

MetroLink currently crosses a single existing freight railroad industry lead known as the Grand Freight Diamond, thus constituting a limited connection to the general railroad system. Freight movements are conducted by Metro's contractor, Squaw Creek Southern Railroad, Inc., across this diamond crossing and are temporally separated, occurring only during MetroLink's nonrevenue hours of 1:15 a.m. to 3:45 a.m.

For this limited connection, Metro seeks permanent waiver of compliance from the following Parts of 49 CFR: Part 217—Railroad Operating Rules, Part 219—Control of Alcohol and Drug Use, Part 220—Railroad Communications, Part 221—Rear End Marking Devices, Part 223—Safety Glazing Standards, Part 238—Passenger Equipment Safety Standards, and Part 239—Passenger Emergency Preparedness. Metro offers that it is similarly governed by the System Safety Program Plan as required by the Federal Transit Administration (FTA) and administered by the Missouri Department of Transportation (Momot).

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA in writing before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number 2007-27207) and must be submitted to the Docket Clerk, DOT Docket Management Facility, Room PL-401 (Plaza Level), 400 7th Street, SW., Washington, DC 20590. Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9 a.m.–5 p.m.) at the above facility. All documents in the public docket are also available for inspection and copying on the Internet at the docket facility's Web site at <http://dms.dot.gov>.

Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may

review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78). The Statement may also be found at <http://dms.dot.gov>.

Issued in Washington, DC on February 23, 2007.

Grady C. Cothen, Jr.,

Deputy Associate Administrator for Safety Standards and Program Development.

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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

[Docket No: FTA-2006-25365]

Formula Grants for Other Than Urbanized Areas Program (49 U.S.C. 5311): Notice of Final Circular

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of Availability of Final Circular.

SUMMARY: This notice announces the publication of final guidance in the form of a circular to assist grantees in implementing the Federal Transit Administration (FTA) Formula Grants for Other Than Urbanized Areas Program (commonly referred to as Section 5311). This notice provides a summary of the Section 5311 program circular, and addresses comments received in response to the July 31, 2006, **Federal Register** notice (71 FR 43280) announcing the availability of the proposed circular for comment.

DATES: The effective date of this final circular is April 1, 2007.

AVAILABILITY OF THE FINAL CIRCULAR: You may download the circular from the Department's Docket Management System (<http://dms.dot.gov>) by entering docket number 25365 in the search field. You may also download an electronic copy of the circular from FTA's Web site, at www.fta.dot.gov. You may obtain paper copies of the circular by calling FTA's Administrative Services Help Desk, at 202-366-4865.

FOR FURTHER INFORMATION CONTACT: Lorna R. Wilson, Office of Program Management, Federal Transit Administration, 400 Seventh Street, SW., Room 9114, Washington, DC 20590, *phone:* 202-366-2053, *fax:* 202-366-7951, or *e-mail:*

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I. Background

On July 31, 2006, the Federal Transit Administration (FTA) published a Notice of Proposed Program Guidance and Request for Comments on the proposed revisions to FTA Circular 9040.1E, "Nonurbanized Area Formula Program Guidance and Grant Application Instructions," dated 10-01-98. The proposed circular contained guidance on how to administer the Section 5311 program. The proposed circular also contained summaries of cross-cutting provisions such as Charter Bus, Buy America, Title VI, and EEO requirements. FTA did not seek specific comments on these cross-cutting provisions, however, because these are subjects of separate rulemaking or circular efforts.

The comment period remained open until September 29, 2006. FTA received 17 comments to the docket. FTA reviewed and considered all comments submitted. In addition to changes made in response to comments received, FTA also edited the proposed circular for clarity and accuracy. Based upon comments received, FTA hereby announces issuance of the final circular, Federal Transit Administration (FTA) Circular 9040.1F, "Nonurbanized Area Formula Program Guidance and Grant Applications Instructions," which supersedes the 1998 FTA Circular 9040.1E. FTA reserves the right to make changes to this circular in the future and to update references to requirements contained in other revised or new guidance and regulations that undergo notice and comment procedures without further notice and comment on this circular.

This notice does not contain the final circular, but rather provides a summary of the provisions found within. An electronic version of the circular may be found on the docket, at <http://dms.dot.gov>, docket number FTA–2006–25365, or on FTA’s Web site, at www.fta.dot.gov. You may obtain paper copies of the circulars by contacting FTA’s Administrative Services Help Desk, at 202–366–4865.

II. Chapter-by-Chapter Analysis

A. Chapter I—Introduction and Background

This chapter is a general introduction to FTA to provide an orientation for those readers less familiar with FTA and our programs. FTA intends to include this introduction in all new and revised program circulars for the orientation of readers new to FTA programs. Chapter I also includes definitions.

Six parties submitted comments on this chapter, with some parties offering multiple comments. One commenter thought that the statement “Grants.gov is information on all Federal grant opportunities” was misleading because not all Federal grants are included on this Web site. This commenter suggested that FTA provide information concerning who is responsible for updating this Web site.

FTA agrees and revised the final circular to reflect that all competitive discretionary Federal grants are included on Grants.gov. FTA further clarified, in the final circular, that while FTA does not manage Grants.gov, FTA is responsible for posting all FTA competitive grant opportunities. In addition, FTA clarified, in the final circular, that the Department of Health and Human Services officially manages the Grants.gov postings.

Five commenters submitted comments concerning the definitions. Four commenters submitted comments regarding the use of the term “small urban areas” throughout the proposed circular. Three of these commenters stated that the inclusion of the term “small urban areas” in the definition of “nonurbanized areas” was confusing and misleading when FTA proposed using “small urban areas” as synonymous with “nonurbanized areas,” “rural and small urban areas,” and “rural.” These commenters proposed that FTA not define small urban areas as synonymous with rural areas. One commenter supported the continued use of the term “small urban” in the circular, and believed that its use was consistent with current language. One commenter suggested that FTA more clearly define intercity bus

service. Another commenter suggested that FTA consistently define “mobility management.”

FTA agrees that while the technical use of the term “small urban” throughout the circular was correct, we understand that the common use of the terms “small urban” and “small urbanized” may be confusing. Therefore, FTA revised the definition of “Other than Urbanized (Nonurbanized) Area,” in the final circular, to clarify that a nonurbanized area means any area outside of an urbanized area, and includes rural areas and urban areas with populations under 50,000 not included within an urbanized area. Further, FTA added definitions of “rural area,” and “urbanized areas” for further clarification. In addition, FTA removed the term “small urban” throughout the circular and replaced it with the term “nonurbanized.”

In response to the commenter who suggested that FTA more clearly define intercity bus service, the commenter failed to specify what aspect of the definition was unclear. Therefore, FTA adopts the definition of intercity bus service from the previous versions of the circular and as proposed in the proposed circular. FTA agrees with the commenter who proposed that FTA consistently define “mobility management.” Therefore, FTA replaced the proposed definition to make it consistent with the definition of mobility management provided in 49 U.S.C. 5302(a)(1)(L).

B. Chapter II—Program Overview

This chapter replaces the former Chapter I, “General Overview,” in Circular 9040.1E. It provides an overview of the Section 5311 program in terms of its statutory authority and program goals. It defines the role of the individual States and FTA, and explains the program’s relationship to other FTA-funded programs, as well as its coordination with other Federal programs. It contains the same information as the existing circular, with minor updates.

Three parties submitted comments on this chapter, with some parties offering multiple comments. One commenter asked FTA to provide a definition of “takedown” when FTA uses it in relation to the Rural Transportation Assistance Program (RTAP).

FTA agrees with this suggestion and added a definition of “takedown” to the definitions section in Chapter I of the final circular.

One commenter suggested that FTA mention, in Chapter II, funding transfers of interrelated FTA grant funding. This commenter further suggested that FTA

mention that States may choose to delegate some of their non-metropolitan transportation planning functions to regional planning organizations, in addition to noting that States may choose to suballocate some of their statewide transportation planning funds to Metropolitan Planning Organizations (MPOs). Another commenter suggested that FTA expand the brief descriptions of its other programs in Chapter II to provide comprehensive cross-program guidance to ensure consistency in management and reporting requirements.

