengthy process, and it would be difficult to specify at what point the oversight agency would have to be established.

Of the commenters that responded to this issue, only a few favored covering the pre-operational phases of the rail fixed guideway system's life cycle. One of these commenters stated that "[t]o ensure that the design of facilities and systems results in optimal safety, the system safety approach has been shown to be highly effective and cost efficient."

The vast majority of the commenters were against covering the planning, design, and construction phases in this rule, stating in effect, that other mechanisms, *i.e.*, FTA's Program Management Oversight (PMO) process and the construction contract itself can ensure that safety is planned, designed, and constructed into new rail fixed guideway systems.

FTA Response. Although we agree that a system safety program plan should cover the planning, design, and construction of a "rail fixed guideway system," the language of section 5330 leads us to conclude that it covers only operating systems or systems about to commence operations. Section 5330 directs a State to establish and carry out a "safety program plan for each [rail] fixed guideway mass transportation system in the State," never mentioning the planning, design, and construction phases of a system's life cycle. Moreover, because of the lengthy planning, design, and construction phases of a system's life cycle, we believe that it is impractical, especially for a State planning its first "rail fixed guideway system," to require that a State create a bureaucracy years before a single passenger is served, when there are other mechanisms available to ensure that safety is designed, planned, and constructed into a new "rail fixed guideway system." This does not mean, however, that a State is precluded from creating an oversight agency that oversees the planning, design, and construction of a "rail fixed guideway system." On the contrary, we encourage the States to do so, although we do not, under this rule, require it. Also, we encourage the oversight agencies to work with PMOs to ensure that safety is designed, planned, and constructed into new "rail fixed guideway systems."

E. Accountability Factor.

While drafting the NPRM, we were concerned that the development of a State Safety Oversight Program would not be complete without some mechanism to ensure transit agencies' commitment to safety. To "institutionalize" this commitment and to meet the requirements of section 5330, we developed the "accountability factor," in which the oversight agency would require a transit agency to

identify tasks critical to safety and the persons responsible for performing those tasks. This concept was derived from section 207 of MIL-STD 882B, which concerns the "identification of safety-critical equipment and procedures." The "accountability factor" was intended to help the transit agency identify and correct problems.

Most of the commenters on this issue opposed the inclusion of the "accountability factor" in the rule because, in their opinion, it would not achieve its intended purpose of making systems safer. For instance, one commenter stated such a requirement would allow the oversight agency not just to oversee but to micromanage the transit agency; another claimed that it would become a "paperwork" exercise and actually hinder the development of safety practices and procedures. Yet another commenter stated that it would be used to "fix" blame. One commenter argued that the "accountability factor" was a "misapplication" of section 207 of MIL-STD 882B, which, according to this commenter, was developed to verify compliance with safety equipment and procedures, an activity distinct from system safety program activities. Last, some commenters indicated that the "accountability factor" was not necessary under the rule because a well-drafted system safety program plan incorporates accountability into it.

Although the NTSB favored the inclusion of the "accountability factor" in the final rule, it did not elaborate on its reasoning.

FTA Response. The final rule does not include the "accountability factor" because on balance, we have concluded that the oversight agency is best suited to meet the directives of section 5330(c)(1) to "establish[] * * * lines of authority [and] levels of responsibility and accountability * * *" for the rail fixed guideway system. We note that the APTA Guidelines checklist numbers 1 through 5 stress the development of a concept similar to the proposed "accountability factor."

F. EPA and OSHA Requirements.

We asked whether the system safety program plan should address matters covered by the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). Four argued that it should; three were opposed. Those in favor supported a "comprehensive approach" to safety in which various safety issues or "disciplines" are integrated for a total prevention effort. Those in opposition were concerned about creating overlapping jurisdiction between the oversight agency and the State agency

with authority to enforce the EPA and OSHA laws and regulations.

FTA Response. By adopting the APTA Guidelines, which address OSHA and EPA matters in System Safety Checklist numbers 19 and 20, respectively, we have required that these matters be included in the system safety program plan. Although this allows the possibility of jurisdictional conflicts among State agencies, the benefits of the oversight agency's adopting a total approach to safety outweigh this possibility. Moreover, a State can plan to reduce or eliminate any duplicative jurisdiction between the oversight agency and any other State agency with jurisdiction over EPA and OSHA matters.

G. Security.

In the preamble to the NPRM, we asked whether the system safety program plan should address security matters, and if so, what specifically should be included. Many commenters responded to this question, most negatively; some contended that security matters should be handled by law enforcement personnel and not by transit safety professionals, others opined that requiring the system safety program plan to address security matters is outside the scope of section 5330, and others stated that whether transit security matters should be included in the system safety program plan should be decided by State and local transit officials and not mandated by the Federal government.

More particularly, one commenter noted that "security is a separate issue which requires separate treatment, separate techniques, separate concerns, and separate disciplines." This commenter continued:

[A]lthough, many times the public may perceive their safety as being 'freedom from assault or attack from other individuals', normally professionals in the industry define safety in association with unintentional events or conditions (accidents), whereas, security is defined as being associated with intentional acts (usually illegal acts). The causes and the control measures for these two situations (safety and security) are entirely different * * *. One good reason for keeping these separate is the different type of management required. Typically, effective management of security requires law enforcement type management philosophies, whereas effective management of safety requires entirely different (and sometimes opposite) kinds of thinking. Management of these two functions must be separated, because of the different skills, philosophies, management styles, and kinds of managers required.

Other commenters noted another important difference between safety

procedures and security measures: Safety procedures, policies, and processes can be made public and still be effective, whereas security measures, to be effective, must be kept confidential. Thus, these commenters reasoned, security measures should not be included in a publicly available document, such as a system safety program plan.

The commenters in favor of requiring the system safety program plan to address security matters focused on the similarities between security measures and safety issues. Most notably, these commenters stated, safety and security procedures are both forms of risk management; "[s]afety is the management of the risk to persons and property from accidental or negligent loss * * [while] security is the management of the risk to persons and property from criminal acts."

