(vi) Related resources.

* * * * *

PART 4—ADMINISTRATIVE MATTERS

3. Amend section 4.1202 by adding paragraph (cc) to read as follows:

4.1202 Solicitation provisions and contract clauses.

* * * * *

(cc) 52.239–XX, Authentic Information Technology Products—Representation.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.301 by adding paragraphs (d)(3) and (d)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(d) * * *

(3) Insert the provision at 52.239–XX, Authentic Information Technology Products—Representation, as prescribed at 39.107(b)(1).

(4) Insert the clause at 52.239–YY, Authentic Information Technology Products, as prescribed at 39.107(b)(2).

* * * * *

PART 39—ACQUISITION OF INFORMATION TECHNOLOGY

5. Amend section 39.002 by adding, in alphabetical order, the definition ''Counterfeit information technology product'' to read as follows:

39.002 Definitions.

* * * * *

Counterfeit information technology product means any item of information technology (IT), including hardware and software, that is an unauthorized copy, replica, or substitute.

* * * * *

6. Amend section 39.101 by adding paragraph (e) to read as follows:

39.101 Policy.

* * * * *

(e) To protect the Government from procuring counterfeit IT products, agencies shall ensure that all acquisitions for IT products are procured from the original equipment manufacturer (OEM), software developer, or authorized distributor or reseller. Agencies shall ensure that all solicitations and contracts for the acquisition of IT products include a requirement for the offeror or contractor to represent that the IT products being sold under its contract to the Government are not counterfeit.

39.102 [Amended]

7. Amend section 39.102 by removing from paragraph (b) ''availability,'' and adding ''availability, counterfeit IT products, performance, security,'' in its place.

8. Amend section 39.107 by designating the undesignated paragraph as paragraph (a); and adding paragraph (b) to read as follows:

39.107 Contract clause.

* * * * *

(b)(1) The contracting officer shall insert the provision at 52.239–XX, Authentic Information Technology Products—Representation, in all solicitations for the acquisition of IT products.

(2) The contracting officer shall insert the clause at 52.239–YY, Authentic Information Technology Products, in all contracts for the acquisition of IT products.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.239–1 [Amended]

9. Amend section 52.239–1 by removing from the introductory paragraph ''39.107'' and adding ''39.107(a)'' in its place.

10. Add sections 52.239–XX and 52.239–YY to read as follows:

52.239–XX Authentic Information Technology Products—Representation.

As prescribed in 39.107(b)(1), insert the following provision:

AUTHENTIC INFORMATION TECHNOLOGY PRODUCTS—REPRESENTATION (DATE)

(a) *Definition. Counterfeit information technology product* means any item of information technology (IT), including hardware and software, that is an unauthorized copy, replica, or substitute.

(b) To be eligible for award of the proposed contract, an offeror must—

(1) Be either the original equipment manufacturer (OEM); or

(2) Have written authorization from the OEM or software developer to function as a distributor or reseller of the subject products.

(c) By submission of this offer, the offeror represents that—

(1) The IT products to be sold or leased to the Government under the proposed contract are authentic and not counterfeit; and

(2) It is the original equipment manufacturer or software developer, or an authorized distributor or reseller for the IT products.

(End of provision)

52.239–YY Authentic Information Technology Products.

As prescribed in 39.107(b)(2), insert the following clause:

AUTHENTIC INFORMATION TECHNOLOGY PRODUCTS (DATE)

(a) *Definition. Counterfeit information technology product* means any item of information technology (IT), including hardware and software, that is an unauthorized copy, replica, or substitute.

(b) The Contractor shall sell to the Government only IT products that are authentic and not counterfeit. In the event that such IT products are determined to be counterfeit, there is no limitation to the Contractor's liability.

(End of clause)

[FR Doc. E8–27275 Filed 11–17–08; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 605

[Docket No. FTA–2008–0044]

RIN 2132–AB00

School Bus Operations

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: Through this notice, the Federal Transit Administration (FTA) proposes to amend its school bus operations regulations. Most notably, FTA proposes to clarify several definitions, amend the school bus operations complaint procedures, and implement Section 3023(f) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU). FTA seeks comment on this notice from interested parties.

DATES: Comments must be received by February 17, 2009. FTA will consider late filed comments to the extent practicable.

ADDRESSES: You may submit comments by one of the following methods.

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Fax:* 1–202–493–2251.
- *U.S. Post or Express Mail:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery:* The West Building of the U.S. Department of

Transportation, 1200 New Jersey Avenue, SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: You must include the agency name (Federal Transit Administration) and the Docket number (FTA–2008–0044) or the Regulatory Identification Number (RIN) (2132–AB00) for this notice at the beginning of your comment. You should include two copies of your comment if you submit it by mail. If you wish to receive confirmation that FTA received your comment, you must include a self-addressed stamped postcard. Note that FTA will post all comments that it receives, including any personal information provided therein, without change, to *http://www.regulations.gov.*

Due to security procedures in effect since October 2001 regarding mail deliveries, mail received through the U.S. Postal Service may be subject to delays. A party that submits a comment responsive to this notice should consider using an express mail firm to ensure the prompt filing of any submissions not filed electronically or by hand.

FOR FURTHER INFORMATION CONTACT: Michael L. Culotta, Attorney, Office of Chief Counsel, Federal Transit Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building—5th Floor, Washington, DC 20590. *E-mail: Michael.Culotta@dot.gov. Telephone:* (202) 366–1936.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

FTA issues this Notice of Proposed Rulemaking regarding its school bus operations regulations at 49 CFR part 605 pursuant to the changes Congress requires in section 3023(f) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU),[1] to provide clarification in the context of the U.S. District Court for the Western District of New York's decision in *Rochester-Genesee Regional Transportation Authority* v. *Hynes-Cherin,*[2] and generally, to update the regulation. Through this Notice of Proposed Rulemaking, FTA intends to provide its grantees with a regulatory basis which will allow them to continue to provide the service that FTA historically has allowed through administrative adjudications, while simultaneously satisfying the statutory requirements of 49 U.S.C. 5323(f). To the extent that FTA departs from any previous guidance with respect to its school bus operations regulations, FTA sets forth its reasons below.

B. Statutory and Regulatory History

In 1973, Congress passed the Federal-Aid Highway Act, which authorizes FTA to provide financial assistance to a grantee under 49 U.S.C. Chapter 53 only if the grantee agrees ''not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator.'' [3] Congress's intent in enacting this provision was to prevent unfair competition between federally funded public transportation systems and private school bus operators.[4]

In 1976, the Urban Mass Transportation Administration, now FTA, codified regulations at 49 CFR part 605 which implemented the above statutory provision.[5] Under 49 CFR 605.14, FTA may not provide financial assistance to a grantee ''unless the applicant and the Administrator shall have first entered into a written agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators.'' [6] FTA defines ''school bus operations'' as ''transportation by bus exclusively for school students, personnel and equipment. * * *'' [7]

FTA exempts ''tripper service'' from the prohibition of school bus operations.[8] FTA defines ''tripper service'' as ''regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems.'' [9]

On August 10, 2005, President George W. Bush signed SAFETEA–LU into law. Section 3023(f)(3) of SAFETEA–LU provides, ''If the Secretary finds that an applicant, governmental authority, or publicly owned operator has violated the [school bus] agreement * * * the Secretary shall bar a recipient or an operator from receiving Federal transit assistance in an amount the Secretary considers appropriate.'' [10] Prior to SAFETEA–LU, Congress required the Secretary of Transportation to completely bar a violator of 49 CFR part 605 of all Federal transit funds to which it was entitled.[11]

C. Rochester-Genesee Regional Transportation Authority v. Hynes-Cherin

On January 24, 2008, the U.S. District Court for the Western District of New York issued a decision in *Rochester-Genesee Regional Transportation Authority* which set aside FTA's interpretation of its school bus operations regulations at 49 CFR part 605.[12] The Court allowed the Rochester-Genesee Regional Transportation Authority (RGRTA) to restructure its public transportation operation through the addition of 240 new express school bus routes proposed to serve the Rochester City School District (RCSD) and its students.[13]

In its decision, the Court narrowly interpreted the word ''exclusively'' in FTA's definition of ''school bus operations'' and concluded that technically, because a member of the general public hypothetically could board a bus along one of RGRTA's proposed 240 routes, RGRTA did not propose to ''exclusively'' transport students, and therefore, RGRTA's proposed express school bus service did not constitute an impermissible school bus operation.[14] Additionally, the Court broadly interpreted FTA's definition of ''tripper service'' citing *United States ex rel. Lamers* v. *City of Green Bay* for the proposition that a grantee may ''completely redesign its transit system to accommodate school children as long as all routes are accessible to the public and the public is kept informed of route changes.'' [15]

D. School Bus Operations Policy Statement

On September 16, 2008, in the context of the Court's decision in *Rochester-Genesee Regional Transportation Authority,* FTA issued a ''Final Policy Statement on FTA's School Bus

[1] Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU) sec. 3023, 49 U.S.C. 5323(f) (2006).

[2] 531 F.Supp.2d 494 (W.D.N.Y. 2008).

[3] Federal Aid Highway Act of 1973, Public Law No. 93–87, sec. 164(b), 87 Stat. 250, 281–82 (1973) (codified as amended at 49 U.S.C. 5323(f) (2006)).

[4] *Chicago Transit Auth.* v. *Adams,* 607 F.2d 1284, 1292–93 (7th Cir. 1979) (citing H.R. REP. NO. 93–410, at 87 (1973) (Conf. Rep.); S. REP. NO. 93–355, at 87 (1973) (Conf. Rep.)).

[5] *See* Codification of Charter Bus Operations Regulations, 41 FR 14,122 (Apr. 1, 1976) (codified at 49 CFR part 605 (2007)).

[6] 49 CFR 605.14 (2007).

[7] 49 CFR 605.3(b).

[8] 49 CFR 605.13.

[9] 49 CFR 605.3(b).

[10] SAFETEA–LU sec. 3023(f)(3).

[11] *See* 49 CFR 605.33(b) (2004).

[12] *See Rochester-Genesee Reg'l Transp. Auth.,* 531 F.Supp.2d 521–22.

[13] *Id.* at 507–17.

[14] *Id.* at 507–09.

[15] *Id.* at 512 (citing *United States ex rel. Lamers* v. *City of Green Bay,* 168 F.3d 1013, 1019 (7th Cir. 1999)).