FTA disagrees that Chapter II should discuss funding transfers in detail because FTA intended Chapter II to be an overview. FTA provided a detailed discussion of transfers of interrelated FTA grant funding in Chapter III. For the same reason, FTA did not adopt the suggestion that FTA expand the brief descriptions of its other programs in Chapter II to provide comprehensive cross-program guidance. However, FTA revised some program descriptions to emphasize the relationship to the nonurbanized area formula program and referenced the transfer provisions.

One commenter suggested that FTA provide additional guidance, under Section 3(b)(2), State Role in Program Administration, concerning the State’s obligation when the Regional Planning Agency makes funding decisions for the nonurbanized area.

In response, FTA added a sentence to Chapter II, Section 5(f) to clarify that the State is responsible for satisfying grantee requirements for the Section 5311 program. Because each State’s unique authorizing legislation defines the roles, responsibilities, and authorities of Regional Planning Agencies, each State must establish appropriate controls to monitor subrecipient activities to ensure that all provisions of the Section 5311 program are met. FTA looks to the States, not to Regional Planning Agencies or other subrecipients, to demonstrate program compliance.

Two commenters submitted multiple comments on the Tribal Transit Program. These commenters asked FTA to clarify the State’s role and relationship to the Section 5311 program in relation to the Federal Highway Administration’s (FHWA’s) Indian Reservation Roads (IRR) Program. Specifically, one commenter asked FTA whether a tribe could support its transit program with simultaneous funding from Section 5311 assistance through the State in which it is located, 5311(c)(1) funding directly from FTA, and IRR funding. This commenter also asked FTA

whether tribes could use IRR funds as the non-Federal share of Section 5311 assistance to tribes.

FTA permits a tribe to support its transit program with simultaneous funding from Section 5311 assistance through the State in which it is located, 5311(c)(1) funding directly from FTA, and IRR funding, as long as the tribe uses the funds for costs associated with administering the respective programs.

Regarding the commenter's question of whether State may use IRR funds for the "non-Federal" share of Section 5311 assistance to tribes, FTA points out that States may use IRR funds for the non-FTA share. Title 49 U.S.C. 5311(g)(3) allows States to use funds from Federal agencies, other than those of the U.S. Department of Transportation, for the non-FTA share of a Section 5311 grant, but makes a specific exception allowing States to use the Federal lands highway programs for the local share. The FHWA, a U.S. Department of Transportation operating administration, administers IRR funds under the Federal Lands program. Therefore, IRR funds are not "non-Federal" funds. They are Federal funds, but they are eligible as local match. To clarify that IRR funds are eligible as local match, FTA added to Chapter III, Section 3(d) of the final circular a statement indicating that IRR funds are an eligible local match.

One commenter suggested that FTA expand Section 6(c) Other Intraagency Coordination to include the following language:

Federal transit law requires metropolitan planning organizations to coordinate their planning with the activities of other governmental agencies and non-profit organizations that receive Federal financial assistance from sources other than the Department of Transportation to provide non-emergency transportation services. This requirement does not extend to statewide transportation planning activities, but FTA does encourage State participation in interagency efforts, such as coordinated statewide planning of public and human services transportation, and the facilitation or involvement in State rural development councils or other interagency coordinating bodies. States also are reminded that they will be responsible for the selection of nonurbanized Section 5310, 5316, and 5317 projects as derived from locally developed, coordinated public transit-human services transportation plans, and that the creation or use of statewide interagency councils or other bodies may be a successful strategy for reviewing plans and making project selections under these programs.

FTA agrees with the general idea of this recommendation. FTA did not adopt this commenter's proposal verbatim, but FTA expanded Chapter II,

Section 6(b) of the final circular to include the following language:

FTA encourages State DOT participation in interagency efforts, such as coordinated statewide planning of public and human services transportation. Since States are responsible for the selection of nonurbanized Section 5310, 5316, and 5317 projects as derived from locally developed, coordinated public transit-human services transportation plans, the creation or use of statewide interagency councils or other bodies may be a successful strategy for reviewing plans and making project selections under these programs.

C. Chapter III—General Program Information

This chapter consolidates the former Chapters II "Apportionments" with Chapter III "Eligibility". This revised chapter sets forth the basis for the apportionment of Section 5311 funds including the availability of those funds and the transfer of funds; also, it identifies eligible recipients and expenses, and the traditional Federal/State matching ratio. Although this revised chapter retains much of the content of the first two chapters, it includes several changes required by the Safe Accountable, Flexible, Efficient Transportation Equity Act (SAFETEA-LU). These changes include: (1) A sliding scale that permits a higher Federal share for capital and operating costs for several States based on a formula used by FHWA; (2) an expanded list of eligible capital expenses for crime prevention and security; and (3) the inclusion of Mobility Management as an eligible capital expense.

Nine commenters submitted comments on this chapter, with some parties offering multiple comments.

One commenter suggested that if the provisions of 48 U.S.C. 1469a do not apply to Puerto Rico, FTA should note this in Section 1(e) Consolidation of Grants to Insular Areas. This commenter further asked FTA to address whether or not Section 5307 (Urbanized Area Formula Grant Program) funds attributable to the U.S. Virgin Islands may be part of the consolidated grants to insular areas authorized under 48 U.S.C. 1469a.

In response to the first issue, FTA notes that 48 U.S.C. 1469a does not specify Puerto Rico as a covered insular territory. Therefore, the consolidated grant provisions do not apply to grants to Puerto Rico. Further, FTA declined to note in Chapter III, Section 1(e) that 48 U.S.C. 1469a does not apply to Puerto Rico. FTA explicitly listed the covered insular territories, and does not believe that listing every other uncovered territory in the circular is warranted. In

response to the second issue, FTA notes that Section 5307 funding that is attributable to the U.S. Virgin Islands and Guam may be part of the consolidated grants to insular areas authorized under 48 U.S.C. 1469a. FTA added Section 5307 to the list of grant programs in this section and notes that the U.S. Virgin Islands do not receive Section 5311 funds.

Two comments concerned transfers of apportionment under different programs. One commenter asked whether FTA permits States to combine funds available to them for program administration under Section 5311 funds with Sections 5310 (Elderly Individuals and Individuals With Disabilities), 5316 (Job Access and Reverse Commute), and 5317 (New Freedom) into a common program management account, or whether FTA requires States to track each program's State administrative expense separately. Another commenter noted it is not clear why FTA allows a transfer of funds if it is only for "administrative streamlining of grant making," particularly when States must separate and track the transferred funds under the same grant, and asked FTA to provide some examples of this procedure. This commenter further suggested that FTA retain the ability to transfer 5310 funds to 5311 strictly for capital projects, without a separate grant process for the use of those funds.

In response to the first comment, FTA determined that States may combine program administration funds available to them into one administrative account at the State level, so long as the State uses the funds for State costs associated with administering the 5310, 5311, and 5316 programs. However, FTA must still track the funds attributable to each program at the accounting classification code, Activity Line Item (ALI), and Financial Purpose Code level in the respective grants. As the State incurs expenses against the pooled funds for program administration, it can draw down the reimbursement against any grant that has undisbursed program administration funds. In response to the second comment, FTA, upon closer examination, agrees that there is little administrative ease in combining the program in a consolidated grant, because FTA would still require States to separate and track the transferred funds under the same grant. However, a State may transfer funds it allocates to Federally recognized Indian tribes under Section 5310, 5316 or 5317 to Section 5311 to enable FTA to make direct grants to Federally recognized Indian tribes for the selected projects, because the tribes are eligible direct

recipients under Section 5311 but not under the other programs.

In response to the third comment, FTA can no longer allow a State to transfer Section 5310 funds to Section 5311 without first selecting projects eligible under Section 5310. In other words, the State must now use the Section 5310 funds it transfers to Section 5311 only for Section 5310 program purposes. This is a result of a change in the law, FTA can no longer allow the transfer of Section 5310 to Section 5311 to supplement resources available under the nonurbanized formula grant program, as the law previously permitted.

Eight comments concerned Federal Motor Carrier Safety Administration (FMCSA) regulations in relation to feeder bus service. Four commenters noted that information in Chapter III, Section 2(c) and Chapter VIII, Section 9 is conflicting when Chapter III states that operators of interstate service "may" be required to comply with FMCSA regulations, and Chapter VIII states that operators of interstate service "are required" to comply with FMCSA regulations. These commenters proposed that FTA clarify these statements. Two commenters recommended that FTA's guidance emphasize that rural transit services that feed intercity bus service with meaningful connections can provide that service without any FMCSA regulatory involvement, as long as the rural transit service does not physically cross state lines and does not interline with the intercity bus service. Additionally, two commenters recommended that FTA provide in the circular that a rural transit agency's costs of compliance with FMCSA safety and insurance regulations are eligible for Section 5311(f) funding to the extent that they are incurred in providing eligible feeder service.