Last, some commenters contended that emergency planning and response procedures were the same for both safety and security events. Four commenters recommended that FTA include security only when it relates to emergency planning and response.

FTA Response. Because we agree with the commenter who noted that safety and security are both forms of risk management and because of recent terrorist acts, we have decided to require the inclusion of security considerations in the system safety program plan. In response to another commenter, however, we have added a provision to the rule that will allow the security portion of the system safety program plan to be barred from public disclosure.

We disagree, however, with the argument that Congress did not intend section 5330 to include security. Section 5330(c)(1) states that "[a] State meets the requirement of this section if the State—establishes and is carrying out a safety program plan for each [rail] fixed guideway mass transportation system in the State * * *" [emphasis added]. According to Webster's Third New International Dictionary, "safety" means "the condition of being safe; freedom from exposure to danger, exemption from hurt, injury, or loss," whereas "security" means "the quality or state of being secure: as (a) freedom from danger: safety." It seems clear, therefore, that the meaning of safety encompasses the meaning of security. Moreover, according to the System Safety Glossary published in 1985, by the Transportation Safety Institute "safety" is defined as "[a] reasonable degree of freedom from those conditions that can cause injury or death to personnel, damage to or loss of equipment or

property; freedom from danger"; this would certainly cover intentional acts. Similarly, according to the Transit Security Program Planning Guide recently published by the FTA, "security" means "freedom from intentional danger," while "safety" means "freedom from danger." Therefore, section 5330 can be interpreted, and we do, to require the inclusion of security in the system safety program plan.

Other commenters indicated that security should not be included in the system safety program plan because safety and security are as different from each other as apples from oranges. One transit agency presented safety and security as two different disciplines requiring two different approaches and two different kinds of trained personnel. Thus, this commenter reasoned, the system safety program plan should not address security matters. In our view, however, safety and security risks are interrelated, especially from the perspective of transit passengers. We agree with the commenter who wrote:

[A]lthough the disciplines have been separated in their normal application, there is a trend for a united knowledge base of safety with security so that any type of hazard is examined for its implication as a security type of problem. As with other disciplines, safety and security requirements may be at odds requiring careful analysis of the potential hazards and threats against the transit system and the development of appropriate trade-off studies. The Transit Safety Professional needs to have security analyses in the curriculum of study and certification to ensure awareness of the issues and concerns related to security. In addition, security systems themselves require safety analyses to ensure that they are properly covered.

We also disagree with the commenter who recommended that only emergency response procedures be included in the system safety program plan. We note that the APTA Guidelines already contain a provision concerning emergency preparedness. While emergency preparedness is itself a valuable activity, it does not prevent either intentional or unintentional acts from occurring. An emergency preparedness plan is used to develop a response to an event, while the overall system safety program plan develops procedures to reduce the likelihood of either intentional or unintentional events from occurring.

H. Biennial Safety Reviews

In the proposed rule, the oversight agency would comprehensively review, on-site, the rail fixed guideway system's safety practices every two years. Most commenters objected to this provision.

Some maintained that a review every two years was unnecessary and burdensome; in support of their contention, they mentioned APTA's Rail Safety Audit Program, in which auditors employed by APTA review a rail fixed guideway system's safety practices every three years. They maintain that a three-year review schedule adequately addresses safety needs. One commenter indicated that APTA adopted a three-year schedule to give rail fixed guideway systems time to take corrective and other recommended actions. Another commenter, a State agency already overseeing rail fixed guideway systems, stated that it does not independently conduct on-site reviews, but instead observes the APTA auditors review a system; this commenter concluded that this approach works well for it and the rail fixed guideway systems under its jurisdiction. Some commenters urged us to specifically allow oversight agencies to use the APTA Rail Safety Audit Program.

Other commenters favored a flexible approach, in which the oversight and transit agencies schedule reviews appropriate for the age, size, and complexity of the rail fixed guideway system. One commenter recommended that we specify the exact requirements of a safety review.

FTA Response. Agreeing generally with the commenters, we have made the rule more flexible. For instance, the rule requires the oversight agency to review the transit agency's safety practices at least every three years instead of every two, as we had proposed. The oversight agency may conduct these reviews more frequently if it chooses. Moreover, the rule expressly allows the oversight agency to use a contractor to conduct the required review, which allows the oversight agency to use the APTA Rail Safety Audit Program or any other qualified contractor to conduct safety reviews.

Although one commenter had urged us to define specifically the requirements of a safety review, we have declined to do so. Instead, the oversight agency should determine for itself, based on the age, size, and complexity of the individual rail fixed guideway system within its jurisdiction, the exact extent of the review; however, it must be comprehensive, *i.e.*, cover all matters included in the transit agency's system safety program plan.

The process used by the California Public Utilities Commission (CPUC) illustrates how the rule can be flexible. Instead of using its staff to conduct comprehensive safety reviews, CPUC staff accompany and observe APTA

auditors who perform a comprehensive safety audit. This system allows CPUC personnel to cover the daily operation and maintenance activities of the rail fixed guideway system and conduct in-depth reviews of particular activities on an "apparent need" basis. For instance, CPUC's staff conducted in-depth reviews of track maintenance practices at five different rail fixed guideway systems. In short, an oversight agency could conduct its own safety reviews, contract them out completely, or adopt an approach similar to CPUC's, in which both a comprehensive safety review and an in-depth review of a particular system component is conducted by another contractor or oversight agency personnel.

One commenter recommended that the extent and frequency of safety reviews depends on the particular phase of the rail fixed guideway system's lifecycle. This commenter recommended that a safety audit be performed during the preliminary engineering phase to assure properly defined criteria, during the final design stage to assure that the criteria has been included in the specifications, during pre-revenue testing to assure the systems have been properly installed and the system tested and safety certified, then every two to three years when the system is operational, and more frequently if there are serious problems. We agree with this commenter, although we have not adopted his suggestions formally in the rule. Instead, we strongly urge oversight agencies to consider these kinds of factors when establishing a safety review process.