Operations Regulations.'' [16] In the policy statement, FTA noted that it respects the Court's decision in the Western District of New York; however, FTA found the Court's decision problematic because, if applied elsewhere in the United States, the decision could obstruct FTA's ability to execute and implement Congress' school bus prohibition and its express intent regarding that prohibition.[17] FTA found that if it permitted a grantee to provide school bus operations so long as the service is technically open to the public, then Congress's purpose of protecting private school bus operators would be nullified.[18] Such an interpretation would create a loophole in the statutory and regulatory scheme which would permit FTA's grantees to displace private school bus operators with ease.[19] Clearly, Congress did not intend this result, otherwise, Congress would not have passed the statutory provision at 49 U.S.C. 5323(f).[20]

Thus, in the policy statement, FTA interpreted the term ''tripper service'' as it historically has interpreted that definition to allow a grantee to (1) utilize various fare collections or subsidy systems, (2) modify the frequency of service, and (3) make *de minimis* route alterations from route paths in the immediate vicinity of schools to stops located at or in close proximity to the schools.[21] FTA interpreted the term ''exclusively'' as used in FTA's definition of school bus operations at 49 CFR 605.3(b) to encompass any service that a reasonable person would conclude was primarily designed to accommodate students and school personnel, and only incidentally to serve the non-student general public.[22] In the policy statement, FTA expressed its intention to issue a Notice of Proposed Rulemaking to amend the regulatory text at 49 CFR part 605.[23]

II. Notice of Proposed Rulemaking

A. Introduction

FTA issues this Notice of Proposed Rulemaking regarding its school bus operations regulations at 49 CFR part 605 pursuant to the changes Congress requires in section 3023(f) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU),[24] to provide clarification in the context of the U.S. District Court for the Western District of New York's decision in *Rochester-Genesee Regional Transportation Authority* v. *Hynes-Cherin,*[25] and generally to update the regulation. Through this Notice of Proposed Rulemaking, FTA intends to provide its grantees with a regulatory basis which will allow them to continue to provide the service that FTA historically has allowed through administrative adjudications, while simultaneously satisfying its statutory requirements under 49 U.S.C. 5323(f). To the extent that FTA departs from any previous guidance with respect to its school bus operations regulations, FTA sets forth its reasons below.

When drafting this Notice of Proposed Rulemaking, FTA sought comment from interested parties on the existing school bus operations regulation at 49 CFR part 605. On June 11, 2008, FTA met with representatives from the National School Transportation Association to discuss viewpoints from private school bus operators on the existing school bus operations regulation. On July 29, 2008, FTA met with representatives from the American Public Transportation Association, the Washington Metropolitan Area Transit Authority, the Champaign-Urbana Mass Transit District, the Greater Cleveland Regional Transit Authority, the Alameda-Contra Costa Transit District, The Rapid, and the Council of the Great City Schools to discuss viewpoints from operators of public transportation systems and public school districts on the existing school bus operations regulation. FTA intends to post on docket number FTA–2008–0044 information from the meetings mentioned above, such as attendance sheets and rulemaking proposals.

On September 16, 2008, FTA issued a ''Final Policy Statement on FTA's School Bus Operations Regulations'' that clarifies FTA's interpretation of its school bus operations regulations at 49 CFR part 605.[26] The public provided FTA with over 600 comments at docket number FTA–2008–0015 regarding FTA's proposed policy statement, and FTA considered those comments in developing this Notice of Proposed Rulemaking.

B. Section-by-Section Analysis

In this section, FTA discusses the differences between the existing regulation and the proposed regulation. In addition to seeking general comments on the proposed regulation, FTA requests comments on the specific issues indicated below.

1. Subpart A—General

a. Purpose (§ 605.1)

FTA proposes to amend 49 CFR 605.1 to update statutory citations. Additionally, FTA proposes to amend 49 CFR 605.1 to include the language of 49 U.S.C. 5323(f), specifically, ''Financial assistance under this chapter may be used for a capital project, or to operate public transportation equipment or a public transportation facility, only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator.''

b. Scope (§ 605.2)

FTA proposes to amend 49 CFR 605.2 to update statutory citations.

c. Definitions (§ 605.3)

i. General

FTA proposes to amend 49 CFR 605.3 to update statutory citations.

FTA proposes to add a definition of the term ''Chief Counsel'' to provide clarification with respect to FTA's proposed procedures under Subpart B and Subpart C.

FTA proposes to delete the term ''grant contract'' because it is no longer applicable under FTA's proposed agreement requirements at 49 CFR 605.11.

FTA proposes to update the term ''grantee'' to include subrecipients of federal financial assistance under 49 U.S.C. Chapter 53 and 23 U.S.C. 133 and 142.

FTA proposes to delete the term ''incidental'' because it is no longer applicable to 49 CFR part 605. FTA cautions grantees, however, that FTA Circular 5010.1 defines ''incidental use'' as:

> [T]he authorized use of real property and equipment acquired with FTA funds for the purposes of transit service but which also has limited non-transit use due to transit operating circumstances. Such use must be compatible with the approved purposes of the project and not interfere with intended public transportation uses of project assets.

FTA proposes to delete the term ''tripper service.'' FTA discusses this proposal in section (II)(B)(2)(d) below.

FTA proposes to delete the term ''urban area'' and replace it with the term ''geographic service area'' which means ''the area in which a recipient is authorized to provide public transportation service under appropriate

[16] Final Policy Statement on FTA's School Bus Operations Regulations, 73 FR 53,384 (Sept. 16, 2008).

[17] 73 FR 53,390.

[18] 73 FR 53,387.

[19] 73 FR 53,387.

[20] 73 FR 53,387.

[21] 73 FR 53,390.

[22] 73 FR 53,390.

[23] 73 FR 53,385.

[24] SAFETEA–LU sec. 3023.

[25] 531 F.Supp.2d 494.

[26] 73 FR 53,384.

local, state, and Federal law.'' FTA no longer uses the term ''urban area,'' but instead, FTA uses the term ''geographic service area'' to refer to the local area in which a grantee operates.

ii. ''School Bus Operations''

FTA proposes to amend the definition of the term ''school bus operations.'' Under 49 U.S.C. 5323(f), FTA may provide financial assistance to a grantee only if the grantee agrees ''not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator.'' [27] Congress's intent in enacting this provision was to prevent unfair competition between federally funded public transportation systems and private school bus operators.[28]

In its school bus operations regulations, FTA defines ''school bus operations'' as ''transportation by bus exclusively for school students, personnel and equipment * * *'' [29] In Rochester-Genesee Regional Transportation Authority, the Court narrowly interpreted the word ''exclusively'' and concluded that, technically, because a member of the general public hypothetically could board a bus along one of RGRTA's proposed 240 routes, RGRTA did not propose to ''exclusively'' transport students, and therefore, RGRTA's proposed express school bus service did not constitute an impermissible school bus operation.[30]

FTA finds the Court's decision in Rochester-Genesee Regional Transportation Authority problematic. FTA believes that a grantee, pursuant to the Court's interpretation of ''school bus operations,'' may believe that it could restructure substantially its public transportation operation to accommodate the needs of a local school district and its students, which might have the effect of displacing private school bus operators and their employees, provided the system keeps the service open to the public even though members of the public unlikely will board these buses. This practice would produce unfair competition for private school bus operators which is precisely the result Congress sought to prevent when enacting 49 U.S.C. 5323(f).

FTA proposes to add a definition of the term ''exclusively'' as used in 49 U.S.C. 5323(f) and the definition of ''school bus operations'' at 49 CFR 605.3 to mean ''transportation that a reasonable person would conclude was designed primarily to accommodate students and school personnel, without regard to demand from the non-student general public.'' FTA intends its proposed definition of ''exclusively'' to effectuate Congress's intent of protecting private school bus operators from unfair competition with federally subsidized grantees.

FTA relies, in part, on the subsequent qualifying language of 49 U.S.C. 5323(f)—''in competition with a private schoolbus operator''—to justify this definition. To illustrate, if FTA permitted a grantee to provide school bus operations so long as the service is advertised as generally open to the public, then Congress's purpose of protecting private school bus operators would be nullified. Such an interpretation would create a loophole in the statutory and regulatory scheme which would permit FTA's grantees to displace private school bus operators with ease. As noted earlier, Congress did not intend this result; otherwise, Congress would not have enacted this statutory provision.

Additionally, the relevant language of the regulation prohibits service that is ''exclusively for'' students and school personnel, and therefore, FTA concludes that it is reasonable and proper to consider whether service is, in fact, ''for'' such riders.

With respect to the ''reasonable person'' standard, FTA points out that this standard has nearly a two hundred year history in the common law.[31] Courts have held that the reasonable person standard is an objective standard, and that a ''reasonable person'' is a person: (1) Of ordinary prudence, (2) who has knowledge of the law and is aware of its consequences, and (3) who exercises caution in similar circumstances.[32] Accordingly, FTA proposes to utilize this objective, rather than subjective, standard when analyzing issues involving school bus operations.

FTA also uses the reasonable person standard in a similar definition of ''exclusive'' in its charter service regulations at 49 CFR part 604. Under 49 CFR 604.3(h), '' 'Exclusive' means service that a reasonable person would conclude is intended to exclude members of the public.'' [33] Employing a similar reasonable person standard in the school bus regulation would afford FTA and the public consistency throughout its regulations.

In addition to utilizing a reasonable person standard, FTA proposes to identify a non-exhaustive list of factors that it intends to consider when evaluating a school bus operations issue. FTA discusses these factors at section (II)(B)(4)(a)(v) below.

Finally, FTA does not intend to discourage grantees from creating new routes to serve new demand, so long as a reasonable person would conclude that the grantees designed the routes to serve some segment of the non-student general public. Therefore, FTA proposes to define ''school bus operations'' to allow a grantee to create a new route to serve school students and personnel if a reasonable person would conclude that the grantee also designed the route to serve some segment of the non-student general public.

d. Public Hearing Requirement (§ 605.4)

FTA proposes to delete the public hearing requirement for applicants that engage or wish to engage in school bus operations at 49 CFR 605.4 and replace it with the proposed procedures in Subpart B as discussed in section (II)(B)(2) below.

2. Subpart B—School Bus Agreements

a. Purpose (§ 605.10)

Under 49 CFR 605.10, FTA explains that the purpose of Subpart B is ''to formulate procedures for the development of an agreement concerning school bus operations.'' [34] FTA proposes to delete this statement of purpose. FTA includes a statement of purpose regarding its school bus operations regulations at 49 CFR 605.1.

Instead, FTA proposes to amend 49 CFR 605.10 to include an express prohibition on school bus operations. Under FTA's current school bus operations regulations, FTA does not have a separate, express provision which prohibits school bus operations. Instead, FTA requires applicants to enter into an agreement with FTA stating that they will not provide school bus operations. With an express prohibition on school bus operations at 49 CFR 605.10, FTA intends to clarify its regulatory scheme.

Additionally, FTA proposes to prohibit grantees from contracting to provide school bus operations. Under the current regulatory scheme, FTA only may entertain a school bus operations case if a potential violation has occurred, that is, if a grantee provided

[27] 49 U.S.C. 5323(f).