FTA agrees with the comments concerning the conflicting language in Chapter III and Chapter VIII. FTA reconciled the conflicting statements by replacing "may be required" in Chapter III with "are required." In response to the commenters' suggestions that FTA guidance emphasize that rural transportation services are subject to FMCSA regulation when the rural transportation service crosses state lines or when interlining is involved, Chapter VIII, Section 9 contains this statement. To the extent FMCSA regulations apply beyond this statement, FTA declines to further interpret FMCSA regulations and directs commenters to contact FMCSA Headquarters for further information.

In response to the commenters' suggestion that FTA state in the circular that a rural transit agency's costs of compliance with FMCSA safety and insurance regulations are eligible for Section 5311(f) funding to the extent that they are incurred in providing eligible feeder service, FTA agrees and added language to clarify in Chapter 8, Section 9.

Three commenters submitted concerns about Eligibility Assistance Categories. One commenter noted that the funding derived under Section 5340 (Apportionments based on growing States and high density States formal factors) is a substantial portion for most States' Section 5311 apportionments, and suggested that FTA move the paragraph that refers to Section 5340 to the second paragraph under the subheading of "Apportionment of Section 5311 Funds." One commenter requested that FTA clarify "capital activities." Another commenter suggested that FTA expressly add park and ride lots to the list of eligible capital items.

FTA agrees with the commenter's suggestion concerning Section 5340 and moved that paragraph as suggested. FTA disagrees that the circular should further clarify eligible capital activities. As proposed, Chapter III, Section 2(e)(2) of the proposed circular defines "capital expenses" and provides a list of eligible capital expenses. In response to the last commenter, FTA added park and ride lots to Chapter III, Section 2(e)(2) of the final circular.

Four commenters submitted multiple comments concerning Federal/Local matching requirements. Two commenters recommended that FTA retain all of the matching requirements set forth in the draft circular without change. One commenter applauded FTA for its proposal to allow the increased "sliding scale" Federal share for Section 5311 assistance in States with high proportions of public lands. This commenter suggested that FTA include a qualifying statement in Section 3(a)(3) regarding whether FHWA is likely to recalculate these sliding scale rates and their qualifying States.

FTA agrees with the first two commenters and retained all matching requirements set forth in the final circular without change. FTA notes that the match provisions in the circular reflect our understanding of Congressional intent. However, FTA notes that technical corrections legislation may be forthcoming which could further clarify SAFETEA-LU provisions on this point. Finally, FTA defers any questions about possible changes to FHWA's rates to FHWA.

One commenter noted that Chapter III (Table 2) is not clear as to whether the 88.53 percent (sliding scale for capital projects) for the State of California covers all capital, including accessible vehicle purchase with 3 percent allowance. Another commenter suggested that FTA name the five specific programs established under the Federal Lands Highway authorization (e.g., Indian Reservation Roads, Park Roads and Parkways, Forest Highways, Public Lands Highways, and Refuge Roads), when FTA discusses the eligibility of Federal Lands Highway funds toward the non-Federal share of Section 5311 grants.

In response to the clarity of Table 2, FTA notes that it allows the recipient the option of using the sliding scale in lieu of the 80 percent match. In addition, FTA notes that a recipient may also use the 90 percent for the actual incremental costs of equipment necessary to comply with the Americans with Disabilities Act (ADA) or the Clean Air Act (CAA) if that calculation proves more advantageous than the sliding scale. FTA added this explanatory language to Chapter III, Section 3(d). While no commenters raised objections regarding a provision in the proposed circular, which stated that States could not use Section 5310 funds received under service agreements as local match for 5311 to the docket, several States subsequently raised this objection to FTA regional staff. FTA reaffirmed and clarified this position, in Chapter III, Section 3(b) of the final circular, based on reading of 49 U.S.C. 5311(g)(3)(A) and 49 U.S.C. 5311(g)(3)(B).

In response to the addition of the eligibility of Federal Lands Highway funds, FTA believes that FHWA is better suited to provide this information. FTA added a reference to Chapter III, Section 3 to direct interested parties to the statutorily defined sources of DOT funds that States can use as local match for Section 5311 projects from the Federal Lands Highway Program.

D. Chapter IV—Program Development

FTA renamed and made minor updates to Chapter IV, including adding a requirement that designated State agencies provide annual Certifications and Assurances to FTA, which was always assumed under the former circular, but is now explicitly stated. FTA also made non-substantive, technical corrections to this chapter for clarity.

E. Chapter V—Locally Developed, Coordinated Public Transit—Human Services Transportation Plan

This chapter replaces the former Chapter V “Application Instructions,” which is now attached as Appendix A to the proposed circular. This new Chapter V describes the Locally Developed Coordinated Public Transit—Human Services Transportation Plan (Coordinated Plan) required under three other FTA programs (Sections 5310, 5316, and 5317) and addresses the relationship to that planning process for Section 5311 subrecipients. Although SAFETEA—LU does not require Section 5311 projects to be derived from a local coordinated plan, FTA states in Chapter V the expectation that Section 5311 and 5307 recipients and subrecipients will be included as essential partners or participants in any coordinated planning activities. FTA also revised Chapter V in the final version to include a reference to the statutory requirements for “maximum feasible coordination” with transportation assistance by other Federal services.

One commenter submitted multiple comments on this chapter. This commenter expressed concern that the proposed guidance was completely silent on the question of how, or whether FTA would allow incumbent Job Access and Reverse Commute (JARC) projects to continue. This commenter also was concerned about how FTA will allow local Section 5311 and 5307 grantees and subrecipients to provide important transportation services through Sections 5310, 5316, or 5317 directly. The commenter was further concerned that the approaches FTA was considering for these designations and allocations “will shut the door on many currently effective and many more potentially effective job access, new freedom, or elderly and disabled persons’ mobility programs.”

FTA agrees that the proposed circular did not address how FTA will allow local Section 5311 and 5307 grantees and subrecipients to provide important transportation services through Sections 5310, 5316, or 5317 directly. FTA has revised this chapter to include a cross-reference to 5310, 5316, and 5317 program circulars. In addition, FTA directs readers to FTA’s proposed JARC circular, which addresses incumbent JARC projects. The **Federal Register** notice accompanying the circular (71 FR 52610, Sept. 6, 2006) and the proposed circular are available on FTA’s Web site at <http://www.fta.dot.gov>. FTA will publish the final JARC Circular at a later date.

F. Chapter VI—Program Management and Administrative Requirements

This chapter retains the requirements that were in Chapter VI of Circular 9040.1E, and adds the National Transit Database (NTD) reporting required by SAFETEA—LU.

Nine commenters submitted comments on this chapter, with some commenters submitting multiple comments. One commenter generally applauded the clarity with which FTA presents procurement procedures that States and subrecipients may consider under the Section 5311 program.

One commenter provided comments on the proposed “Procurement” section. This commenter suggested that FTA emphasize in Section 5(a) that States may set procurement procedures or requirements that are more restrictive than FTA’s guidance, provided that a State’s policy does not violate Federal requirements. This commenter further suggested that FTA consider giving States’ authority to establish vehicle useful life and replacement standards for vehicles acquired with Section 5309 assistance for use by subrecipients under Section 5310, 5311, 5316, and 5317.

In response to this commenter’s first suggestion, FTA does not believe that it needs to add this qualifying statement to Chapter VI, Section 5(a) because this qualifying statement appears in the first sentence of this section. In response to this commenter’s second suggestion, FTA believes that this suggestion would be better addressed in the Section 5309 (Capital Investment Grant program) Circular, which is currently in the process of being revised.

One commenter provided a comment on the proposed “Financial Management” section. This commenter requested that FTA clarify Section 6(c) regarding the application of accrual accounting to subrecipients.

The common grant rule gives States the right to have the same financial management system for Federal funds they receive that they use for State funds. However, the requirement for accrual accounting is an FTA requirement. FTA requirements as well as common grant rule requirements are passed through to the subrecipient. Therefore, the accrual accounting requirement applies to subrecipients as well.