I. Safety Audits

FTA proposed to require the transit agency to conduct a "safety audit," a "methodical, ongoing, internal examination 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." The results of these safety audits were to be compiled every six months by the transit agency into a report to the oversight agency, which would review those reports as part of its monitoring function required under section 5330.

Nineteen commenters responded to this proposed safety audit process, with most of them objecting that such audits amount to a "paperwork exercise" that could be detrimental to the safe operation of a rail fixed guideway system. They argued that the "safety audits" and the "biennial reviews" were redundant and that auditing continuously was not necessary to

ensure the safe operation of a rail fixed guideway system. Some of these commenters recommended that FTA adopt a system of random periodic checks similar to the APTA review process; others recommended that the oversight agency set the timeframe for safety audits by the transit agency. Still others recommended that the frequency of safety audits be linked to the age, type, and speed of the system, maintaining that different rail fixed guideway systems have different safety auditing needs.

FTA Response. FTA had intended the "safety audit" process to be used in addition to the "Internal Safety Audit Process" in checklist number 9 of the APTA Guidelines, which apparently confused the commenters. To clarify our intent, we have withdrawn the proposed definition, "safety audit," and now require the oversight agency to develop a process that complies with APTA's "Internal Safety Audit Process." Although we make this change, we nevertheless encourage transit and oversight agencies to view safety and the safety auditing process as a routine, daily matter. As noted in the APTA Guidelines, "[t]he Internal Safety Audit Process * * * requires constant attention and activity."

To ensure that both transit and oversight agencies view the safety auditing process as a "constant activity," we have retained the requirement for the transit agency to complete and submit safety auditing reports to the oversight agency, a requirement in the APTA Guidelines, which states that audit reports are to be used as a "management tool." FTA had proposed semi-annual reports, which most commenters objected to as a "paperwork exercise." In response, we have changed the reporting time period from semi-annually to annually to reduce the paperwork burden.

J. Accident

To focus oversight agency accident investigations on serious events that may show a systemic safety problem, FTA proposed to define "accident" as "any event involving the operation of a rail fixed guideway system resulting in: (1) [D]eath directly related to the event; (2) [i]njury requiring hospitalization within twenty-four hours of the event; (3) [a] collision, derailment, or fire causing property damage in excess of \$25,000; or (4) [a]n emergency evacuation." The vast majority of commenters opposed this definition and recommended numerous ways to change it.

For instance, several commenters requested that FTA limit the definition

to those events involving revenue service operations, thus excluding incidents occurring in rail yards. According to the commenters, these kinds of incidents are covered by OSHA rules; eliminating them from the rule, these commenters reasoned, would avoid duplicative and perhaps conflicting jurisdiction between the oversight agency and the State and Federal agencies responsible for enforcing OSHA regulations.

Some commenters recommended that any incident involving trespassers or employees be excluded from the definition. These commenters maintained that events involving trespassers would not necessarily indicate a systemic safety problem; in other words, it is impossible to protect against trespassers. Several commenters maintained that events involving employees should not be covered to avoid duplicative jurisdiction between the oversight agency and the State and Federal agencies regulating the workplace.

Other commenters recommended that FTA exclude certain kinds of personal injuries from the definition, stating that it is difficult, if not impossible, for a transit agency to monitor every slip, trip, or fall that occurs at a rail fixed guideway system. They further maintain that these kinds of injuries are not sufficiently serious to trigger an investigation by the oversight agency.

Still other commenters noted that, in most cases, a transit agency would be unable to determine whether a person was hospitalized as a result of the injury. Transit agency personnel operating in large metropolitan areas would be forced to contact dozens of hospitals, a task that would strain its resources; moreover, many hospitals do not release this kind of information to the public.

Several of these commenters recommended that FTA define accident, in part, as any injury in which a person is treated at the scene or is transported from the scene by medical personnel. This change would ease the administrative burden on the rail fixed guideway system, these commenters contended.

Many commenters strongly objected to the \$25,000 property damage threshold, with most of them indicating that property damage estimates are subjective and become obsolete over time; others contended that \$25,000 was too low. Some recommended that FTA annually adjust the dollar amount for inflation, and others recommended that the dollar amount be set by agreement between the oversight and transit agencies.

Several commenters recommended that FTA define an emergency evacuation, with one proposing that it be limited to circumstances in which emergency doors and exit routes are used, thus excluding instances when passengers are asked to leave a train disabled in a station.

FTA Response. In light of the comments, FTA has made several changes to the definition of accident. For instance, we have limited the definition to only those events that occur during the revenue service operation of the rail fixed guideway system, which eliminates from the rule any injuries or deaths to workers in rail yards. We made this change, not because these are unimportant events, but to avoid overlapping jurisdiction among State agencies. We do, however, encourage the oversight agency to establish a relationship with the State agency having jurisdiction over these matters and share information, thus making the workplace safer for rail fixed guideway system employees.

We disagree with commenters asking us to exclude incidents involving trespassers from the rule. Although we sympathize with the perspective of transit agencies, we believe that any death or injury requiring immediate medical treatment away from the scene of the event, which occurs while the rail fixed guideway system is in revenue service, should be investigated by the oversight agency.

We agree with those commenters who objected to the hospitalization requirement and have changed the rule to state that an accident has occurred if a person has been injured and "immediately receives medical treatment away from the scene of the accident." This language is used in FTA's drug and alcohol rules, as well.

Although several commenters asked us to remove property damage dollar thresholds, we did not do so. Instead, we have raised the dollar threshold to \$100,000, which should reduce the number of accidents involving property damage.

Last, we have removed the portion of the definition concerning emergency evacuations. In many instances, a serious event involving the evacuation of a mass transit vehicle also will involve a death, an injury requiring immediate medical treatment away from the scene, or more than \$100,000 in property damage, any of which, by themselves, will trigger an oversight agency investigation. Hence, by making this change we have focused an oversight agency's resources on serious events involving the emergency evacuation of a mass transit vehicle.