[28] *Chicago Transit Auth.,* 607 F.2d at 1292–93.

[29] 49 CFR 605.3.

[30] *Rochester-Genesee Reg'l Transp. Auth.,* 531 F.Supp.2d at 507–09.

[31] *See Vaughan* v. *Menlove,* (1837) 132 Eng. Rep. 490, and its progeny.

[32] *See* William L. Prosser & W. Page Keeton, Prosser and Keeton On Torts 173–93 (5th ed. 1984).

[33] 49 CFR 604.3(h).

[34] 49 CFR 605.10.

service that was a potential school bus operation. Currently, if a grantee contracted to provide service, but has not yet provided it, then the case is not ripe for FTA's adjudication.[35] FTA believes that this scenario is problematic because, at the point when a case becomes ripe, the academic year likely is in session, and FTA's decision on the merits could potentially disrupt school transportation for that academic year. By considering cases in which a grantee contracted to provide service that potentially constitutes a school bus operation, but has not yet provide the service, FTA proposes to mitigate the risk of disrupting school transportation for the academic year by providing the grantees, private operators, and school districts with time to create a system that complies with FTA's school bus operations regulations.

b. Exemptions (§ 605.11)

i. Existing Provisions

Pursuant to 49 U.S.C. 5323(f), FTA provides exemptions to its prohibition on school bus operations where (1) a grantee or applicant operates a school system and a separate and exclusive school bus program for that school system; (2) private school bus operators in the local area are unable to provide adequate transportation, at a reasonable rate, and in conformance with applicable safety standards; and (3) a grantee or applicant is a state or local public body or agency that previously was engaged in school bus operations.[36]

In the existing regulation, a grantee or applicant that wishes to provide school bus operations under an exemption must follow the procedures set forth in 49 CFR 605.16–605.19. In sum, a grantee or applicant must (1) provide notice to local private school bus operators of its proposed or existing school bus operation,[37] (2) publish in a local newspaper a description of its proposed or existing school bus operation,[38] (3) hold public hearings regarding the proposed or existing school bus operation,[39] and (4) submit an application to FTA setting forth reasons why FTA should allow the grantee or applicant to provide school bus operations.[40] If no private school bus operator operates in the grantee's or applicant's local area, then the grantee or applicant may so certify in lieu of providing the notice required above.[41] Private school bus operators have an opportunity to comment on the grantee's or applicant's proposed or existing school bus operations.[42] The FTA Administrator subsequently issues a decision regarding the grantee's or applicant's application for an exemption.[43] Since FTA promulgated its school bus operations regulations in 1976, grantees and applicants rarely have applied for an exemption under 49 CFR 605.11.

ii. Proposed Exemptions

FTA proposes to restructure its regulatory scheme with regard to exemptions. First, FTA proposes to move its list of exemptions from 49 CFR 605.11 to 49 CFR 605.12.

Second, FTA proposes to delete from 49 CFR 605.3(b) its definition of ''tripper service'' and its provision regarding tripper service at 49 CFR 605.13. FTA proposes to add exemptions to the school bus operations prohibition for service that FTA historically has considered to be tripper service. This amendment is discussed in detail in Section (II)(B)(2)(d) below.

Third, FTA proposes to remove from its list of exemptions the exemption located at 49 CFR 605.11(b) which allows a grantee or applicant to provide school bus operations if the grantee or applicant demonstrates to the satisfaction of the Administrator, ''That private school bus operators in the urban area are unable to provide adequate transportation, at a reasonable rate, and in conformance with applicable safety standards.''[44] FTA proposes to make this ''exemption'' a new ''exception,'' and FTA discusses this proposal in detail in Section (II)(B)(2)(b)(iii) below.

Fourth, FTA proposes to eliminate the procedural requirements that a grantee or applicant must follow at 49 CFR 605.16–605.19 to provide service pursuant to an exemption. FTA intends its proposed exemptions to serve as defenses for grantees in the context of a school bus operations complaint filed under proposed Subpart C.

iii. New Exceptions

As mentioned above, FTA proposes to amend 49 CFR 605.13 to provide exceptions to the proposed prohibition on school bus operations at 49 CFR 605.10. Here, FTA borrows from, and modifies, the current procedures corresponding to a petition for an exemption.

FTA proposes to allow an applicant or grantee to petition the Chief Counsel for an exception to the school bus operations prohibition ''where private school bus operators in the applicant's or grantee's geographic service area are unable to provide adequate transportation at a reasonable rate and in conformance with applicable safety standards.''

To provide service pursuant to this proposed exception, an applicant or a grantee must follow a series of proposed procedural requirements. FTA proposes to require an applicant or a grantee to formally apply to FTA for a ''Petition for an Exception.'' First, the applicant or grantee must provide notice to the Chief Counsel that it intends to apply for a Petition for an Exception. This notice must include a description of the proposed school bus operations, including a description of (1) the geographic service area that the applicant or grantee intends to serve; (2) the schools and school districts that the applicant or grantee intends to serve; (3) the anticipated ridership related to the school bus operation; (4) an estimation of the number and types of buses that the applicant or grantee intends to utilize to provide the school bus operation; (5) the duration of the school bus operation; (6) the frequency of daily service related to the school bus operation; (7) an analysis regarding the extent to which the proposed school bus operation complies with local, state, and Federal safety laws; (8) a summary of the fully allocated costs related to the school bus operation; and (9) the rate that the applicant or grantee intends to charge for the school bus operation. FTA believes that this information will help it determine whether the proposed service is adequate, safe, and at a reasonable rate. FTA invites the public to comment on the components of a fully allocated cost analysis that it should require from its applicants and grantees.

Second, FTA will open an electronic docket, entitled ''Petition for an Exception Docket,'' at *http://www.regulations.gov* corresponding to the Petition for an Exception. Instead of requiring applicants and grantees to provide notices in local newspapers, FTA intends to utilize current technology, particularly the electronic docket, to provide more accessibility to the public regarding a Petition for an Exception. FTA also believes that the utilization of this technology will make FTA action more transparent.

Third, FTA will transmit a copy of the notice and its docket number to the

[35] *See, e.g., Laidlaw Transit, Inc.* v. *Rochester-Genesee Reg'l Transp. Auth.,* FTA School Bus Operations Docket Number 2007–01 1, 3 (2007).

[36] 49 CFR 605.11.

[37] 49 CFR 605.16(a)(1).

[38] 49 CFR 605.16(a)(2).

[39] 49 CFR 605.18.

[40] 49 CFR 605.11.

[41] 49 CFR 605.17.

[42] 49 CFR 605.18.

[43] 49 CFR 605.19.

[44] 49 CFR 605.11.

applicant or grantee and to the National School Transportation Association (NSTA). NSTA may circulate the notice to any appropriate private school bus operators that provide school bus operations in a particular geographic service area. Furthermore, persons interested in monitoring petitions submitted to FTA for which a docket is opened may sign up for the Regulations.gov list serv. Through this service, Regulastions.gov will notify subscribers each time a party submits a document to the docket.

Fourth, any private operator having a place of business in the applicant's or grantee's geographic service area may, within thirty days of the notice's docketing date, submit comments on the Petition for an Exception Docket demonstrating the extent to which it can provide school bus operations that constitute adequate transportation at a reasonable rate and in conformance with applicable safety standards. FTA invites the public to comment on whether it should allow a private operator a different timeframe for commenting on a proposed school bus operation.

Fifth, the applicant or grantee, after evaluating any comments from private school bus operators, may petition the Chief Counsel for an exception to the school bus operations prohibition at 49 CFR 605.10. The applicant or grantee must demonstrate to the satisfaction of the Chief Counsel that no private operator having a place of business in the applicant's or grantee's geographic service area can provide school bus operations that constitute adequate transportation at a reasonable rate and in conformance with applicable safety standards. The Chief Counsel subsequently will issue a decision that either grants or denies the applicant's or grantee's Petition for an Exception.

c. Use of Project Equipment (§ 605.12)

FTA proposes to delete the regulatory provision at 49 CFR 605.12 regarding the use of project equipment. FTA recently amended its charter service regulations at 49 CFR part 604, and FTA believes that the current provision at 49 CFR 605.12 is no longer applicable.[45]

d. Tripper Service (§ 605.13)

FTA proposes to delete the regulatory provision at 49 CFR 605.13 regarding tripper service. Although there is no statutory definition for the term, FTA included the concept of ''tripper service'' in its school bus operations regulations.[46] FTA defines ''tripper service'' as:

> [R]egularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems. Buses used in tripper service must be clearly marked as open to the public and may not carry designations such as ''school bus'' or ''school special.'' These buses may stop only at a grantee or operator's regular service stop. All routes traveled by tripper buses must be within a grantee's or operator's regular route service as indicated in their published route schedules.[47]

Under this definition of tripper service, FTA originally allowed grantees to accommodate students only with respect to ''different fare collections and subsidy systems.'' However, through administrative decisions over the years, FTA broadened its interpretation of its tripper service definition to allow grantees to make accommodations beyond subsidies and fare collection systems. Specifically, FTA began to allow its grantees to make minor modifications to its route paths and frequency of service. As FTA stated in one matter concerning the Erie Metropolitan Transit Authority:

> Read narrowly, ''modification of regularly scheduled mass transportation service to accommodate the needs of school students and personnel'' means using different fare collections and subsidy systems. In practice, ''modification of mass transportation service'' has been broadened to include minor modifications in route or frequency of scheduling to accommodate the extra passengers that may be expected to use particular routes at particular times of day.[48]

For example, in *Travelways, Inc.* v. *Broome County Department of Transportation,* FTA stated that, ''A familiar type of modification would be where the route deviates from its regular path and makes a loop to a school returning back to the point of deviation to complete the path unaltered.'' [49] FTA reaffirmed this particular interpretation of tripper service in its October 12, 2007 RGRTA determination by permitting RGRTA to operate four loop-like route extensions, each only several blocks in length, to accommodate the needs of school students.[50]

FTA has not, however, allowed a grantee to restructure its public transportation operation solely to accommodate the needs of school students—such a modification would be a major modification. Thus, in its October 12, 2007 letter to RGRTA, FTA rejected RGRTA's proposed addition of 240 new routes because it would have constituted a major overhaul of RGRTA's public transportation system solely to accommodate the needs of school students.[51]

In addition to minor modifications to route paths, FTA previously has allowed grantees to modify route schedules and the frequency of service. For example, in *Travelways,* FTA stated, ''Other common modifications include operating the service only during school months, on school days, and during school and opening and closing periods.'' [52]

Jurisprudence in United States courts has broadened the scope of FTA's tripper service definition to include essentially any modification. In *United States* ex rel. *Lamers* v. *City of Green Bay,* the Seventh Circuit stated, arguably in dicta, ''[T]he City may completely redesign its transit system to accommodate school children as long as all routes are accessible to the public and the public is kept informed of route changes.'' [53] Citing *Lamers,* the Court in *Rochester-Genesee Regional Transportation Authority* allowed RGRTA to restructure its public transportation system by adding 240 new routes to accommodate the needs of RCSD and its students.[54]

FTA finds the definition of tripper service and its subsequent interpretations problematic. FTA believes that a grantee, pursuant to the jurisprudence of the Courts in *Lamers* and *Rochester-Genesee Regional Transportation Authority,* may believe that it could substantially restructure its public transportation operation solely to accommodate the needs of a local school district and its students while displacing private school bus operators and their employees provided the system keeps the service open to the public even though no member of the public likely will ride those particular

[45] *See* Charter Service Final Rule, 73 FR 2,326 (Jan. 14, 2008).