One commenter took exception on the proposed closeout requirements that require closing out subrecipient grant agreements within 90 days after all funds are expended. This commenter preferred to closeout a subrecipient grant after FTA has reviewed the single

audit report and made any adjustments, including repayments, to the grant.

The common grant rule, which is applicable to all recipients and subrecipients, requires the recipient or subrecipient to submit all financial, performance, and other reports required as a condition of the grant within 90 days after the expiration or termination of the grant. As this is a separate regulation not governed by FTA, FTA did not incorporate this commenter’s proposal into the final circular.

Seven commenters provided comments on the proposed NTD reporting requirements. One commenter recommended that FTA should keep data collection and reporting requirements to a minimum. This commenter further suggested that data collection and reporting requirements should have a direct purpose to transit performance. Three commenters noted that FTA designed the existing Rural NTD data module for a voluntary pilot program that predates the SAFETEA—LU requirements, and includes data categories that exceed the statutory requirements. These commenters also proposed that FTA eliminate the excess data categories and requirements to avoid unnecessary data collection and reporting.

FTA agrees that 49 U.S.C. 5311(b)(4) does not require some data elements, such as fatalities, that the current form requires. FTA also notes that the current form does not provide for collection of data required by SAFETEA—LU, such as fleet size and type. However, due to timing and funding limitations for the 2006 reporting year, FTA used the existing NTD rural data reporting module, which FTA developed in consultation with the State DOTs. For the FY 2007 reporting cycle, FTA is working with a team of NTD experts, selected State DOTs, and rural and private operators to review data elements and definitions in light of SAFETEA—LU requirements. FTA anticipates data for intercity bus and Tribal transit will be added at this time, though the number of data elements will be kept to a minimum. FTA also agrees with the direct purpose comment, and points out that the one-page, rural form requires the following performance measures: trips, costs, miles, and hours.

Three commenters supported direct reporting of data from rural subrecipients of Section 5311 funds. One of these commenters further suggested that FTA develop the option for States to allow their 5311 subrecipients to directly enter NTD data elements, subject to verification/concurrence by the State and suggested that FTA use, as a model, the Volpe

Center's Drug and Alcohol Management Information System (DAMIS) submission system.

FTA will continue to require the States to submit subrecipient data, and in the short term FTA will continue to require recipients to use the module that FTA and State DOTs developed. While FTA cannot use the Volpe Center's DAMIS submission system for direct reporting by subrecipients as a model at this time, FTA will explore implementing improvements in the reporting software as resources permit in the future. FTA will also explore other alternate means of receiving formatted data from the States.

Four commenters opposed FTA collection of subrecipient NTD data. Two commenters suggested that FTA consider accepting rural data in the aggregate rather than requesting forms for each State's subrecipients. One of these commenters further suggested that FTA discontinue such requests and accept rural transit data on an aggregate statewide level because such reporting is not compelled by statute. This commenter urged FTA to make an express written decision, reflected either in the final program circular or in a **Federal Register** notice, that it will not require the submission of 5311 program data by subrecipient. This commenter further questioned whether FTA provided notice that is legally sufficient to enable it to impose upon Section 5311 recipients a requirement to collect and submit data by subrecipient, at least for FY 2007 and beyond.

FTA is preparing a separate **Federal Register** notice on NTD reporting that will address the 5311 reporting requirements for in SAFETEA-LU for FY 2007, and seek comment on the implementation of rural data collection provisions. Overall, FTA has statutory authority to require recipients to gather and report subrecipients' NTD data to FTA pursuant to 49 U.S.C. Section 5335. Section 5335(a) states that FTA may request and receive appropriate information for the NTD from "any source," and Section 5335(b) states that FTA "may award a grant under section 5307 or 5311 only if the applicant, and any person that will receive benefits directly from the grant, are subject to the reporting and uniform systems." A subrecipient of Section 5311 is a direct beneficiary of the grant and, as such, is subject to providing information for the NTD to the extent FTA requires.

On the issue of collecting subrecipient data in the aggregate, FTA disagrees with the commenter's position. As stated above, 49 U.S.C. 5335(a) permits FTA to "request and receive appropriate information from any source," and 49

U.S.C. 5335(b) subjects "any person that receives benefits directly from the grant" to the reporting and uniform systems. In addition, Congress expected that the data collection requirements would be "tailored to the smaller size of the typical public transportation system in rural areas, while still providing enough information to judge the condition and performance of our Nation's network of rural public transportation systems." Conference Report No. 109-203, at 943 (2005). FTA does not believe that aggregate data is "tailored to the smaller size of the typical public transportation system in rural areas." Moreover, FTA does not believe that aggregate data provides "enough information to judge the condition and performance of our Nation's network of rural public transportation systems." Based on 49 U.S.C. 5335 and the Conference Report, FTA will require that States provide individual subrecipient NTD data to FTA.

One of these commenters suggested that FTA add a sentence at the end of the paragraph concerning NTD reporting to read as follows: "It is the State's responsibility to collect such information from its subrecipients as will be necessary to submit these annual reports to the NTD."

FTA agrees with the general idea of this sentence, and added the following statement to the end of the Chapter VI, Section 12(e): "*The State agency administering the FTA Formula Program for Non-Urbanized Areas (49 U.S.C. 5311) will be responsible for the data collection and compilation from each Section 5311 subrecipient in the State serving the general public.*"

Two commenters suggested that FTA provide training on the Rural NTD Program requirements and processes. One of these commenters recommended "in person" training in addition to online training or telephone help desk assistance.

FTA agrees and is working to provide more training on rural reporting. Currently, most States are using the NTD rural reporting telephone help desk, 703-462-5233. Additionally, FTA anticipates providing an NTD rural training session during the FY 2007 State Programs Meetings, in addition to various trainings throughout the year. FTA will post the training schedule on FTA's public Web site, located at <http://www.fta.dot.gov>. FTA will also post the training schedule on the NTD Program Web site, located at <http://www.ntdprogram.com>. States should frequently check these Web sites for updated training information.

One commenter provided comments on proposed Chapter VI, Section 14, "FTA Management Review." This commenter stated that there have been misunderstandings, or misplaced apprehensions, about ramifications of subrecipient site visits in the context of FTA management reviews. This commenter suggested FTA state that while FTA or its contractors may visit a sampling of subrecipients as part of the State Management Review, FTA does not intend for these visits to validate observations of States' program management practices, or to be compliance reviews of subrecipients. This commenter further suggested that FTA revise the first paragraph of Section 14 to read, "FTA also conducts more specific compliance reviews of States or their subrecipients in particular areas; for example * * *"

FTA agrees that there have been misunderstandings, or misplaced apprehensions, about ramifications of subrecipient site visits in the context of FTA management reviews, and therefore, incorporated a modified version of the commenter's suggested language into Chapter VI, Section 14 of the final circular.

G. Chapter VII—State Management Plan

This chapter consists of the previous Circular 9040.1E's Chapter XI, which FTA moved forward in the document to be consistent with the general format for FTA's revised circulars.

One commenter provided multiple comments on this chapter. This commenter generally applauded FTA's encouragement of States to prepare consolidated State Management Plans (SMPs) that encompass Sections 5310, 5316, and 5317, in addition to their Section 5311 program management. This commenter was concerned, however, that FTA does not require SMPs to explain the State's processes for assuring that it considered rural projects in the statewide transportation planning process. This commenter suggests that FTA encourage States to discuss outreach and consultation with local officials and, as appropriate, with Indian tribal governments as part of the Section 5311 management process.

FTA agrees that discussion of the State's approach to outreach and consultation with local officials should be included in the State Management Plan. FTA added clarifying language to Chapter VIII, Section 4 of the final circular.

H. Chapter VIII—Intercity Bus

This chapter retains the same information from Chapter VII of Circular 9040.1E, and adds the SAFETEA-LU

mandated enhanced consultative process requirement. While consultation between a State and intercity bus operators regarding the adequacy of intercity bus service within the State was encouraged under the previous circular, SAFETEA-LU now makes consultation mandatory for any State certifying that intercity bus needs are adequately met.

Ten commenters submitted comments on this chapter, with some commenters providing multiple comments. Two commenters submitted general comments. One of these commenters applauded FTA's efforts to see that States more fully include and consider intercity bus service operators in the development and support of rural transit services. Another commenter expressed concern that the guidance under this section would affect an urban grantee as well as a non-urban grantee, and suggested that FTA consider intercity bus service as public transportation.