K. Hazardous Condition

FTA proposed to define a "hazardous condition" as "any condition which may endanger human life or property," and "unacceptable hazardous condition" as "a hazardous condition determined to be an unacceptable hazardous condition using the hazard resolution matrix of the 'Rail Safety Audit Manual' published by APTA." FTA further proposed to require the oversight agency to investigate only unacceptable hazardous conditions, whereas the transit agency was to correct or eliminate any hazardous condition.

Several commenters were confused by these two definitions and one maintained that the definitions were understandable only in conjunction with the APTA Guidelines checklist number 7.

Another commenter argued that FTA should not adopt the APTA Guidelines' hazard classification process. This commenter stated that

[T]he Hazard Resolution Matrix contained in the APTA guidelines is an inadequate indicator of when an investigation should be triggered. As an example, it is well-known that currently-operating modern escalators frequently cause minor injuries to patrons (particularly children). Following the APTA guidelines, one would categorize the hazard associated with an operating escalator in Category III (marginal-minor injury). Furthermore, since escalators are usually operating more often than not, the hazard exists all the time the escalator is operating. Again following the APTA guidelines, the hazard probability would be in Category A—frequent-likely to occur frequently (individual); continuously experienced (fleet/inventory). Under the Hazard Resolution Matrix of the APTA guidelines, this would be a Category III-A, which would be labeled 'unacceptable.' Following the reasoning proposed in the NPRM, all escalators would continuously have to be corrected or eliminated by all transit agencies, and all escalator accidents investigated by the oversight agency. Since escalators cannot be corrected (at least so far no one has been successful in creating an escalator that doesn't have these hazards), all escalators would have to be eliminated from transit properties.

In contrast, another commenter supported the use of the APTA Guidelines Hazard Resolution Matrix because, according to this commenter, it has been adopted and practiced by more than 95 percent of the affected systems.

Several commenters objected to FTA's proposal to require transit agencies to "correct or eliminate any hazardous condition," which they characterize as an "impossible chore." In the words of one commenter, "[i]f every transit agency was required to eliminate every condition that may cause minor injury

***, all of its resources would be extended in attempting to eliminate these potential minor threats, with little resources left to run the transit system." One commenter recognized this problem also, and suggested that FTA require that hazardous conditions be corrected, eliminated, or controlled. One commenter maintained that the oversight agency should not be required to investigate any hazardous condition.

FTA Response. Although FTA has made some changes to the rule, we have not changed the definitions. The terms "hazardous condition" and "unacceptable hazardous condition" must be read in conjunction with the APTA Guidelines, particularly with the hazard resolution process, checklist number 7. To identify hazards, FTA has mandated the use of this particular process by transit agencies, even if a transit agency has used MIL-STD 882B or 882C to develop its system safety program plan. We have mandated this process, despite some commenters who opposed its adoption, because it is widely used and accepted throughout the transit industry.

Also, the rule requires the oversight agency to investigate unacceptable hazardous conditions as well as accidents. Although at least one commenter opposed requiring the oversight agency to investigate unacceptable hazardous conditions, section 5330(c)(2)(B) requires the oversight agency to "investigate hazardous conditions." To focus State resources on serious safety issues, FTA has interpreted section 5330 narrowly, thus requiring an oversight agency to investigate only "unacceptable hazardous conditions."

We agree with the commenters who maintained that not all hazardous conditions can be corrected or eliminated. Risk cannot be taken out of life. Therefore, we require a transit agency to correct or eliminate any hazardous condition if possible, and if not, the transit agency must either minimize or control it. For instance, one commenter noted that escalators are hazardous conditions, which can be corrected only by eliminating the escalator. Under this rule, the transit agency is not required to eliminate escalators, but it is required to minimize or control the risks associated with escalators. A transit agency can take one or more of several actions to minimize these risks, such as installing an emergency shut-off switch, retrofitting the escalator with additional safety devices, posting instructions on how to avoid accidents on escalators, or developing educational programs for children on how to properly use

escalators. Many transit agencies have addressed the safety issues of escalators, but we urge them to consider other measures to make escalators safer, especially for children.

L. Investigations

FTA proposed to require the oversight agency to develop its own investigation procedures and to investigate accidents, except those being investigated by the National Transportation Safety Board (NTSB), and all unacceptable hazardous conditions.

Twenty-seven commenters responded to issues arising from this proposal. Although one commenter stressed that the oversight agency should not conduct any investigations, most commenters focused on the oversight agency's role in investigating an "accident" or "unacceptable hazardous condition." The vast majority of these commenters maintained that the oversight agency should not conduct its own independent investigation, but should focus on the process used by the transit agency in conducting investigations. These commenters noted that the transit agency must be responsible for operating its own system; an independent investigation by the oversight agency may implicitly usurp the authority of the transit agency over safety and other operational matters, according to these commenters. Others insisted that although the oversight agency's primary responsibility was to ensure that the transit agency properly conducted investigations, it should nevertheless be authorized to investigate extraordinary events. One commenter maintained that the oversight agency should not investigate an "accident" or "unacceptable hazardous condition" unless the transit agency's investigation is inadequate.

FTA Response. Despite the opinion of at least one commenter, the oversight agency is required under section 5330 to investigate accidents and hazardous conditions. As discussed above, we proposed to define "accident" in a manner to focus the oversight agency's investigation on serious events of a systemic nature. Similarly, instead of proposing to require the oversight agency to investigate all "hazardous conditions," we proposed that it investigate only "unacceptable hazardous conditions." We have not changed this basic scheme.

Moreover, we believe that our proposal was misunderstood, and we seek now to clarify the role of the oversight agency in conducting investigations. The oversight agency is not only responsible for developing its own investigatory procedures, it is

responsible for determining how it will investigate. An oversight agency may contract for this service; some may elect to use APTA's Panel of Inquiry, others may choose to use other experts. The oversight agency may allow the transit agency to conduct some or all investigations. The oversight agency may choose to investigate all "accidents" and "unacceptable hazardous conditions" or investigate some and contract for the investigation of others. The rule is flexible in this regard, just as we had proposed in the NPRM. Although the examples set forth above are not exhaustive, ultimately, unless the NTSB is conducting an investigation, either the oversight agency or an entity acting on its behalf must investigate "accidents" and "unacceptable hazardous conditions."