[46] The Urban Mass Transportation Administration (UMTA), now the Federal Transit Administration (FTA), did not include the term ''tripper service'' in its proposed school bus operations regulation. *See* 40 FR 25,309–14 (June 13, 1975). UMTA introduced the term ''tripper service'' into its final rule with no explanation as to why it inserted that regulatory term. *See* 41 FR 128 (Apr. 1, 1976).

[47] 49 CFR 605.3.

[48] *See In re* Erie Metropolitan Transit Authority 1, 4 (1989).

[49] *Travelways, Inc.* v. *Broome County Dep't of Transp.* 1, 7 (1985) (allowing a grantee to run a bus to a point and express to a school from that point if the grantee ran a second bus along the regular route path from the point at which the first bus expressed to the school).

[50] Letter from Federal Transit Administration to Rochester-Genesee Regional Transportation Authority at 6 (Oct. 12, 2007).

[51] *Id.* at 2–6.

[52] *Travelways* at 7.

[53] United States *ex rel. Lamers* v. *City of Green Bay,* 168 F.3d 1013, 1019 (7th Cir. 1999).

[54] *Rochester-Genesee Reg'l Transp. Auth.,* 531 F.Supp.2d 494, 509.

routes. This practice would produce unfair competition for private school bus operators which is precisely the result Congress sought to prevent when enacting 49 U.S.C. 5323(f).

In this notice, FTA proposes to codify in regulatory text the type of service that it historically has allowed through administrative adjudications. FTA proposes to eliminate the term ''tripper service,'' and instead, create exemptions to FTA's proposed school bus operations prohibition at 49 CFR 605.11. This regulatory scheme would allow a grantee to continue to use various fare collection or subsidy systems, modify the frequency of its service, and make *de minimis* route alterations to accommodate the needs of school students and personnel.

To illustrate, FTA would allow a grantee to issue fare cards to students and school personnel and it would allow a grantee to accept a payment from a school or a school district in exchange for service. FTA would allow a grantee to modify the frequency of its service, meaning, FTA would allow a grantee to run more buses on routes in the morning when school begins and more buses in the afternoon when school ends. With respect to the *de minimis* route alterations, FTA would allow a grantee to make one-half mile or less route alterations from routes within a one-half mile or less radius of a school building to accommodate the needs of students and school personnel.[55] FTA invites the public to comment on whether it should utilize a different measurement, such as time traveled or route percentage. For example, should FTA allow route deviations where a bus makes a five minute deviation from a route? Should FTA allow route deviations that constitute ten percent of the route? Alternatively, should FTA allow route deviations that are greater than one-half mile? FTA also invites public comment on whether it should allow grantees to make route deviations at multiple portions of routes or only within the immediate vicinity of school buildings.

FTA notes that, through this proposed regulatory scheme, a grantee may provide services pursuant to an exemption without a formal application to FTA, similar to a grantee's existing opportunity to provide ''tripper service'' without a formal application to FTA. FTA's intent here is to clarify in regulatory text the type of service that it will allow and to simplify the organization of its school bus operations regulatory scheme—FTA's intent is not to overhaul the types of service that it historically has allowed. FTA does not intend to create additional regulatory burdens for grantees that wish to provide this type of service.

e. Agreement (§ 605.14)

FTA proposes to consolidate the regulatory provisions at 49 CFR 605.14 and 49 CFR 605.15 regarding a school bus agreement and move those provisions to a new 49 CFR 605.11. Through this proposed provision, FTA intends to simplify the requirements regarding school bus agreements.

Under the current regulatory scheme, FTA requires an applicant to enter into an agreement with the Administrator whereby the applicant agrees ''that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators.'' [56] Under current practice, FTA's grantees and applicants submit and certify to FTA an ''Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements'' and grantees subscribe to FTA's ''Master Agreement.'' Under the terms of these documents, the applicants and grantees agree not to provide school bus operations.

To simplify FTA's requirements regarding school bus agreements and to codify current practice, FTA proposes to allow applicants to satisfy the requirements regarding school bus agreements by submitting and certifying to FTA an ''Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements'' and by subscribing to FTA's ''Master Agreement.'' No separate school bus agreement is necessary under this proposal.

f. Content of Agreement (§ 605.15)

For the reasons discussed above, FTA proposes to consolidate the regulatory provisions at 49 CFR 605.14 and 49 CFR 605.15 regarding a school bus agreement and move those provisions to a new 49 CFR 605.11. FTA intends to simplify the requirements regarding school bus agreements and proposes to provide financial assistance to an applicant or a grantee only if ''the applicant or grantee agrees not to provide school bus operations exclusively for students and school personnel in competition with a private school bus operator.''

g. Notice (§ 605.16)

FTA proposes to delete 49 CFR 605.16 regarding the notice requirements for an exemption to FTA's school bus operations prohibition in light of FTA's proposed procedures in Subpart B explained above.

h. Certification in Lieu of Notice (§ 605.17)

FTA proposes to delete 49 CFR 605.17 regarding the opportunity for a certification in lieu of notice corresponding to an exemption to FTA's school bus operations prohibition in light of FTA's proposed procedures in Subpart B explained above.

i. Comments by Private School Bus Operators (§ 605.18)

FTA proposes to delete 49 CFR 605.18 regarding comments from private school bus operators on an applicant's petition for an exemption in light of FTA's proposed procedures in Subpart B explained above.

j. Approval of School Bus Operations (§ 605.19)

FTA proposes to delete 49 CFR 605.19 regarding FTA's approval of an applicant's school bus operations in light of FTA's proposed procedures in Subpart B explained above.

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

a. Modification of Prior Agreements (§ 605.20)

FTA proposes to delete the regulatory provision at 49 CFR 605.20 regarding the modification of prior school bus agreements in light of FTA's proposed school bus agreement requirements in Subpart B explained above. FTA proposes to replace this provision with amended complaint procedures as explained in Subpart D below.

b. Amendment of Applications for Assistance (§ 605.21)

FTA proposes to delete the regulatory provision at 49 CFR 605.21 regarding the amendment of applications for assistance in light of FTA's proposed school bus agreement requirements in Subpart B explained above. FTA proposes to replace this provision with amended complaint procedures as explained in Subpart D below.

4. Subpart D—Complaint Procedures and Remedies

Generally, FTA proposes to reorganize its complaint procedures and remedies under a proposed ''Subpart C—Complaint Procedures and Remedies'' at 49 CFR 605.20–605.31.

[55] Historically, FTA has allowed grantees to make route deviations that are several blocks in length within the immediate vicinity of school buildings. *See Travelways* at 7; Letter from Federal Transit Administration to Rochester-Genesee Regional Transportation Authority at 6 (Oct. 12, 2007).

[56] 49 CFR 605.14.

a. Filing a Complaint (§ 605.30)

i. Centralized Decision-Making Through the Chief Counsel

Under FTA's existing school bus operations regulations, any interested party may file a written complaint with the Administrator alleging a violation of 49 CFR part 605.[57] FTA requires the complainant to write its complaint, to specify in detail the potential violation, and to provide evidence substantiating the allegation.[58]

FTA proposes to restructure and modify this section. Under the existing regulation, the Administrator issues school bus operations decisions. In practice, the Administrator delegates this authority to each of FTA's ten Regional Administrators. FTA finds that this practice may breed inconsistencies in decision-making and school bus operations guidance. Different regions, under different administrations, may issue conflicting decisions.

To remedy this potential conflict, FTA proposes to issue decisions centrally through the Chief Counsel. This system will ensure consistency in decision-making and school bus operations guidance.

ii. Time Limit for Filing a Complaint

Under the current regulatory scheme, FTA does not impose a time limit on parties that wish to file a complaint alleging a violation of 49 CFR part 605. FTA finds this regulatory scheme problematic because a party may believe that it may file a complaint alleging a school bus operations violation years after the potential violation occurred. At that point, valuable evidence may be lost or destroyed. Under FTA's proposal, the complainant must file its complaint with the Chief Counsel within ninety days after the alleged event giving rise to the complaint occurred. FTA invites the public to comment on whether it should impose a different time limit on parties wishing to file a complaint under 49 CFR part 605.

iii. Burden of Persuasion

Under the current regulatory scheme, FTA does not identify which party carries the burden of persuasion in a school bus operations adjudication. In this notice, FTA proposes to impose on the complainant the burden of persuasion, that is, the complainant loses if the evidence is equally balanced. FTA notes that this is the default rule in an administrative adjudication,[59] and FTA invites the public to comment on whether it should utilize some other standard.

iv. Standard of Proof

Under the current regulatory scheme, FTA does not identify a standard of proof in a school bus operations administrative adjudication. In this notice, FTA proposes to utilize a preponderance of the evidence standard. FTA notes that the preponderance of the evidence standard is the default standard in administrative adjudications,[60] and to hold something by a preponderance of the evidence means that something is more likely so than not so. FTA invites the public to comment on whether it should utilize some other standard of proof.

v. School Bus Operations Factors

In practice, when evaluating a school bus operations issue under 49 CFR part 605, FTA weighs and considers a series of factors when determining whether a grantee provided school bus operations. In this notice, FTA presents factors that should provide clearer guidance in its school bus operations regulations. FTA's intent is to codify an objective standard for evaluating a potential school bus operations violation. The non-exhaustive list of factors is as follows.

(1) Whether and to what extent a grantee designed and intended to design its service to meet the demands of a school or school district. If a grantee designed and intended its service to meet the demands of a school or school district, then the service is more likely to be a school bus operation.

(2) Whether and to what extent the grantee controls its routes and schedules. If the grantee does not control its routes and schedules, but instead, a school or school district controls the routes and schedules at issue, then the service is more likely to be a school bus operation.

(3) Whether and to what extent students' residences and schools serve as the starting or ending points of a route. If students' residences and schools serve as the starting or ending points of a route, then the service is more likely to be a school bus operation.