On the issue of considering intercity bus transportation as public transportation, FTA does not agree. Title 49 U.S.C. 5302(a)(10) expressly excludes intercity bus transportation from the definition of public transportation. Although, intercity bus transportation is explicitly eligible for assistance under Section 5311(f), the commenter's concern is misplaced. Commuter bus service is public transportation, not intercity bus service, and is eligible for assistance under FTA's Urbanized Area Formula Program. As such, FTA has not incorporated the commenter's suggestion into the final circular.

Three commenters provided multiple comments on the consultation requirement to access intercity bus service. These commenters thought this requirement was too burdensome, and were concerned that the State will be unable to certify that intercity needs are met because private intercity bus operators are reluctant to submit proposals for intercity program funding. Two of these commenters believed that the evaluation of private sector business activities is outside of its scope and authority.

FTA is aware that it may be difficult to obtain proposals for intercity bus projects in areas where the State has identified unmet needs. The statutory provision for certification implies a statewide assessment of intercity bus service that is currently available and an assessment of any existing needs. This is not a new requirement.

On the issue of FTA's scope and authority, FTA notes that 49 U.S.C. 5311(f)(2) requires the chief executive officer to consult with "affected

intercity bus providers." Affected intercity bus providers may include private sector providers. In addition, 49 U.S.C. 5311(f)(2) requires the State to certify to FTA that the "intercity bus service needs of the State are being met adequately," if the State will not use the funds to support intercity bus service. Because FTA requires a direct correlation between the consultation process and the result of such certification, States will necessarily have to assess private sector business. Therefore, it is not outside of FTA's scope and authority to require States to assess private sector business activities to the extent that 49 U.S.C. 5311(f)(2) requires.

One commenter was concerned that any proposal related to counting expenditures on intercity bus services outside of a delineated Section 5311(f) project would need to verify that the service does meet the standards for Section 5311(f) participation.

FTA believes that Chapter VIII is clear that intercity bus mobility needs can be met in many ways, including by publicly provided service. FTA agrees that to meet the Section 5311(f) expenditure requirement, a project must meet the standards for 5311(f) participation provided in Chapter VIII of the final circular.

Two commenters suggested that if consultation demonstrates that there are significant unmet intercity bus needs in the State and there are substantial proposals presented to meet those needs, there is no "direct correlation" between the process and the result. The commenters suggest that the requirement for certification that there are no unmet bus needs renders the consultation process meaningless. These commenters proposed that when there is no direct correlation between the process and the results, FTA should not accept the certification. Further, these commenters suggested that FTA clarify, in Section 3 or 4, that FTA will reject the certification if it finds that there is no direct correlation between the certification and the results of the consultation process.

FTA agrees that a "direct correlation" should exist between the certification processes and consultation results, including any needs assessment. In response, FTA strengthened the language in Chapter VIII, Section 3, and modified the model certification letter in Appendix E. As such, FTA will review letters of certification upon receipt to ensure that a direct correlation exists. FTA will not accept the certification if it is apparent that there is no direct correlation between the certification and the results of the

consultation process. FTA will also review the consultation processes and needs assessment during the State Management Review.

Four commenters submitted multiple comments on the proposed consultation process requirements. One commenter suggested that Sections 4(b)(2) and (4) are not clear. Another commenter was concerned that the process, as proposed, was too burdensome.

These commenters were not specific concerning which aspects of the consultation requirements were unclear or burdensome. Therefore, FTA adopted the consultation process for intercity bus service as proposed in the proposed circular.

Two commenters supported the definition of "consultation" as defined in the joint FTA/FHWA Metropolitan and Statewide Planning regulation (49 CFR part 613). Specifically, one of these commenters noted that the specific aspects in Section 4(b) undermine the flexibility granted in the planning regulation, and proposed that the consultation requirements of this circular should reflect the requirements of the planning regulation. This commenter further recommended that FTA replace "must include" with "may include" in Section 4(b) to support flexibility in the approaches that States may take in the consultation process.

FTA retained the definition of "consultation" as provided in FTA/FHWA's Statewide and Metropolitan Planning regulation, but also notes that consultation, as it applies to the intercity bus program, must meet specific requirements. FTA disagrees with the proposal that FTA replace "must include" with "may include" in Section 4(b). FTA believes that the four elements outlined in the guidance are necessary to establish an effective consultation with intercity bus providers and an assessment of the State's needs. FTA further believes the elements are not too prescriptive and allow the State's flexibility in establishing an assessment and consultation process.

Two commenters submitted comments on the proposed suggestions for identifying private intercity carriers. One commenter applauded FTA's comprehensive list of suggested consultation activities and suggested that States may identify the intercity bus network and consultation with its members through State outreach to State-level or multi-State regional associations of motor coach operators. This commenter further suggested consultation activities could include participation, dialogue, and meaningful interactions at the meetings and

conferences of these associations. This commenter also feels that the locally developed, coordinated public transit-human services transportation plans have enough concerns and priorities from their statutory mandates, and to have them become a vehicle for intercity bus industry consultation, as well, strikes the commenter as too burdensome a suggestion. Another commenter suggested that FTA change the wording in 4(c)(b) regarding the use of "The Bus Industry Directory" to "industry directories" to avoid reference to a particular book that may no longer be published.

FTA agrees with the commenters and encourages States to engage in as many activities as possible to facilitate an effective consultation process. FTA also agrees that the requirement to include an assessment of intercity bus needs in the development of Coordinated Public Transit-Human Service Transportation Plans could indeed become burdensome. However, Section 5311 and 5307 recipients are the "public transit" in the Coordinated Public Transit-Human Service Transportation Plan, and FTA expects and encourages their involvement in the development of those plans. To the extent that intercity bus service is an unmet need for low income, elderly, or persons with disabilities, States should include those needs, and strategies to meet those needs, in their coordinated plans. To that extent, the coordinated planning process can be a resource to States in identifying unmet intercity bus transportation needs. On the issue of amending "The Bus Industry Directory" to read "industry directories," FTA agrees and incorporated this change accordingly.

Two commenters thought that informing intercity bus carriers of a State's intent to certify was not an appropriate way to start the consultation process because it implies that a State has made a judgment about certification that it should not make prior to consultation. Furthermore, these commenters believed that the proposed Section 4(c)(2)(a) implies that consultation should be limited to those situations where the State is considering certifying, rather than including intercity bus operators in the State rural planning process on an ongoing basis. These commenters recommended that FTA strike the language of Section 4(c)(2)(a) and substitute it with the following language:

Inform intercity bus carriers of the State's rural planning process and encourage their participation in that process, and where a State is considering possible certification, provide an opportunity to submit comments

and/or request a public meeting to identify unmet needs and discuss proposals for meeting those needs.

FTA agrees with these comments and incorporated this language into Chapter VIII, Section 4(c)(2)(a) of the final circular.

Two commenters agreed with FTA's proposal in Section 4(c)(3)(a) concerning the appropriateness for a State to work in partnership with the American Bus Association. However, these commenters suggested that this should not preclude States from working with carriers on an individual basis. These commenters proposed adding "and/or carriers individually" after "Association" in line two of Section 4(c)(3)(a). Another commenter noted that not all of Greyhound's schedules are listed in the Russell's Guide, and suggested that FTA list Greyhound's Web site as a source for identifying intercity bus carriers and service.

FTA agrees that States should not be precluded from working with intercity bus carriers on an individual basis and incorporated the language "and/or carriers individually," accordingly. On the issue of adding the Greyhound Web site, FTA agrees that while the Russell's Guide may not contain the most current information, the addition of only Greyhound's Web site (and not other intercity carriers' Web sites) is not warranted. FTA, however, added "Web sites of private intercity bus operators" in the resources for identifying intercity bus operators in the State.

Three commenters submitted comments concerning eligible activities. One commenter supported the inclusion of FTA's new definition of joint development, and applauded FTA for describing this new eligibility in the "eligible activities" section. Two commenters indicated that FTA published proposed guidance on joint development projects, including implementation of the new intercity bus terminal eligibility in the **Federal Register** on September 12, 2006. These commenters suggested that FTA reference that guidance in Section 8 and suggested that FTA correct the last sentence to reflect that the joint development eligibility criterion for intercity bus terminals is "physical or functional" relationship to public transportation facilities, not "physical and functional" relationship.