We do, however, encourage the oversight agency to either directly or by contract conduct independent investigations. Moreover, we disagree strongly with commenters who maintain that the oversight agency should focus on the process used by the transit agency to conduct investigations. The purpose of this rule is to ensure that a rail fixed guideway system operates safely and that the systemic causes of "accidents" and "unacceptable hazardous conditions" are addressed; focusing on process in this context, therefore, is misplaced. Rather, the focus of the oversight agency should be to assist the transit agency in preventing "accidents" and "hazardous conditions."

M. Confidentiality of Oversight Agency Investigation Reports

Several commenters to the ANPRM requested that we include a provision in the rule barring the discovery or the use in evidence of any investigative report compiled as a result of this rule. In the NPRM, we noted that section 5330 did not specifically address this matter, and hence, we doubted that we could make such a mandate. Nevertheless, we asked whether we should adopt a provision which would require that the oversight agency investigation reports be kept confidential.

Almost every commenter favored the adoption of such a provision. One commenter wrote:

[T]he investigations at rail fixed guideway systems are often confidential * * * and thus they are not subject to discovery or public disclosure. If the information gathered by the states becomes a public document, then the FTA will be building into this regulation a serious conflict between the state agencies and the [rail] fixed guideway systems. In order to ensure better gathering of information by the states, and to maintain

unreserved cooperation with the local transit systems, it is strongly recommended that the information gathered by the states must be protected from disclosure.

Another commenter wrote "[w]e submit that a discovery exemption is critical to the efficient operation of the oversight agency, as it would protect the agency's limited staff and resources from the inundation of subpoenas and other discovery requests." Yet another commenter wrote that

[The rail fixed guideway system] believes that FTA should provide protection for Attorney-Client privilege under the proposed rule to include investigative materials and materials pertaining to 'hazardous condition' discussions or findings by the State oversight agency. If FTA does not have the statutory authority to provide such protection, it should require the States to do so. The loss of [the rail fixed guideway system's] Attorney-Client privilege over such documents would have a serious negative economic impact on third party litigation.

The remaining commenters maintained that although the issue is an important one, FTA should remain silent on it.

FTA Response. FTA agrees strongly that the oversight agency investigation reports should be kept confidential; thus, we have added a provision to the rule permitting a State to require that these reports be kept confidential, and we encourage strongly that the State authorize the oversight agency to do so.

N. Certified Transit Safety Professional.

FTA proposed to require the use of Certified Transit Safety Professionals primarily in response to comments to the ANPRM and related public hearings, which reflected concern throughout the transit industry about the expertise necessary to carry out an effective oversight program. These commenters maintained that an effective oversight program could not be achieved without the use of certified safety professionals.

In response to these comments, the NPRM proposed to require both the oversight agency and the transit agency to use the services of a Certified Transit Safety Professional, either from within their own organizations or under contract, to comply with the requirements of the rule. A Certified Transit Safety Professional was defined as one who had "successfully completed the Safety Professional Certification requirements established by the Board of Certified Safety Professionals, * * * or, a registered professional engineer in system safety." FTA also sought comment on whether it should require a Certified Transit Safety Professional to have a minimum number of years of experience in transit safety.

Forty-seven comments were received on this matter, which was among the most controversial proposals in the NPRM. Although most commenters opposed the inclusion of this concept in the final rule, some recommended changes to the definition of certified transit safety professional. For instance, several commenters noted that organizations other than the Board of Certified Safety Professionals certify safety professionals, such as the World Safety Organization or the Federal Railroad Administration. Others recommended that the rule recognize experience equivalent to the training required by the Board of Safety Professionals. One commenter recommended that, in addition to certification, a Certified Transit Safety Professional be required to have a minimum number of years of experience.

Several commenters opposing this proposal maintained that the Board of Certified Safety Professionals does not certify professionals in transit safety. The Board of Safety Professionals, however, did not oppose this proposal. Instead, they recommended that FTA require the certified transit safety professional's certification to be current. Several commenters noted that States do not certify professional engineers in system safety, although one commenter noted that the Board of Certified Safety Professionals 1993-1994 Directory listed 200 Safety Professionals certified in system safety.

One commenter who opposed this proposal nevertheless recommended that FTA require safety professionals to complete FTA's Rail System Safety Course. Another commenter recommended that a peer group develop guidelines concerning the experience and training for transit safety professionals, which a transit agency could adopt. Other commenters objected to the proposal stating that such a training requirement would be too expensive.

FTA Response. In response to the overwhelming comments opposed to this proposal, FTA has removed the Certified Transit Safety Professional provision from the rule. We do, however, urge the States to develop their own criteria to ensure that both the transit and oversight agencies are using qualified professionals under this rule to ensure the safe operation of rail fixed guideway systems. In this regard, we recommend that safety professionals, at a minimum, have transit safety experience and complete the courses at the Transportation Safety Institute (TSI) sponsored by FTA applicable to rail transit systems. TSI offers the following

courses: System Safety, Accident Investigation, System Security, and Emergency Management. FTA has provided training assistance to the transit industry in safety since 1976, and this program will be a major contribution to State Safety Oversight. Moreover, we urge States to require safety employees to be certified by the Board of Certified Safety Professionals, the World Safety Organization, or other comparable organization; safety professionals should possess a certain level of experience as well.

III. Section-by-Section Analysis

Please note that issues addressed in the Section-by-Section Analysis may also be discussed in the Discussion of the Comments.