(4) Whether and to what extent the grantee publicizes the service at issue. If the grantee does not publicize the service at issue, for example by not publicizing the service in its regularly published route schedules and maps, then the service is more likely to be a school bus operation.

(5) Whether and to what extent the grantee's service displaces private school bus operators. If the grantee's service displaces private school bus operators, then the service is more likely to be a school bus operation.

(6) Whether and to what extent the grantee's service is open to the public. If the grantee's service is open to the public, then the service is less likely to be a school bus operation.

(7) The extent to which non-students use the grantee's service. If a significant portion of non-students use the grantee's service at issue, then the service is less likely to be a school bus operation.

(8) Whether and to what extent the grantee operates its service during times when school is not in session. If the grantee operates the service at issue during times when school is not in session, then the service is less likely to be a school bus operation.

(9) The frequency of the grantee's service during times when school is in session. If the grantee frequently operates the service at issue during times when school is in session, then the service is less likely to be a school bus operation.

(10) Whether and the extent to which buses stop at clearly marked regular route stops. If buses stop at clearly marked regular route stops, then the service is less likely to be a school bus operation.

FTA invites the public to comment on whether it should utilize these factors or some of these factors in its analysis of a school bus operations issue.

vi. Previous Oversight Findings

Under 49 U.S.C. 5307(h)(2), Congress mandates FTA to conduct periodic, triennial reviews of its grantees to ensure that the grantees are in compliance with the conditions imposed on them as recipients of Federal funds.[61] As a practical matter, however, a triennial review is a constrained means of monitoring compliance.

In a triennial review, if FTA finds that a grantee has complied with its school bus operations regulations, then that finding should not preclude FTA from later finding, pursuant to a complaint filed under 49 CFR part 605, that a grantee has violated the school bus operations prohibition. At the time of a triennial review, FTA may not have all the pertinent facts when it makes a school bus operations finding. FTA may find new facts in a complaint proceeding. Therefore, FTA proposes to add a provision in its school bus operations regulations that, ''Any previous oversight findings of compliance with the Federal Transit Administration's school bus operations regulations will not preclude the Chief Counsel from finding a violation of this part.''

vii. Independent Investigation

Under the current regulatory scheme, the Administrator may investigate a grantee if the Administrator believes

[57] 49 CFR 605.30.

[58] 49 CFR 605.30.

[59] *See, e.g.,* Schaffer *ex rel Schaffer* v. *Weast,* 546 U.S. 49, 56 (2005).

[60] *See, e.g., Yzaguirre* v. *Barnhart,* 58 F.App'x 460, 462 (10th Cir. 2003) (quoting Jones *ex rel Jones* v. *Chater,* 101 F.3d 509, 512 (7th Cir. 1996)).

[61] 49 U.S.C. 5307(h)(2).

that it has violated 49 CFR part 605.[62] FTA proposes to amend this section to allow the Chief Counsel to initiate and conduct an investigation if it has reasonable suspicion to believe that a grantee violated 49 CFR part 605.

b. Notification to the Respondent (§ 605.31)

Pursuant to 49 CFR 605.31, when a complainant files a complaint, or if the Administrator has reason to believe that grantee violated FTA's school bus operations regulations, the Administrator notifies the grantee that it may have violated this 49 CFR part 605.[63] FTA proposes to overhaul this provision and insert new complaint procedures at 49 CFR 605.21.

i. Complaint Procedures

Under the current regulatory scheme, FTA imposes few requirements on parties with respect to the format and content of their submissions in a school bus operations proceeding. FTA finds that this system is problematic because parties often do not provide FTA with the facts that it needs to make well-informed decisions. Furthermore, the parties often do not apply the facts of their cases to applicable laws. Therefore, FTA proposes to update its school bus operations regulations to require parties to provide clarity in their submissions.

Under FTA's proposal, FTA would require a complainant to identify a potential violator of 49 CFR part 605, the specific provisions of 49 CFR part 605 that were violated, any relevant documentation, a brief statement of the relevant facts, and the harm suffered by the complainant. Additionally, FTA would require parties, in their responses, replies, and rebuttals, to provide FTA with a brief statement of the relevant facts, admissions or denials where appropriate, affirmative defenses where appropriate, and any supporting documentation. FTA also proposes to allow parties to request extensions of time, not to exceed thirty days for good cause, to file a submission under this section.

Furthermore, under the current regulatory scheme, a respondent has only one opportunity—in its response—to make its case to FTA. A respondent is unable to rebut a complainant's reply which may include additional facts or arguments that may merit an additional opportunity for the respondent to file a submission. In FTA's proposal, FTA would allow a respondent to file a rebuttal to a complainant's reply within ten days of the date of service of the reply.

Additionally, under the current regulatory scheme, FTA allows a respondent thirty (30) days to respond to a complaint.[64] FTA allows the complainant a ''like time'' to reply to the response. FTA finds that this timeframe is ambiguous because FTA does not specify the duration of the ''like time.'' In this notice, to provide clarity, FTA proposes to allow a complainant to reply to a response within twenty (20) days from the date of service of the respondent's response.

ii. Third Party Intervention

Under the current regulatory scheme, FTA has no explicit authority to allow third parties to intervene in a school bus operations proceeding. In some instances, a third party may be integral to a proceeding because the existing parties may not adequately represent the third party's interests and the third party consequently may suffer harm. Therefore, FTA proposes to add 49 CFR 605.22 to explicitly allow a third party to intervene in a school bus operations proceeding if it demonstrates to the satisfaction of the Chief Counsel that the parties to the proceeding do not adequately represent the third party's interests and that it will suffer harm if the Chief Counsel does not grant its motion to intervene.

iii. Dismissal of a Complaint

FTA proposes to add 49 CFR 605.23 to provide the Chief Counsel with authority to dismiss a complaint or any claim in a complaint, with prejudice, if the complaint or claim is outside FTA's jurisdiction, the complainant does not state a claim, or the complainant lacks standing.

iv. Incomplete Complaint

FTA proposes to add 49 CFR 605.24 to provide the Chief Counsel with authority to dismiss a complaint without prejudice if the complaint is deficient as to one or more of the requirements set forth in FTA's proposed 49 CFR 605.21.

v. Filing of a Complaint

Under the current regulatory scheme, FTA requires parties to submit to FTA paper submissions in a school bus operations proceeding. Since 1976, the year that FTA promulgated its school bus operations regulations, technology has undergone huge advancements. For example, electronic dockets available through Regulations.gov provide opportunities for Federal agencies to conduct adjudicative proceedings electronically. FTA believes that electronic dockets promote transparency in the Federal government, preserve public documents in an easily accessible public forum, and provide parties with a simple and efficient method of filing submissions in administrative adjudications. For these reasons, FTA proposes to add 49 CFR 605.25 to create an electronic filing system for its complaint process through Regulations.gov.

vi. Service

Under the current regulatory scheme, FTA does not require parties to serve copies of their submissions to opposing parties. FTA finds this system problematic because parties may not be aware of complaints and other submissions filed with FTA on a timely basis. In this notice, FTA proposes to require parties to serve copies of all submissions that they file with FTA on all other opposing parties.

vii. Appeal From Chief Counsel's Decision

Under the current regulatory scheme, a party adversely affected by a decision may not file an appeal with FTA before filing an action in United States District Court. FTA finds that this system has prevented FTA from remedying issues administratively so that parties need not seek relief in expensive and protracted litigation before United States courts. In this notice, FTA proposes to add 49 CFR 605.29 to allow parties adversely affected by a decision of the Chief Counsel to file an appeal with the Administrator. On appeal, the Administrator shall review the entire administrative record within the context of any issue on appeal, and the Administrator shall issue a final decision. FTA also proposes to amend 49 CFR 605.30 to authorize the Administrator to review the Chief Counsel's decision at his or her own motion. FTA invites the public to comment on whether it should utilize a different standard of review on appeal.

c. Accumulation of Evidentiary Material (§ 605.32)

Under the current regulatory scheme, the Administrator allows the respondent to respond to a complaint within thirty days of receipt of the complaint.[65] The Administrator allows the complainant to reply to the respondent's response within ''a like period.''[66] The Administrator may undertake such

[62] 49 CFR 605.31.

[63] 49 CFR 605.31.

[64] 49 CFR 605.32.

[65] 49 CFR 605.32.

[66] 49 CFR 605.32.

further investigation as the Administrator deems necessary.[67]

FTA proposes to amend its procedures for accumulating evidentiary material with its provisions at 49 CFR 605.20–605.26 as discussed above.

d. Adjudication (§ 605.33)

Under the current regulatory scheme, the Administrator issues a written decision at the conclusion of a school bus operations proceeding.[68] If the Administrator determines that a grantee violated 49 CFR part 605, then the Administrator shall order such remedial measures as the Administrator deems appropriate.[69] FTA proposes to reorganize this section by moving the provision regarding the Administrator's remedial measures to 49 CFR 605.28—the proposed section that outlines the remedies available to FTA.

e. Remedy Where There Has Been a Violation of the Agreement (§ 605.34)

FTA proposes to amend the provisions at 49 CFR 605.34 regarding remedies for a violation of the school bus agreement. Under the Federal-Aid Highway Act of 1973, Congress instructed the Urban Mass Transportation Administration (UMTA), now FTA, that if it found a violation of the school bus operations prohibition, then it ''shall bar such applicant from receiving any other federal financial assistance. * * *''[70] FTA subsequently implemented this statutory provision at 49 CFR 605.34 which states, ''If the Administrator determines * * * that there has been a violation of the terms of the agreement, he may bar a grantee or operator from the receipt of further financial assistance for mass transportation facilities and equipment.''[71]

Under this framework, the Administrator did not exercise the remedy provision at 49 CFR 605.34 because such an action would completely bar a grantee or operator from the receipt of financial assistance and significantly obstruct their ability to provide public transportation. That changed when Congress enacted the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, and amended 49 U.S.C. 5323(f) as follows, ''If the Secretary finds that an applicant, governmental authority, or publicly owned operator has violated the agreement * * * the Secretary shall bar a recipient or an operator from receiving Federal transit assistance in an amount the Secretary considers appropriate.''[72]

FTA intends to implement the amended statutory provision at 49 U.S.C. 5323(f). Using the language of 49 U.S.C. 5323(f), FTA proposes the following remedies provision at 49 CFR 605.28, ''If the Chief Counsel determines, pursuant to this subpart, that a grantee has violated this part or the terms of the agreement, then the Chief Counsel shall bar the grantee from the receipt of further financial assistance for public transportation in an amount that the Chief Counsel considers appropriate.''

Additionally, FTA proposes to authorize the Chief Counsel to issue cease and desist orders where appropriate. FTA believes that this remedy will allow the Chief Counsel some additional flexibility when issuing remedies and tailoring those remedies to the severity of the violation.