FTA agrees that the joint development eligibility criterion for intercity bus terminals is "physical or functional" relationship to public transportation facilities, not "physical and functional" relationship. FTA published final guidance on joint development on

February 7, 2007. Accordingly, FTA added a reference to this document in Section 8.

Two commenters submitted multiple comments concerning feeder service. These commenters recommended that Section 9 make clear that feeder service is only eligible for Section 5311(f) funding if it makes "meaningful connections with scheduled intercity bus service to more distant points" by adding "and which makes meaningful connections with scheduled intercity bus service to more distant points" at the end of the first sentence of Paragraph 9. These commenters further noted there are many factors (e.g., weather, accidents, change of plans) that can impede a customer's ability to properly schedule a return intercity bus trip with a demand-responsive feeder service, and suggested that FTA add language to Section 9 that encourages feeder services to make regularly scheduled connections with intercity bus services. These commenters also recommended that FTA make clear, in Section 9, that States should also use the same merit based selection process, as outlined in Section 6, for feeder services.

On the issue of adding "and which makes meaningful connections with scheduled intercity bus service to more distant points" at the end of the first sentence, FTA agrees and added this language accordingly. On the issue of adding language that encourages feeder services to make regularly scheduled connections with intercity bus services, FTA disagrees. FTA believes that this is a local operational issue and should be resolved at the local level. On the issue of a merit based selection process as applied to feeder service, FTA agrees that States should use the same merit based selection process as outlined in Section 6 and this process should be documented in the State Management Plan.

One commenter submitted comments concerning ADA requirements. This commenter suggested that FTA's explanation of ADA obligations in relation to intercity bus operations was "too light" in its listing of ADA obligations. This commenter pointed out other features of accessibility that pertain to public and private intercity bus operators alike, such as, the requirement to provide accommodation to persons with disabilities and to make information on the operation accessible to persons with sensory or cognitive impairments. This commenter asked FTA to clarify whether the ADA "stand in the shoes" standard applies to private operators of intercity bus services who

receive public support through Section 5311(f).

On the issue of whether the Section 5311 Circular is “too light” in its listing of ADA obligations, FTA believes DOT’s ADA regulation is self-explanatory and that there is no need to repeat the regulation at length in this circular. However, FTA revised the final circular to state that while the ADA complementary paratransit provisions may not apply to intercity bus, FTA notes that other relevant requirements of 49 CFR parts 27, 37, and 38 may apply to intercity bus service.

With regard to the “stand in the shoes” issue, FTA acknowledges that DOT has proposed changes to 49 CFR 37.23 in an attempt to address the relationship between a public and private entity where the private entity was providing service under a contract or other arrangement, with the “other arrangement” taking the form of a grant. FTA provided a discussion on this issue in the section pertaining to Chapter X.

Eight commenters submitted comments on the Federal share requirements. One commenter concurred with the Federal share for this program, and recommended that FTA include the requirement of a 50 percent of net cost Federal share for operations and 80 percent for capital projects and project administration in the final circular. Seven commenters submitted comments supporting the use of verifiable capital costs of the unsubsidized intercity bus network within its borders as local match for a project involving Section 5311(f) services that make meaningful connections to that unsubsidized intercity bus network, when the entity operating the unsubsidized service approves of such use. Two commenters suggested that FTA add the following paragraph at the end of Section 11:

FTA is aware that the 50 percent local match requirement for operating assistance for intercity bus services is problematic for States attempting to develop networks of intercity bus services since these services are, by definition, intercity, not local services. In order to encourage the development of such networks, FTA will allow a State to use the verifiable capital costs of the unsubsidized intercity bus network within its borders as local match for a project involving Section 5311(f) services that make meaningful connections to that unsubsidized intercity bus network, provided that the entity operating the unsubsidized service approves of such use. In such cases, the project cost will be defined as the net operating cost of the subsidized service plus the capital cost of the unsubsidized intercity bus network and any other local match as may be needed. Section 5311 funds can be used to fund up to 50 percent of that project cost.

Another commenter suggested that the following language be added to Section 11:

In order to encourage the development of intercity networks, FTA will allow a State to use the verifiable capital costs of the unsubsidized intercity bus network within its borders as local match for a project involving Section 5311(f) services that make meaningful connections to that unsubsidized intercity bus network. In such cases, the project cost will be defined as the net cost of the subsidized service plus the capital cost of the unsubsidized intercity bus network and any other local match as may be needed. Section 5311(f) funds can be used to fund up to 50 percent of that project cost.

FTA agrees in part with the proposal to use verifiable capital costs of the unsubsidized intercity bus network within its borders as local match, and approved a two-year pilot of In-Kind Match for Intercity Bus (“Pilot Program”). This Pilot Program allows States to use the capital costs of private sector intercity-bus service as in-kind match for the operating costs of connecting rural intercity bus feeder service funded under 49 U.S.C. 5311(f). FTA included an Appendix to this notice that outlines the program terms of the Pilot Program.

I. Chapter IX—Rural Transportation Assistance Program

This chapter contains the renumbered Chapter VIII from Circular 9040.1E. Although it makes no significant substantive changes, it reflects the new funding source for Rural Transportation Assistance Program (RTAP) as defined by SAFETEA-LU. Prior to SAFETEA-LU, RTAP was funded out of FTA’s Research budget. SAFETEA-LU now funds RTAP with a 2 percent takedown from the Section 5311 program, with 85 percent going to the States for local projects, and 15 percent to be used towards national projects to supplement State projects, such as the maintenance of a National RTAP resource center. This funding method ensures a predictable source of annual funding.

Two commenters submitted multiple comments on this chapter. One commenter applauded FTA for noting that SAFETEA-LU re-named this program from “Rural Transit Assistance Program” to “Rural Transportation Assistance Program.” This commenter further applauded FTA for its accurate embodiment of SAFETEA-LU’s substantive changes to RTAP, and agrees that tribal transit technical assistance is a matter of pressing need, but thinks that it is outside the scope of this circular. This commenter also suggested that FTA update the list of initiatives that parallel the national

component of RTAP, such as Project ACTION, the National Technical Assistance Center for Senior Transportation, the National Resource Center for Human Service Transportation Coordination, and the FTA/Labor Department JobLinks initiative.

FTA agreed with this commenter and incorporated a link to other National Technical Initiatives to Chapter 9, Section 6 of the final circular.

Another commenter stated that this section incorrectly indicated how many operators were in Alaska. This commenter suggests that when next reviewing RTAP allocations, that FTA make RTAP apportionments to States according to the population and area formulas already in place for the 5311 program.

At the time of publication of the proposed circular, FTA used information that was readily available; however, we discovered this was not the most current information. FTA apologizes to the State of Alaska. FTA did not receive other comments advising a change in the RTAP formula, and will not be changing the formula at this time.

J. Chapter X—Other Provisions

This chapter combines Circular 9040.1E’s Chapter IX “Civil Rights Requirements” and Chapter X “Other Provisions.” Chapter X of the revised circular incorporates the same text from those two existing chapters. FTA renumbered and reorganized this text. The revised Chapter X also: (1) Expands the public hearing and involvement requirement for capital project planning to conform with SAFETEA-LU; (2) adds standardized language on real property acquisition and relocation assistance; (3) relieves the pre-award and post-deliver audit review requirement for procurements of 20 vehicles or less; (4) amends the Buy America section to reflect SAFETEA-LU changes regarding post-award requests and the right of an adversely affected party to seek FTA review; and (5) adds a new section on safety and security.

Four commenters submitted comments on this chapter, with some commenters submitting multiple comments. One commenter raised the fact that FTA and FHWA are in the process of drafting updated regulations for statewide and metropolitan transportation planning that address the National Environmental Policy Act (NEPA) compliance and environmental protections, in addition to, core aspects of the planning requirements incumbent on States and metropolitan planning organizations. This commenter also

hopes that FTA is taking steps to assure that the Disadvantaged Business Enterprise (DBE) language in the circular comports with DBE rules and guidance that DOT has issued in recent months and years.