Subpart A—General Provisions

A. Purpose. (§ 659.1)

This section explains that FTA is implementing the requirements of 49 U.S.C. § 5330, which requires a State to establish an agency to oversee the safety of rail fixed guideway systems. This rule directs the oversight agency to develop a system safety program standard and to require the transit agency to develop a system safety program plan that complies with the system safety program standard. In addition, the oversight agency must conduct safety reviews and investigations and ensure that the transit agency has developed and implemented a system safety program plan that complies with this rule and is effective.

B. Scope. (§ 659.3)

This section explains that the rule applies only to States with rail fixed guideway systems that are not regulated by the FRA.

C. Definitions. (§ 659.5)

1. Accident

An accident triggers an investigation by the oversight agency or its agent, and is defined as an event that occurs when the rail fixed guideway system is in revenue service and an individual dies or is injured and immediately receives medical treatment away from the scene; or a collision, derailment, or fire results in \$100,000 in property damage.

Injuries, deaths, or property damage that occur when the rail fixed guideway system is not in revenue service are excluded from the definition. Hence, under the rule, the oversight agency or its agent is not required to investigate these events, but may do so under its own authority.

An "individual" means anyone, including a passenger, trespasser, employee, or other bystander.

2. APTA Guidelines

The "APTA Guidelines" means the "Manual for the Development of Rail Transit System Safety Program Plans" published by the American Public Transit Association on August 20, 1991.

3. Contractor

A "contractor" means an entity that performs tasks required under this part on behalf of the oversight or transit agency. A transit agency may not be a contractor for an oversight agency.

4. FTA

The "FTA" means the Federal Transit Administration, an agency of the United States Department of Transportation.

5. Hazardous Condition

"Hazardous Condition" means a condition that may endanger human life or property. It encompasses "unacceptable hazardous conditions," defined below.

6. Investigation

"Investigation" means the process used to determine the probable cause of the "accident" or "unacceptable hazardous condition." It includes a review by the oversight agency of the transit agency's determination of the probable cause of an "accident" or "unacceptable hazardous condition."

An "investigation" may be conducted by the oversight agency itself or by some other entity acting on its behalf, or the investigation may be conducted by the transit agency. If the oversight agency chooses the latter method it must, at a minimum, review and approve the transit agency's findings of probable cause of the "accident" or "unacceptable hazardous condition."

7. Oversight Agency

The agency designated by the State or affected States to implement the requirements of this part.

8. Rail Fixed Guideway System

"Rail fixed guideway system" means any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas and is not regulated by the Federal Railroad Administration.

9. Safety

"Safety" means freedom from danger; it includes freedom from unintentional as well as intentional acts.

10. Safety Review

"Safety review" means a comprehensive review by the oversight agency of the transit agency's safety practices. It includes an analysis by the oversight agency of the efficacy of the transit agency's system safety program plan and a determination of whether the system safety program plan must be modified, changed, or updated. The safety review must be conducted at the rail fixed guideway system.

11. Security

"Security" means freedom from intentional danger. Intentional danger includes criminal acts such as muggings, rapes, robberies, or terrorists acts, such as bombings, releases of poisonous gases, or kidnappings.

12. System Safety Program Plan

"System safety program plan" means the written document developed by the transit agency in accordance with the requirements of the oversight agency's system safety program standard.

13. System Safety Program Standard

"System safety program standard" means the document developed by the oversight agency that complies, at a minimum, with the APTA Guidelines and requires the rail fixed guideway system to address the personal security of its passengers and employees. It may contain more requirements than the APTA Guidelines. The transit agency must comply with this document when it develops its system safety program plan.

14. Transit Agency

"Transit agency" means the entity operating the rail fixed guideway system.

15. Unacceptable Hazardous Condition

An "unacceptable hazardous condition" is a particular kind of hazardous condition determined by using the Hazard Resolution Matrix contained in the APTA Guidelines at checklist number 7.

D. Withholding of Funds for Non-Compliance. (§ 659.7)

This section is taken from section 5330, which authorizes FTA to withhold Federal funding from a State or an urbanized area in the State. In particular, FTA is authorized to withhold up to five percent of an affected urbanized area's apportionment if the State, in the opinion of FTA, is not in compliance or making adequate efforts to comply with the rule. The sanctions for non-compliance do not begin until September 30, 1997. In the event of non-compliance with the rule,

the Administrator may withhold funds until the State comes into compliance.

Subpart B—The Role of the State

A. Designation of Oversight Agency. (§ 659.21)

This section directs the State to select an agency to oversee the rail fixed guideway system and prohibits the State from selecting the transit agency to perform this role. Paragraph (a) concerns rail fixed guideway systems that operate within only one State. In these instances, the State must designate a State agency to implement the rule. If the State chooses, this paragraph allows the State to designate an oversight agency for each rail fixed guideway system within the State. For instance, a State may wish to designate one agency for an historical trolley system and another for the remaining systems within the State. The rule is flexible in this regard and is written to accommodate those States that have established an oversight program under State law.

For those States that have not established an oversight program and have more than one rail fixed guideway system within the State, we recommend that the State designate only one agency to implement the rule. This would save resources and ensure the consistent application of the rule.

Paragraph (b) is directed to States that jointly operate a multi-State rail fixed guideway system. Although we recommend that the affected States designate a single oversight agency, this paragraph allows them to designate more than one agency, other than the transit agency, to implement the rule. Moreover, this paragraph recognizes that a single oversight agency designated by the affected States will not be an agency of any particular State.

B. Confidential Accident Reports. (§ 659.23)

This section permits the State to require the oversight agency to keep investigation reports confidential in civil litigation.

Subpart C—The Oversight Agency's Role

A. The System Safety Program Standard. (§ 659.31)

This section directs the oversight agency to develop a system safety program standard that complies, at a minimum, with the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans" (APTA Guidelines) available from the American

Public Transit Association, 1201 New York Avenue, N.W., Washington, D.C. 20005-3917 or Office of Safety and Security, Federal Transit Administration, 400 Seventh Street, S.W., Washington, D.C. 20590, and requires the transit agency to address the personal security of its passengers and employees.