Finally, FTA proposes to authorize the Chief Counsel to issue any other such remedies that the Chief Counsel believes are appropriate. FTA currently authorizes the Administrator to issue such remedies at 49 CFR 605.33(b). To illustrate, FTA may require a violator of 49 CFR part 605 to submit a remediation plan to FTA whereby it would outline a plan to restructure its service so that it complies with FTA's school bus operations regulations. FTA believes that this remedy will allow the Chief Counsel some additional flexibility when issuing remedies and tailoring those remedies to the severity of the violation.

f. Judicial Review (§ 605.35)

FTA proposes to restructure its regulatory scheme by moving the judicial review provisions at 49 CFR 605.35 to a proposed 49 CFR 605.31.

5. Subpart E—Reporting and Records

a. Reports and Information (§ 605.40)

Under the current regulatory scheme, ''The Administrator may order any grantee or operator for the grantee, to file special or separate reports setting forth information relating to any transportation service rendered by such grantee or operator, in addition to any other reports required by this part.''[73] FTA does not propose to amend this section.

b. Proposed Subpart E—Grandfathering of Existing School Bus Operations

FTA proposes to add 49 CFR 605.50 to include grandfathering provisions in its amended regulatory framework. FTA recognizes that some grantees may need significant time to modify their school bus operations to comply with FTA's amended 49 CFR part 605. Therefore, FTA proposes to allow these grantees to modify their school bus operations to comply with FTA's amended 49 CFR part 605 by June 30, 2010. With this timeframe, FTA proposes to give these grantees until the end of the next academic year to comply with this part.

FTA also proposes to allow grantees to provide school bus operations to schools or school districts if the grantee provided the school bus operations without payment from the schools or school districts prior to August 1, 2008. If a grantee receives payment from a school or school district for school bus operations on or after August 1, 2008, then this grandfathering provision no longer would apply.

6. Appendix A to Part 605

Under the current regulatory scheme, FTA attaches Appendix A to 49 CFR part 605 which is an opinion of the Comptroller General of the United States dated December 7, 1966. The Comptroller General discusses the definition of the term ''incidental.'' FTA used this discussion to clarify its definition of the term ''incidental'' as used in its charter service regulations at 49 CFR part 604 and its school bus operations regulations at 49 CFR part 605. FTA recently promulgated amended charter service regulations at 49 CFR part 604, and FTA proposes to delete Appendix A to 49 CFR part 605 because it is no longer applicable in light of FTA's amended charter service regulations.

III. Rulemaking Analyses and Notices

A. Executive Order 12866: Regulatory Planning and Review/DOT Regulatory Policies and Procedures

Under Executive Order 12866, the U.S. Department of Transportation (DOT) must examine whether this proposed rule is a ''significant regulatory action.'' A significant regulatory action is subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. Executive Order 12866 defines ''significant regulatory action'' as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $120 million or more or adversely affect in a material way the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or state, local, or tribal governments or communities; (2) Create a serious

[67] 49 CFR 605.32.

[68] 49 CFR 605.33(a).

[69] 49 CFR 605.33(b).

[70] Federal-Aid Highway Act sec. 164(b).

[71] 49 CFR 605.34.

[72] SAFETEA–LU sec. 3023.

[73] 49 CFR 605.40.

inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This rulemaking is not a significant regulatory action within the meaning of Executive Order 12866, and, therefore, this rulemaking was not reviewed by OMB. Further, this rule is not significant under DOT's regulatory policies and procedures. This Notice of Proposed Rulemaking contains revisions that are clarifying in nature.

FTA does not anticipate this rule to adversely affect, in a material way, any sector of the economy. Through this rulemaking, FTA proposes to effectuate the purpose of 49 U.S.C. 5323(f) and to clarify provisions to protect private school bus operators from unfair competition by federally subsidized public transit agencies; thus, these changes should increase economic opportunities for private school bus operators. Additionally, this proposed rule would not create a serious inconsistency with another agency's action or materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required. FTA also estimates the costs associated with this rule to be minimal because the rule clarifies definitions and exemptions.

B. Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. FTA has analyzed this Notice of Proposed Rulemaking in accordance with the principles and criteria contained in Executive Order 13132, and FTA has determined that this Notice of Proposed Rulemaking would not have sufficient federalism implications to warrant the preparation of a federalism assessment. FTA has also determined that this Notice of Proposed Rulemaking would not preempt any state law or regulation or affect a state's ability to discharge traditional state governmental functions.

C. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that ''significantly or uniquely affect'' Indian communities and that impose ''substantial and direct compliance costs'' on such communities. FTA has analyzed this proposed rule under Executive Order 13175 and FTA believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal laws. Therefore, a tribal impact statement is not required.

D. National Environmental Policy Act

As a rulemaking process, FTA concludes that this proposed action is categorically excluded from the requirements of the National Environmental Policy Act (NEPA) and FTA's NEPA regulation at 23 CFR 771.117(c)(20). Although FTA's NEPA regulation requires some level of environmental review even for those activities that are categorically excluded if they involve ''unusual circumstances,'' 23 CFR 771.117(b), FTA finds that the proposed action, if finalized, would not result in the unusual circumstances that would cause FTA to perform an environmental review. Although commenters on FTA's Notice of Proposed Policy Statement on FTA's School Bus Operations Regulations [74] raised concerns about the environmental effects of the operation of school buses relative to the operation of transit buses, FTA lacks the evidence and data on the numerous variables necessary to predict differences between operating the various types of buses that are used in both public and private school transportation. Furthermore, it is impossible to predict the likely minor changes in the types of buses used that would result from FTA's proposal.

E. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 [75] (PRA), a Federal agency must obtain approval from OMB for each collection of information it conducts, sponsors, or requires through regulations. This Notice of Proposed Rulemaking does not impose any paperwork collection requirements.

F. Regulatory Flexibility Act

When an agency issues a rulemaking proposal, the Regulatory Flexibility Act (RFA) requires the agency to ''prepare and make available for public comment an initial regulatory flexibility analysis'' which will ''describe the impact of the proposed rule on small entities.'' [76] Under section 605 of the RFA, Congress allows an agency to certify a rule, in lieu of preparing an analysis, if the agency does not expect the proposed rulemaking to have a significant economic impact on a substantial number of small entities.

The nature of this rulemaking is to effectuate the purpose of 49 U.S.C. 5323(f) and to prevent unfair competition by federally subsidized public transit agencies with private school bus operators. FTA invites comment on the economic impact of the proposed regulations on small entities.

G. Unfunded Mandates Reform Act of 1995

In this notice, FTA does not propose to impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995.[77] This Notice of Proposed Rulemaking will not result in the expenditure of non-Federal funds by state, local, and Tribal governments, in the aggregate, or by the private sector, of $120.7 million in any one year.[78]

List of Subjects in 49 CFR Part 605

School bus operations.

In consideration of the foregoing, FTA amends Chapter VI of Title 49 of the Code of Federal Regulations as set forth below.

Title 49—Transportation

1. Revise part 605 to read as follows:

PART 605—SCHOOL BUS OPERATIONS

Subpart A—General

Sec.
605.1 Purpose.
605.2 Scope.
605.3 Definitions.

Subpart B—School Bus Operations Prohibition and Agreement

605.10 Prohibition.
605.11 Agreement.
605.12 Exemptions.
605.13 Exceptions.

Subpart C—Complaint Procedures and Remedies

605.20 General.
605.21 Complaint Procedures.

[74] 73 FR 28,790 (May 19, 2008).

[75] *See* 44 U.S.C. Chapter 35 (2006).

[76] 5 U.S.C. 603(a) (2006).

[77] Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48 (1995).

[78] *See* 2 U.S.C. 1532 (2006).

605.22 Third Party Intervention.
605.23 Dismissal of a Complaint.605.24 Incomplete Complaint.
605.25 Filing of a Complaint.
605.26 Service.
605.27 Adjudication.
605.28 Remedies.
605.29 Appeal from the Chief Counsel's Decision.
605.30 Administrator's Discretionary Review of the Chief Counsel's Decision.
605.31 Judicial Review of a Final Decision and Order.

Subpart D—Reporting and Records

605.40 Reports and Information.

Subpart E—Grandfathering of Existing School Bus Operations

605.50 Grandfathering Provisions.

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

Subpart A—General

§ 605.1 Purpose.

(a) The purpose of this part is to prescribe policies and procedures to implement 49 U.S.C. 5323(f).

(b) By the terms of 49 U.S.C. 5323(f), financial assistance under this chapter may be used for a capital project, or to operate public transportation equipment or a public transportation facility, only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator.

§ 605.2 Scope.

These regulations apply to all recipients of financial assistance for the construction or operation of facilities and equipment for use in providing public transportation under 49 U.S.C. Chapter 53 and 23 U.S.C. 133 and 142.

§ 605.3 Definitions.

(a) Terms defined at 49 U.S.C. Chapter 53 shall have the same meaning in this part.

(b) For purposes of this part:

The Acts means the Urban Mass Transportation Act of 1964, as amended and codified at 49 U.S.C. Chapter 53, and 23 U.S.C. 133 and 142.

Administrator means the Federal Transit Administration Administrator or his or her designee.

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

Agreement means an agreement required under 49 U.S.C. 5323(f).

Applicant means applicant for assistance under the Acts.

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

Chief Counsel means the Federal Transit Administration Chief Counsel or his or her designee.

Exclusively means transportation that a reasonable person would conclude was designed primarily to accommodate school students, personnel, or equipment, without regard to demand from the non-student general public.

Geographic service area means the area in which a recipient is authorized to provide public transportation service under appropriate local, state, and Federal law.

Government means the Government of the United States of America.

Grantee means a recipient, including a subrecipient, of assistance under the Acts.

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

Reasonable rates means rates which are fair and equitable taking into consideration the local conditions which surround the geographic service area where the rate is in question, including the portion of Federal assistance that a grantee uses or intends to use to provide school bus operations.

School bus operations means transportation by bus exclusively for school students, personnel, and equipment.

Subpart B—School Bus Operations Prohibition and Agreement

§ 605.10 Prohibition.

A grantee shall not provide, or contract to provide, school bus operations, except as provided in § 605.12 and § 605.13.

§ 605.11 Agreement.

(a) The Federal Transit Administration shall not provide assistance under the Acts unless the applicant or grantee agrees not to provide school bus operations exclusively for students and school personnel in competition with a private school bus operator, except as provided in § 605.12 and § 605.13.

(b) A grantee shall satisfy § 605.11(a) by submitting and certifying to the Federal Transit Administration its ''Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements'' and by subscribing to the Federal Transit Administration's ''Master Agreement.''