On February 14, 2007 FTA and FHWA published the new joint planning regulation. There were no significant changes in the new planning rule that are inconsistent with the more general information in this circular relative to the Statewide or Metropolitan planning process. Members of the public interested in the planning rulemaking may wish to review the docket by going to <http://dms.dot.gov> and entering docket number 22986. FTA agrees with the comment concerning DBE rules and guidance. FTA is taking steps to assure that the DBE language in the circular comports with DBE rules and guidance that DOT has issued.

Three commenters submitted comments on civil rights. One of these commenters noted that FTA is in the process of revising its civil rights circular that addresses a number of issues, including Title VI compliance, environmental justice, and consideration of limited English proficiency, and suggested that FTA reference these issues referenced by this and other program management circulars.

FTA agrees with these comments, but declined to amend the final circular to incorporate changes made in other reference documents until these documents have gone through notice and comment, and have been finalized. Members of the public interested in the transportation for individuals with disabilities rulemaking may wish to review the docket by going to <http://dms.dot.gov> and entering docket number 23227.

Another commenter stated that Chapter X fails to provide a specific reference to the clarification of 49 CFR 37.23 in the Office of the Secretary's Notice of Proposed Rulemaking "Transportation for Individuals with Disabilities." This commenter proposed highlighting this change in the Section 5311 Circular because it affects grants, sub-grants, cooperative agreements, and contracting for services.

FTA declines at this time to provide a specific reference to the clarification of 49 CFR 37.23 in Chapter X of the final circular. With regard to the "stand in the shoes" issue, FTA acknowledges that DOT has proposed changes to 49 CFR 37.23 in an attempt to address the relationship between a public and private entity where the private entity was providing service under a contract or other arrangement, with the "other

arrangement" taking the form of a grant. In other words, under current DOT policy and the proposed rule, Section 5311 subrecipients that are private non-profit agencies providing fixed route public transit service would be required to provide complementary paratransit. Traditional means of financial support for intercity bus, such as vouchers or operating subsidies, would remain covered under 49 CFR 37.37(a), which would not be changed under the proposed rulemaking. According to 49 CFR 37.37(a), a private entity does not become subject to requirements applicable to a public entity simply "because it receives an operating subsidy from, is regulated by, or is granted a franchise or permit to operate by a public entity." The nature of the arrangement between the public entity and the private intercity operator would determine whether Section 37.37 or Section 37.23 applies. In any case, the language likening intercity bus service to commuter service in terms of applicability of the requirement to provide ADA complementary paratransit is still valid and would not be changed by the proposed ADA rulemaking.

Two commenters submitted comments on charter service. One commenter agreed that FTA should not issue any new rules or regulations regarding charter bus service until the negotiated rulemaking advisory committee completes its work. This commenter suggested that FTA rely on its prior charter bus rulings and existing legislation. Another commenter suggested that FTA add a note that it has begun a negotiated rulemaking process concerning its charter service regulations, and the outcome of that rulemaking, when completed, likely will result in changes to this circular's charter service language.

FTA agrees, and will rely on the existing regulations. However, FTA can supplement the existing regulations with the language in SAFETEA-LU to the extent the regulations do not conflict. In the interim, recipients can forward any charter issues regarding a particular fact scenario to the regions. FTA further suggests that interested parties follow the rulemaking proceedings by going to <http://dms.dot.gov> and entering docket number 22657 into the search criteria.

Two commenters suggested that FTA consider adding language to Chapter X, Section 19, "Safety" to explain any expectations that FTA has of its Section 5311 recipients and subrecipients in the area of public transit security. One commenter submitted multiple comments concerning safety and/or

security. This commenter suggested that FTA add a sentence to Section 19 that reads as follows:

FTA has entered into a Memorandum of Understanding with the American Association of State Highway and Transportation Officials (AASHTO), the American Public Transportation Association (APTA) and the Community Transportation Association of America (CTAA) that supports the transit industry and Federal commitment to bus safety, and supports a model bus safety program to which all the signatories of this agreement have agreed to subscribe.

FTA agrees, and incorporated the commenter's proposed language. FTA further added the following sentence to the end of the commenter's suggested language: "This program will also focus on addressing the needs of rural and small urban providers." FTA has reserved the right to amend the final circular to incorporate changes, with regard to any expectations that FTA has of its Section 5311 recipients and subrecipients in the area of public transit security, made in other reference documents that have gone through notice and comment, and have been finalized.

K. Appendices

FTA proposed to re-label and reorganize Exhibits A–G of Circular 9040.1E as Appendices A–H of the revised circular. The proposed new Appendix A contained revised application instructions that were formerly contained in Chapter V of Circular 9040.1E. The proposed Appendix B retained the Sample Selection of Projects that was formerly Exhibit A, but FTA proposed amending it to recognize the transfer of funds from the Section 5310, 5316, and 5317 programs. The proposed Appendix C retained the Section 5311 budget information from the former Exhibit B, and added new codes for the Section 5310, 5316, and 5317 programs. FTA proposed adding a new Appendix D to reflect the use of flexible funds under SAFETEA-LU. FTA proposed to retain the next three appendices without change: Appendix E retained the sample intercity bus certification from the former Exhibit E with the addition of evidence of consultation; Appendix F proposed to reserve the Section 5333(b) labor protection warranty from the former Exhibit F; and Appendix G retained the Capital Cost of Contracting percentage breakdowns from the former Exhibit G. FTA proposed to add a new Appendix H, listing contact information for FTA's Regional Offices.

Three commenters submitted comments on the Appendices to this circular. One commenter asked whether

the Department of Labor (DOL) and/or FTA will publish the procedures and afford States an opportunity to comment in response to the statement in Appendix A. Section 1h. under Certification of Labor Protective Arrangements that states, “at the time of this draft, DOL is preparing to revise its procedures for Section 5311.”

In response, FTA would like to clarify that DOL has not yet issued a Notice of Proposed Rulemaking (NPRM), but may in coming months. FTA anticipates that DOL will provide States an opportunity to submit comments on this NPRM. FTA will advise the States how to access the NPRM when DOL issues it.

Two commenters suggested that the following paragraph replace the second paragraph and the second bracketed paragraph in Appendix E of the Revised Guidelines:

The State has conducted an assessment of statewide intercity bus mobility needs between (fill in dates), which dates are no more than four years prior to the date of this certification. What follows is a description of the assessment process and findings: * * * Prior to this certification, as required by 5311(f)(2), the State consulted with affected intercity bus operators. That consultation process contained the four elements required by the circular and involved the following activities: (Description of activities and how they complied with required elements): Considering the State assessment and the results of the consultation process, the basis for the certification that there are no unmet intercity bus needs in the State is (explain in detail).

These commenters believed this language would provide FTA with an initial view of whether a State is complying with the new standards so that it can move quickly when corrective action appears necessary.

FTA agrees and has incorporated these commenters’ proposed language into the final circular accordingly. FTA has adopted the remainder of the Appendix as proposed, with minor technical corrections. FTA does not now recommend consolidation of multiple programs into a single grant, but retains the Scope code information for potential use. In the final circular FTA has also added new data fields for subrecipient information in the program of projects to comply with new requirements

contained in the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282), enacted September 26, 2006.

Appendix 1. Implementation of Two-Year Pilot of In-Kind Match for Intercity Bus

Prior to publication of the proposed circular, FTA had ongoing conversations with intercity bus industry representatives, a private consultant working on intercity bus issues, and a State DOT to explore the possibility of capturing the value of unsubsidized intercity bus service as a source of in-kind local match for intercity bus projects funded with Section 5311(f). Greyhound and the American Bus Association submitted comments to the docket for the revisions to the Section 5311 program circular that reflected the outcome of those preliminary conversations, and several States submitted comments in support of the intercity bus industry’s proposal.

On October 20, 2006, FTA initiated a two-year pilot allowing States to use the capital costs of private sector intercity-bus service as in-kind match for the operating costs of connecting rural intercity bus feeder service funded under 49 U.S.C. 5311(f).

Background

Title 49, U.S.C. 5311(f) requires each State to use 15 percent of its annual apportionment under its Section 5311 program to support intercity bus service, unless the Governor certifies that the intercity bus needs of the states are adequately met. SAFETEA–LU strengthened this requirement by requiring consultation with intercity bus operators prior to certification.

In the last several years Greyhound has terminated most of its rural service, but Greyhound and other private operators maintain service between larger cities. Smaller regional carriers and rural transit systems can help support the national network of intercity bus service and meet the mobility needs of rural residents by providing feeder service that connects rural communities to the closest city with intercity bus service.