As discussed above, because the APTA Guidelines were derived from MIL-STD 882B, we believe that existing oversight agencies that have used MIL-STD 882B or its successor MIL-STD 882C to create their oversight programs should meet, if not exceed, the APTA Guidelines, although we recommend that these existing oversight agencies review their programs in this regard.

This section further directs the oversight agency to develop a standard that would require the transit agency to address the personal security of its passengers and employees. In this regard, FTA has neither developed specifications nor adopted a standard for the oversight agency to follow. Instead, we have published, independently, two "how to" documents to be used by both the oversight and transit agencies in developing security standards and procedures. These documents, "Transit Security Procedures Guide" and "Transit System Security Program Planning Guide," are available free of charge from the Office of Safety and Security, Federal Transit Administration, at the address noted above. Although the use of these documents is not mandated under the rule, we recommend strongly that every affected State and transit agency obtain copies and review them. As noted above, FTA also offers several courses on security through TSI. Moreover, we suggest that the oversight agency require the transit agency to address such criminal acts as terrorist activities and "street crime" such as muggings, rapes, drug dealings, etc.

This section also allows the oversight agency to create a program that is more stringent than that required under the APTA Guidelines, although we urge those agencies not to adopt FRA-type regulations.

B. System Safety Program Plans. (§ 659.33)

This section establishes January 1, 1997, as the deadline for the implementation of the system safety program plan and requires the oversight agency to have initially reviewed and approved it before that date. It further establishes January 1, 1998, as the implementation date for the security provisions of the system safety program

plan. It also requires the oversight agency to direct the transit agency to update the system safety program plan as necessary. The oversight agency may decide that it is necessary for a system safety program plan to be updated at certain intervals, or it may make a determination based on accident statistics or results from safety audits or reviews, for example. Should the oversight agency make such a determination, this section directs it to again review and approve the transit agency's updated system safety program plan.

This section allows the oversight agency to determine whether the security provisions of the system safety program plan should be publicly available. FTA recommends strongly that the oversight agency prohibit the transit agency from publicly disclosing the security portions of the system safety program plan under any circumstance.

C. Transit Agency Annual Audit Reports. (§ 659.35)

Checklist number 9 of the APTA Guidelines requires the transit agency to draft a report summarizing the findings of its internal safety audit. This section of the rule requires the annual submission of that report to the oversight agency for its review.

D. Safety Reviews. (§ 659.37)

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. After this review has been completed, the oversight agency must issue a report detailing its findings and recommendations, its analysis of the system safety program plan, and its determination whether the safety program plan should be updated or changed.

E. Transit Agency Report on Accidents and Unacceptable Hazardous Conditions. (§ 659.39)

To investigate "accidents" and "unacceptable hazardous conditions" as required by section 5330, the oversight agency must know about them. This section directs the oversight agency to require the transit agency to report "accidents" and "unacceptable hazardous conditions" within the time specified by the oversight agency.

F. Investigations. (§ 659.41)

As discussed above in the Discussion of the Comments, the oversight agency is not required to conduct the investigation itself, but may do so through another entity such as a

contractor or even the transit agency. The oversight agency, however, must decide how it is going to conduct an investigation and establish the procedures it or the entity acting on its behalf will use.

There are numerous ways the oversight agency may comply with this requirement. For instance, the oversight agency may establish one set of procedures to investigate accidents and another to investigate unacceptable hazardous conditions. The oversight agency may use a contractor, such as the APTA Panel of Inquiry, to investigate certain kinds of accidents and its own staff to investigate others.

The rule is intentionally flexible to allow the oversight agency to adapt an oversight program to the needs of the rail fixed guideway systems within the State's jurisdiction.

G. Corrective Actions. (§ 659.43)

Section 659.41 requires the oversight agency to investigate "unacceptable hazardous conditions." This section directs the oversight agency to require the transit agency to develop a corrective action plan to eliminate, minimize, or control investigated hazardous conditions in accordance with the approved corrective action plan and within the time period specified by the oversight agency.

H. Oversight Agency Report to the Federal Transit Administration. (§ 659.45)

This section requires three kinds of reports: initial, annual, and periodic. The initial submission contains information that will not change frequently, such as the name and address of the oversight agency and the transit agencies it oversees, a copy of the system safety program standard, and a description of the oversight agency's procedures for conducting investigations and ensuring that the transit agency has undertaken appropriate corrective actions. This report must be updated only when some of the information within it changes.

The annual submission describes the activities of the oversight agency for the previous twelve months, including any determinations by the oversight agency of the probable cause of "accidents" and "unacceptable hazardous conditions," if it can do so and protect the confidentiality of investigation reports. This section allows an oversight agency required to submit annual reports to the State to submit the same report to FTA, if it contains all the necessary information.

Last, this section allows FTA to periodically ask the oversight agency to

submit certain kinds of information such as the status reports on "accidents," "hazardous conditions," and corrective action plans. These reports must be submitted only upon FTA's request.

I. Use of Contractors. (§ 659.47)

This section expressly allows the oversight or transit agency to use contractors to perform certain tasks required under the rule. The agencies may use a contractor to perform some or all of these tasks. For instance, an oversight agency may use a contractor to conduct only accident investigations, while another may use a contractor solely to conduct safety reviews. A transit agency may not be a contractor for the oversight agency, however.

J. Certification of Compliance. (§ 659.49)

This section requires the oversight agency to initially certify before January 1, 1997, that it has complied with the rule. Thereafter, the oversight agency is required to certify annually that it is in compliance with the rule.

IV. Economic Analysis

FTA has evaluated the industry-wide costs and benefits of the rule, "Rail Fixed Guideway Systems; State Safety Oversight," which requires a State to develop, through an oversight agency, a program to oversee the safety of rail fixed guideway systems. At least 19 States will be required to create an oversight agency that must:

- Develop a System Safety Program Standard which includes provisions addressing security.
- Approve the transit agency's initial system safety program plan.
- Conduct safety reviews.
- Establish investigation procedures.
- Investigate accidents and unacceptable hazardous conditions.
- Ensure the transit agency complies with the oversight agency's system safety program standard.