(c) The ''Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements'' and the Federal Transit Administration's ''Master Agreement'' shall state as follows:

> The [Grantee, Recipient, or Applicant] agrees that it will not provide school bus operations exclusively for students and school personnel in competition with a private school bus operator, except as provided in 49 U.S.C. 5323(f), 49 CFR Part 605, and any relevant Federal Transit Administration directives. The [Grantee, Recipient, or Applicant] agrees that it will comply with all the provisions of 49 U.S.C. 5323(f), 49 CFR Part 605, and any relevant Federal Transit Administration directives.

§ 605.12 Exemptions.

(a) The school bus operations prohibition at § 605.10 shall not apply where:

(1) The grantee uses various fare collection or subsidy systems for students, the grantee modifies the frequency of service, and the grantee makes a one-half mile or less route deviation from a route within a one-half mile or less radius of a school building;

(2) The grantee operates a school system in a grantee's geographic service area and also operates a separate and exclusive school bus program for that school system; or

(3) The grantee is a state or local public body or agency thereof, or a direct predecessor in interest which has acquired the function of transporting school students and personnel along with facilities to be used therefor, which provided school bus operations:

> (i) In the case of a grant involving the purchase of buses—anytime during the twelve (12) month period immediately prior to August 13, 1973; or
>
> (ii) In the case of a grant for construction or operating of facilities and equipment made pursuant to 49 U.S.C. Chapter 53, anytime during the twelve (12) month period immediately prior to November 26, 1974.

§ 605.13 Exceptions.

(a) *Exceptions.* An applicant or grantee may petition the Chief Counsel for an exception to the school bus operations prohibition at § 605.10 where private school bus operators in the applicant's or grantee's geographic

service area are unable to provide adequate transportation at a reasonable rate and in conformance with applicable safety standards.

(b) *Procedures.* An applicant or grantee shall provide notice to the Chief Counsel that it intends to apply for a ''Petition for an Exception,'' and the applicant or grantee shall complete the following:

(1) An applicant or grantee shall send the notice required under § 605.13(b)(1) by electronic mail to the Chief Counsel at *FTA.SchoolBusOperations@dot.gov.*

(2) An applicant or grantee shall include the following information in its notice:

(i) A description of the geographic service area that the applicant or grantee intends to serve;

(ii) A description of the schools and school districts that the applicant or grantee intends to serve;

(iii) A description of the anticipated ridership related to the school bus operation;

(iv) An estimation of the number and types of buses that the applicant or grantee intends to utilize for the school bus operation;

(v) A description of the duration of the school bus operation;

(vi) A description of the frequency of daily service related to the school bus operation;

(vii) An analysis regarding the extent to which the proposed school bus operation complies with local, state, and Federal safety laws;

(vii) A summary of the fully allocated costs related to the school bus operation; and

(viii) The rate that the applicant or grantee intends to charge for the school bus operation.

(c) The Federal Transit Administration shall open an electronic Petition for an Exception Docket and file the notice at *http://www.regulations.gov.*

(d) The Federal Transit Administration shall transmit a copy of the notice and its docket number to the applicant or grantee and the National School Transportation Association.

(e) Any private operator having a place of business in the applicant's or grantee's geographic service area may, within thirty (30) days of the notice's docketing date, submit comments on the Petition for an Exception Docket demonstrating the extent to which it can provide school bus operations that constitute adequate transportation at a reasonable rate and in conformance with applicable safety standards.

(f) *Petition for an Exception.* After the thirty (30) day comment period closes, an applicant or grantee may petition the Chief Counsel for an exception to the school bus operations prohibition at § 605.10 after completing the following steps:

(1) The applicant or grantee shall title the petition ''Petition for an Exception'';

(2) The applicant or grantee shall file the Petition for an Exception electronically in the appropriate Petition for an Exception Docket at *http://www.regulations.gov* or mail it to the Docket Office at 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590;

(3) The applicant or grantee shall send an executed original copy of the Petition for an Exception by U.S. mail to the Chief Counsel at 1200 New Jersey Avenue, SE., East Building—5th Floor, Washington, DC 20590; and

(4) The applicant or grantee shall include in its Petition for an Exception the applicant's or grantee's response to any comments filed in the docket before the close of the thirty (30) day comment period.

(g) To qualify for an exception under this section, the applicant or grantee shall demonstrate to the satisfaction of the Chief Counsel that no private operator having a place of business in the applicant's or grantee's geographic service area can provide school bus operations that constitute adequate transportation at a reasonable rate and in conformance with applicable safety standards.

(h) The Chief Counsel shall issue a written decision that either grants or denies the applicant's or grantee's Petition for an Exception.

(i) If the applicant or grantee fails to satisfy any of the requirements in this section, then the Chief Counsel may dismiss the Petition for an Exception with or without prejudice.

Subpart C—Complaint Procedures and Remedies

§ 605.20 General.

(a) *Standing.* Any interested party affected by an alleged noncompliance of this part may file a complaint with the Chief Counsel alleging a violation or violations of this part.

(b) *Time Limit for Filing a Complaint.* The complainant shall file its complaint with the Chief Counsel within ninety (90) days after the alleged event giving rise to the complaint occurred.

(c) *Burden of Persuasion.* The complainant bears the burden of persuasion in a proceeding under this subpart, that is, the complainant loses if the evidence is equally balanced.

(d) *Standard of Proof.* The standard of proof in a proceeding under this subpart is a preponderance of the evidence standard. To hold something by a preponderance of the evidence means that something is more likely so than not so.

(e) *School Bus Operations Factors.* The Chief Counsel may weigh and consider a variety of factors in determining whether a grantee provided, or contracted to provide, school bus operations, including, but not limited to, the following:

(1) Whether and to what extent the grantee designed and intended to design its service to meet the demands of a school or school district;

(2) Whether and to what extent the grantee controls its routes and schedules;

(3) Whether and to what extent students' residences and schools serve as the starting or ending points of a route;

(4) Whether and to what extent the grantee publicizes the service at issue;

(5) Whether and to what extent the grantee's service displaces private school bus operators;

(6) Whether and to what extent the grantee's service is open to the public;

(7) The extent to which students and non-students utilize the grantee's service;

(8) Whether and to what extent the grantee operates its service during times when school is not in session;

(9) The frequency of the grantee's service during times when school is in session; and

(10) Whether and the extent to which buses stop at clearly marked regular route stops.

(f) *Previous Oversight Findings.* Any previous oversight findings of compliance with the Federal Transit Administration's school bus operations regulations will not preclude the Chief Counsel from finding a violation of this part, particularly when the Chief Counsel finds new facts during the course of a proceeding under this subpart which were not known or available during a triennial review.

(g) *Independent Investigation.* If the Chief Counsel, at any time, has reasonable suspicion to believe that a grantee violated this part, then the Chief Counsel may initiate and conduct an investigation and take appropriate action pursuant to this part.

§ 605.21 Complaint Procedures.

(a) *Complaint.* In its complaint, the complainant shall:

(1) Title its complaint ''School Bus Operations Complaint'';

(2) State the name and address of each grantee that is the subject of the complaint, and, with respect to each

grantee, state the specific provision(s) of this part that the complainant believes were violated;

(3) Serve the complaint in accordance with § 605.26, along with all documents then available in the exercise of reasonable diligence that are offered in support of the complaint, upon each grantee named in the complaint as being responsible for the alleged actions(s) or omission(s) upon which the complaint is based;

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

(5) Describe how the complainant was directly and substantially affected by the action(s) or omission(s) of the grantee(s).

(b) *Withdrawal of Complaint.* The complainant may withdraw a complaint at any time by serving a ''Notification of Withdrawal'' on the Chief Counsel and the respondent.

(c) *Docketing of Complaint.* Unless the Chief Counsel dismisses the complaint pursuant to this subpart, the Chief Counsel shall notify the complainant and respondent that the Chief Counsel received the complaint and that the complaint has been docketed.

(d) *Response.* (1) The respondent shall have thirty (30) days from the date of service of the Chief Counsel's notification under § 605.21(a)(3) to file a response.

(2) In its response, the respondent shall provide a concise but complete statement of the facts upon which the respondent relies to substantiate its answers, admissions, denials, or averments.

(3) In its response, the respondent shall provide supporting documentation upon which the respondent relies.

(4) In its response, the respondent shall admit or deny each allegation made in the complaint or state that it is without sufficient knowledge or information to admit or deny an allegation.

(5) In its response, the respondent shall assert any affirmative defense.

(6) In its response, the respondent may make a motion to dismiss the complaint, or any portion thereof, with a supporting memorandum of points and authorities.

(e) *Reply.* (1) The complainant may file a reply within twenty (20) days of the date of service of the respondent's response.

(2) In its reply, the complainant shall provide a concise but complete statement of the facts upon which the complainant relies to substantiate its answers, admissions, denials, or averments.

(3) In its reply, the complainant shall provide supporting documentation upon which the complainant relies.

(f) *Rebuttal.* (1) The respondent may file a rebuttal within ten (10) days of the date of service of the reply.

(2) In its rebuttal, the respondent shall provide a concise but complete statement of the facts upon which the respondent relies to substantiate its answers, admissions, denials, or averments.

(3) In its rebuttal, the respondent shall provide supporting documentation upon which the respondent relies.

(g) *Extensions of Time.* A party may request from the Chief Counsel an extension of time, not to exceed thirty (30) days, for good cause, to file a submission with the Chief Counsel under this section. The Chief Counsel may grant an extension of time to a party as he or she deems appropriate.

(h) *Evidentiary Hearing.* The Chief Counsel, as he or she deems appropriate, may hold an evidentiary hearing to allow each party to submit evidence under this part.

§ 605.22 Third Party Intervention.

(a) Any interested party may submit a motion to the Chief Counsel requesting intervention in a proceeding under this subpart.

(b) The party requesting intervention shall demonstrate to the satisfaction of the Chief Counsel that the parties to the proceeding do not adequately represent the third party's interests and that it will suffer harm if the Chief Counsel does not grant its motion to intervene.

(c) The Chief Counsel may grant or deny the motion to intervene.

§ 605.23 Dismissal of a Complaint.

(a) The Chief Counsel may dismiss a complaint or any claim in a complaint, with prejudice, if:

(1) On its face, it appears to be outside the jurisdiction of the Federal Transit Administration under the Acts;

(2) On its face, it does not state a claim that warrants an investigation or further action by the Federal Transit Administration; or

(3) The complainant lacks standing to file a complaint under this part.

(b) The Chief Counsel shall provide reasons for dismissing a complaint or any claim in the complaint.

§ 605.24 Incomplete Complaint.

(a) If the Chief Counsel does not dismiss a complaint under § 602.23, but the complaint is deficient as to one or more of the requirements set forth in § 605.21, then the Chief Counsel may dismiss the complaint.