Several States have conducted comprehensive state intercity bus needs assessments and identified corridors that could be supported by Section 5311(f) funding for feeder service, providing intercity connections to rural communities and increasing ridership and productivity to help sustain the unsubsidized intercity service provided by Greyhound and other operators.

However, even when the State was interested and willing to use Section 5311(f)

funds to meet identified needs and the private operator needed and desired the connecting service, lack of sources of local match often impeded implementation of the feeder service.

A consultant working with the State of Washington came up with a creative financing concept, which Greyhound endorsed and promoted to FTA. While FTA rejected the original proposal to use the entire value of the unsubsidized intercity bus network in a State as a form of credit to be awardable for match, FTA continued to work with the advocates to refine the proposal. Several states and industry groups sought FTA’s approval of the financing concept in comments submitted to the Docket for the proposed revisions to the Section 5311 program circular. FTA internally discussed the proposal and agreed to test a limited version of the financing concept in a two-year pilot for Section 5311 grants obligated during FY 2007–2008.

In this notice, FTA addressed the financing concept in the preamble but FTA did not incorporate the financing concept in the Circular because FTA is limiting the financing concept to a two-year period pilot. Depending on whether the pilot proves that the financing concept is workable and beneficial, FTA may extend and incorporate it into later iterations of the Section 5311 Circular, or in future legislative proposals.

I. Implementation Instructions

A. Defining the FTA Assisted Project

To use the capital provided by a private operator as in-kind match, the FTA assisted project must be defined as including both the feeder service and an unsubsidized segment of intercity bus network to which it connects.

B. Costs Allowable As In-Kind Match

To be eligible to be used as in-kind match, a cost must be otherwise allowable under the project. Thus, to be eligible under Section 5311, the costs contributed by the private operator as in-kind match must connect the rural community to further points. Also, since FTA can only fund the net project cost and the private operator is presumed to be collecting at least enough in fares to cover the operating costs of the service, we are only allowing the capital costs of the unsubsidized service to be used as in-kind match. To simplify matters, we will use the percentages allowed in the capital cost of contracting guidance to determine how much of the private operator’s total costs are attributable to capital. (e.g., 50% where the operator provides and maintains all the equipment, less if FTA funded equipment is provided.)

C. Simplified Example of a Project

FEEDER SERVICE—RURAL COMMUNITY A TO INTERCITY BUS TERMINAL IN CITY B

| | | |
|-----------------------------|----------|---|
| Total Operating Costs | \$15,000 | Service operates 2 round trips per day, 5 days per week. 1000 miles total @ \$15/ mile. |
| Less Farebox Revenue | 5,000 | Based on weekly ridership of 20 passengers who use the feeder to connect with intercity service at point B. |
| Net Operating costs | 10,000 | Subsidized by 5311(f). |

Note: City B may be either under or over 50,000 in population if the origin in Point A is a non-urbanized area.

CONNECTING SERVICE—FROM INTERCITY BUS TERMINAL IN CITY B TO BIG CITY C

| | | |
|---|----------|---|
| Total Operating Costs | \$20,000 | Documented fully allocated costs (both capital and operating) of unsubsidized privately operated service—2 trips each day that connect with the feeder service. (ten trips per week) 500 hours of service @ \$40/hour. (If there are more trips per day that do not connect with the feeder, those costs aren't counted). |
| Less Operating Costs | 10,000 | The operating portion of the fully allocated costs is not allowable as in-kind match because the private operator is not operating at a loss, so farebox revenues are presumed to cover all the operating costs. Capital cost of contracting ratios may be used to determine the percentage of the total unsubsidized cost of the private service attributable to capital—50% if no FTA provided vehicles are used. The remainder is operating costs. |
| Value of Capital contributed by private operator. | 10,000 | May be used as In-Kind match. |

Note: Both City B and City C are on the route on which the private intercity bus operator provides scheduled service. In this example there is just one destination, but in other cases there may be additional segments of the network included in the calculation—for example, service from B to D as well as B to C.

FTA ASSISTED PROJECT—SERVICE FROM RURAL COMMUNITY A TO BIG CITY C

| | | |
|-------------------------------------|----------|--|
| Operating Deficit Segment A–B | \$10,000 | Funded by 5311(f)—Federal Share. |
| Capital Costs Segment B–C | 10,000 | In-Kind Match—Local Share. |
| Net Cost of project A–C | 20,000 | Net Project Cost—included in program of projects and in TEAM Budget. |

Note: The example above assumes a 50/50 match ratio for operating assistance. The Federal share may be greater if a State is eligible to use the sliding scale match ratios.

D. Use of Private Capital as In-Kind Match for Subsidized Private Sector Routes or Service Contracted From Private Operator

A contribution of unsubsidized private capital can also be used to provide in-kind match when Section 5311(f) funds are used to subsidize an unprofitable rural intercity bus route that might otherwise be discontinued by the private operator. Section 5311(f) funds can be used to pay for the operating deficit and the local match can come from the capital costs contributed by the private operator. Alternatively, a State (or local transit agency) can contract with a private operator to provide rural intercity bus service, and pay for the operating deficit with Section 5311(f) funds, with the private operator providing in-kind match in the form of the value of the unsubsidized capital portion of the contracted service.

E. Excess or Insufficient In-Kind Match

If there is excess in-kind match available from the value of the capital costs, it cannot be used to increase the Federal share above the actual operating deficit of the project. In the simplified example above, if the capital costs of the connecting service were \$12,000, the Federal share of the project provided in Section 5311(f) funds would still be \$10,000 because that is what is needed to pay the operating deficit of the feeder service. Only \$10,000 of the capital costs are used for in-kind match.

On the other hand, if the value of the unsubsidized capital contribution does not provide sufficient in-kind match to equal the Section 5311(f) funds needed to cover the operating deficit, the State or local agency has to produce the difference in cash. In the simplified example above, if the capital costs of the unsubsidized service were only \$8,000, the \$10,000 operating deficit of the feeder service could be paid with \$8,000 in Section 5311(f) funds and \$2,000 in cash from other sources.

F. Period of Availability of the In-Kind Match

Once included in an approved grant obligated within the two-year pilot period, the capital contribution described in the application may be used as in-kind match until the Federal share is fully expended.

G. Documentation Required in State's Application for Section 5311

When applying to use the unsubsidized capital as in-kind match, the State must provide supplemental information with its Section 5311 grant application.

1. For each Section 5311(f) project using the match, the State must provide a detailed description of the feeder service and the connecting service, identifying locations served by each, and the connections. Only those runs that actually connect with the feeder service can be used for match. For example, if the private operator makes four trips per day through point B but the feeder service only operates twice daily, only the capital costs of the two daily connecting trips can be used as in-kind match.

2. Itemize the total and net costs of each segment used in the project description (for example A–B and B–C, by actual place names, and level of service.) The value of the in-kind match must be based on the documented fully allocated costs incurred by the private operator in providing the connecting service, with reasonable calculations by methods such as costs per mile, or costs per hour. Capital Cost of Contracting percentages may be used to determine the amount of fully allocated costs attributable to capital, unless the operator can provide documentation that the capital costs (including preventive maintenance) are higher. The detailed information may be presented in table form, as in the simplified example above.

3. If the capital costs do not provide sufficient match for the entire operating deficit of the feeder service, additional cash

match is required, and should be documented in the application.

4. The application should include documentation that the private operator has consented to the arrangement, documented the costs of the private service being used for in-kind match, and acknowledged that the private service is part of the FTA project and thus is covered by the labor warranty and other Federal requirements.

H. Regional Review and Processing of Grant Application

When a State applies to use this source of in-kind match during the two-year pilot in FY 2007 or 2008, the FTA regional office will review the documentation to ensure that the project as defined is eligible for Section 5311(f) assistance and that sufficient local match is provided by the in-kind capital contribution to match the operating assistance provided.

I. Assessment of Pilot Project

FTA invites States and industry to comment on the implementation of the pilot as it proceeds. Observations about any procedural issues and reflections on the impact of the pilot in increasing the rural intercity bus connections are welcome at any time. FTA particularly invites you to submit an assessment on the two-year pilot in July, 2008, when FTA expects to consider whether to extend or terminate the pilot.

Issued in Washington, DC, this 22nd day of February, 2007.

James S. Simpson,
Administrator, Federal Transit Administration.

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