- Review corrective action plans.
- Report to FTA.

At least 33 transit agencies must:

- Develop a System Safety Program Plan and update it, as necessary.
- Prepare annual audit reports.
- Conduct safety audits.
- Classify hazardous conditions according to the APTA Hazard Resolution Matrix.
- Report accidents and unacceptable hazardous conditions to the oversight agency.
- Prepare corrective action plans.
- Handle hazardous conditions according to approved corrective action plans.
- Maintain safety data.

Generally, in analyzing the costs of this rule, the Regulatory Evaluation considered only those activities required by the rule. For those States and transit agencies that have already established a program similar to the one required by the rule, the Regulatory Evaluation considered only those activities necessary to bring these programs into compliance with the rule. Year One costs are estimated to be approximately \$336,000, the lowest for any single year. This is because the costs incurred in Year One are generally limited to activities of the oversight agencies and the FTA. Total costs for the first ten years are estimated to be approximately \$9.1 million.

The estimated benefits of the rule are assumed to take full effect in the third year of implementation, 1998. Therefore, the estimated fatalities and injuries averted are based on an eight-year period. For this period there would be 16 fatalities and 1,528 injuries averted. Based on the Department's Willingness to Pay Threshold, the total benefit of the rule is approximately \$107 million over a ten-year period.

V. Regulatory Process Matters

A. Executive Order 12866

FTA has evaluated the costs and benefits to the States of creating an oversight program to oversee the safety of rail fixed guideway systems and has determined that this rule is a major rule under Executive Order 12866 because it affects State and local governments.

B. Departmental Significance

This proposed rule is a "significant regulation" under the Department's Regulatory Policies and Procedures, because it changes an important Departmental policy. That policy change requires the States to oversee the safety of rail fixed guideway systems, something the Federal government has never before required.

C. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603(a), FTA has evaluated the effects of this proposed rule on small entities. Based on this evaluation, FTA hereby certifies that this action will not have a significant economic impact on a substantial number of small entities because the affected transit agencies will in most cases be large.

D. Paperwork Reduction Act

The information collection requirements in this rule have been reviewed and approved by the Office of Management and Budget under OMB #2132-0558.

E. Executive Order 12612

We have reviewed this rule under the requirements of Executive order 12612 on Federalism. FTA has determined that since this rule has significant Federalism implications it warrants a Federalism assessment. We note, however, that this rulemaking is mandated by 49 U.S.C. 5330, which requires a State to create an oversight agency to oversee the safety of rail fixed guideway systems.

In considering the Federalism implications of the proposed rule, FTA has focused on several key provisions of Executive order 12612.

Necessity for action. This rule is mandated by law, which requires that rail fixed guideway systems be subject to State oversight. Approximately twenty-one States have rail fixed guideway systems operating within their jurisdictions. Of those, only five States have established a State oversight program.

Consultation with State and local governments. FTA's mission is to provide financial assistance to mass transportation systems throughout the nation, thus providing grants to State and local governments. Because this rule will affect almost half of the States as well as many local governments, we published an ANPRM on June 25, 1992, at 57 FR 28572, to solicit the views of State and local governments. In addition, we held three public hearings in conjunction with the ANPRM. Also, FTA published an NPRM on December 9, 1993, at 58 FR 64855, on which numerous State and local governmental agencies commented. Moreover, we held a public hearing on the NPRM on March 8, 1994, in conjunction with an American Public Transit Association conference, thus allowing more State and local agencies to participate in the development of this rule. In short, we actively sought the views and comments of the affected States.

Need for Federal action. This rule responds to a Congressional mandate but is designed to give a State maximum flexibility in designing its own oversight program.

Authority. The statutory authority for this rule is discussed elsewhere in this preamble.

Pre-emption. This rule does not, as such, pre-empt State or local law. There may be instances in which a State or local agency faces a conflict between compliance with the rule and State and local requirements. Because compliance with the rule is a condition of Federal financial assistance, State and local governments have the option of not

seeking the Federal funds if they choose not to comply with this rule.

F. National Environmental Policy Act

FTA has determined that this rule has no environmental implications. Its purpose is to create a State oversight program designed to oversee the safety of rail fixed guideway systems.

G. Energy Impact Implications

This regulation does not affect the use of energy because it creates a State oversight program designed to oversee the safety of rail fixed guideway systems.

List of Subjects in 49 CFR Part 659

Grant programs—transportation, Incorporation by reference, Mass transportation, Reporting and recordkeeping requirements, Safety, Security, and Transportation.

Accordingly, for the reasons cited above, the agency amends title 49 of the Code of Federal Regulations by adding a new part 659, to read as follows:

PART 659—RAIL FIXED GUIDEWAY SYSTEMS; STATE SAFETY OVERSIGHT**Subpart A—General Provisions**

Sec.

659.1 Purpose.

659.3 Scope.

659.5 Definitions.

659.7 Withholding of funds for non-compliance.

Subpart B—The Role of the State

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659.33 System safety program plans.

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659.41 Investigations.

659.43 Corrective actions.

659.45 Oversight agency report to the Federal Transit Administration.

659.47 Use of contractors.

659.49 Certification of compliance.

Appendix to Part 659—Sample Certification of Compliance.

Authority: 49 U.S.C. § 5330.

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 non-compliance.

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, N.W., Washington D.C. 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, S.W., Washington, D.C. 20590, and at the Office of the Federal Register, 800 North Capitol Street, N.W., Washington, D.C.

§ 659.33 System safety program plans.

(a) Except as provided in § 659.33(b), the oversight agency must require the transit agency to—

(1) 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 require the transit agency to—

(1) Implement, beginning on January 1, 1998, the security portions 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.

§ 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 January 1 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, D.C. 20590.

§ 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, D.C. 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.

Issued: December 18, 1995.

Gordon J. Linton,

Administrator.

[FR Doc. 95-31159 Filed 12-26-95; 8:45 am]

BILLING CODE 4910-57-U