(b) If the Chief Counsel dismisses a complaint under this section, then the Chief Counsel shall dismiss the complaint without prejudice and the complainant may re-file a complaint after amendment to correct the deficiency.

(c) The Chief Counsel shall include in the dismissal under this section the reasons for the dismissal without prejudice.

§ 605.25 Filing of a Complaint.

(a) *Filing Address and Method of Filing.* (1) The complainant shall file the complaint electronically in the School Bus Operations Complaint docket at *http://www.regulations.gov* or mail it to the Docket Office at 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

(2) Parties shall file responses, replies, rebuttals, appeals, and responses to appeals electronically in the School Bus Operations Complaint docket at *http://www.regulations.gov* or mail it to the Docket Office at 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590.

(b) *Date.* Unless the date is shown to be inaccurate, documents filed with the Federal Transit Administration shall be deemed filed, on the earliest of:

(1) The date that the party filed the document electronically in the School Bus Operations Complaint docket at *http://www.regulations.gov;*

(2) The date of personal delivery;

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

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

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

(c) *Electronic Mail or Facsimile.* A document sent by electronic mail or facsimile shall not constitute service as described in this subpart.

(d) *Number of Copies.* Each party shall send to the Chief Counsel by personal delivery or by U.S. mail return receipt requested an executed original copy of each document that it electronically files on the School Bus Operations Complaint docket. Each party shall send the executed original copy to the Chief Counsel at 1200 New Jersey Avenue SE., East Building—5th Floor, Washington, DC 20590.

(e) *Form.* Each party shall type or legibly print each document that it files with the Office of Chief Counsel. In the case of docketed proceedings, the document shall include a title and the docket number, as established by the Chief Counsel, of the proceeding on the front page.

(f) *Signing of Documents and Other Papers.* Either the complainant or a duly

authorized representative of the complainant shall sign the original copy of each document that it files with the Office of Chief Counsel. The signature shall serve as a certification that the signer has read the document, and, based on reasonable inquiry, to the best of the signer's knowledge, information, and belief, that the document is:

(1) Consistent with this part;

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

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

§ 605.26 Service.

(a) *Designation of Person to Receive Service.* (1) In its complaint, the complainant shall:

(i) State the complainant's name, post office address, and telephone number;

(ii) State the complainant's facsimile number, if any, and e-mail addresses, if any; and

(iii) Designate a person to receive service on behalf of the complainant.

(2) If any of the items in paragraph (a) of this section change during the proceeding, then the complainant promptly shall file notice of the change with the Chief Counsel and shall serve the notice on each party to the proceeding.

(b) *Who Must be Served.* Each party shall serve a copy of each document that it files with the Chief Counsel to each other party to the proceeding. Each party shall include a certificate of service on each document when the party tenders it for filing and shall certify concurrent service on each other party. Certificates of service shall be in substantially the following form:

I hereby certify that I have this day served the foregoing [name of document] on the following persons at the following addresses by [specify method of service]:

[list persons and addresses]

Dated this ____day of _____, 20__.

[signature], for [party]

(c) *Method of Service.* Unless otherwise agreed by the parties, as appropriate, the method of service is personal delivery or U.S. mail.

(d) *Presumption of Service.* There shall be a presumption of lawful service:

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

(2) When a properly addressed envelope, sent to the last known address, has been returned as undeliverable, unclaimed, or refused.

§ 605.27 Adjudication.

(a) Upon the conclusion of a proceeding under this subpart, the Chief Counsel shall issue a written determination as to whether a grantee has committed a violation of this part.

(b) The Chief Counsel shall include an analysis and explanation of his or her findings in the determination.

§ 605.28 Remedies.

(a) If the Chief Counsel determines that a grantee has violated this part or the terms of the agreement, then the Chief Counsel shall bar the grantee from the receipt of financial assistance for public transportation in an amount that the Chief Counsel considers appropriate.

(b) If the Chief Counsel determines that a grantee has violated this part or the terms of the agreement, then the Chief Counsel may issue a cease and desist order requiring the grantee to cease and desist from the provision of the service at issue.

(c) If the Chief Counsel determines, pursuant to this subpart, that a grantee has violated this part or the terms of the agreement, then the Chief Counsel may issue other remedies as the Chief Counsel determines are appropriate.

§ 605.29 Appeal from the Chief Counsel's Decision.

(a) Each party adversely affected by a decision of the Chief Counsel may file an appeal with the Administrator within thirty (30) days of the date of the Chief Counsel's decision.

(b) *Procedures.* (1) The appellant shall file the appeal electronically and consistently with § 605.25.

(2) The appellant shall serve a copy of the appeal on each appellee by either personal delivery or U.S. mail consistent with § 605.26.

(3) Each appellee may file a response to an appeal within twenty (20) days after the appellant serves the appeal on the appellee.

(c) If a party files an appeal, then the Administrator shall review the entire administrative record and issue a final agency decision based on the administrative record that either accepts, rejects, or modifies the Chief Counsel's decision. If a party does not file an appeal, then the Administrator may review the Chief Counsel's decision on his or her own motion. If the Administrator finds that a party is not in compliance with this part, then the final agency order shall include a statement of corrective action, if appropriate, and identify remedies.

(d) If a party does not file an appeal, and the Administrator does not review the Chief Counsel's decision on the Administrator's own motion, then the Chief Counsel's decision shall take effect as the final agency decision and order on the thirtieth day after the date that the Chief Counsel issued the decision.

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

§ 605.30 Administrator's Discretionary Review of the Chief Counsel's Decision.

(a) If the Administrator reviews the Chief Counsel's decision on the Administrator's own motion, then the Administrator shall issue a notice of review to each party by the thirtieth day after the date that the Chief Counsel issued the decision.

(1) In the notice of review, the Administrator shall set forth the specific findings of fact and conclusions of law in the Chief Counsel's decision subject to review.

(2) Each party may file one brief on review to the Administrator or rely on its post-hearing briefs to the Chief Counsel. Each party shall file a brief on review no later than ten (10) days after the Administrator serves notice of the review. Each party shall file and serve its brief on review by personal delivery or U.S. mail consistent with § 605.26.

(3) The Administrator shall issue a final agency decision and order within thirty (30) days after the due date of the briefs on review. If the Administrator finds that a party is not in compliance with this part, then the final agency order shall include a statement of corrective action, if appropriate, and identify remedies.

(b) If the Administrator reviews a decision of the Chief Counsel on the Administrator's own motion, then the Administrator shall stay the Chief Counsel's decision pending a final decision by the Administrator.

§ 605.31 Judicial Review of a Final Decision and Order.

(a) A party may seek judicial review in an appropriate United States District Court of a final decision and order as provided in 5 U.S.C. 701–706.

(b) The Chief Counsel's decision to dismiss a complaint under § 605.24 does not constitute a final decision and order subject to judicial review.

Subpart D—Reporting and Records

§ 605.40 Reports and Information.

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

Subpart E—Grandfathering of Existing School Bus Operations

§ 605.50 Grandfathering Provisions.

(a) Each grantee shall have until June 30, 2010, to modify its school bus operations to comply with this part.

(b) If a grantee provided school bus operations for a school or school district and received no payment from that school or school district for the school bus operations prior to August 1, 2008, then that grantee may continue to provide the school bus operations for that particular school or school district. If a grantee receives payment from a school or school district for school bus operations on or after August 1, 2008, then this grandfathering provision does not apply.

Issued in Washington, DC, on this 3rd day of November, 2008.

James S. Simpson,

Administrator.

[FR Doc. E8–26683 Filed 11–17–08; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 070719384–7386–01]

RIN 0648–AV80

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 30B

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to implement Amendment 30B to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP) prepared by the Gulf of Mexico Fishery Management Council (Council). This proposed rule would establish annual catch limits (ACLs) and accountability measures (AMs) for commercial and recreational gag, red grouper, and shallow-water grouper (SWG); establish a commercial quota for gag; adjust the commercial quotas for red grouper and shallow-water grouper; establish an incidental bycatch allowance trip limit for commercial gag and red grouper; reduce the commercial minimum size limit for red grouper; reduce the gag bag limit and the aggregate grouper bag limit; increase the red grouper bag limit; extend the closed season for recreational shallow-water grouper; establish a new reef fish seasonal-area closure; eliminate the end date for the Madison-Swanson and Steamboat Lumps marine reserves; and require that federally permitted reef fish vessels comply with the more restrictive of Federal or state reef fish regulations when fishing in state waters. In addition, Amendment 30B would establish management targets and thresholds for gag consistent with the requirements of the Sustainable Fisheries Act; set the gag and red grouper total allowable catch (TAC); and establish interim allocations for the commercial and recreational gag and red grouper fisheries. This proposed rule is intended to end overfishing of gag and maintain catch levels of red grouper consistent with achieving optimum yield.

DATES: Written comments must be received on or before January 2, 2009.

ADDRESSES: You may submit comments on the proposed rule, identified by ''0648–AV80'' by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: *http://www.regulations.gov*.
- Fax: 727–824–5308; Attention: Peter Hood.
- Mail: Peter Hood, Southeast Regional Office, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

To submit comments through the Federal e-Rulemaking Portal: *http://www.regulations.gov*, enter ''NOAA-NMFS–2008–0203'' in the keyword search, then select ''Send a Comment or Submission.'' NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). You may submit attachments to electronic comments in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of Amendment 30B, which includes an environmental impact statement, an initial regulatory flexibility analysis (IRFA), and a regulatory impact review (RIR) may be obtained from the Gulf of Mexico Fishery Management Council, 2203 North Lois Avenue, Suite 1100, Tampa, FL 33607; telephone 813–348–1630; fax 813–348–1711; e-mail gulfcouncil@gulfcouncil.org; or may be downloaded from the Council's website at *http://www.gulfcouncil.org/*.

FOR FURTHER INFORMATION CONTACT: Peter Hood, 727–824–5305.

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf of Mexico is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and achieve, on a continuing basis, the optimum yield (OY) from federally managed fish stocks. These mandates are intended to ensure fishery resources are managed for the greatest overall benefit to the nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems. To further this goal, the Magnuson-Stevens Act requires fishery managers to specify their strategy to rebuild overfished stocks to a sustainable level within a certain time frame, and to minimize bycatch and bycatch mortality to the extent practicable. The reauthorized Magnuson-Stevens Act as amended through January 12, 2007, requires the councils to establish ACLs for each stock or stock complex and AMs to ensure these ACLs are not exceeded. This proposed rule addresses these requirements for gag and red grouper.

NMFS has published proposed guidelines to address the new Magnuson-Stevens Act requirements for ACLs and AMs. A proposed rule for these guidelines was published in the **Federal Register** on June 9, 2008 (73 FR 32526), and requested public comment. According to these guidelines, stocks in the fishery should have quantitative reference points, including status determination criteria, maximum