

**DEPARTMENT OF TRANSPORTATION****Federal Transit Administration****49 CFR Part 670**

[Docket No. FTA–2015–0009]

RIN 2132–AB22

**Public Transportation Safety Program**

**AGENCY:** Federal Transit Administration (FTA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The Federal Transit Administration is issuing a final rule to establish substantive and procedural rules for FTA's administration of a comprehensive safety program to improve the safety of the Nation's public transportation systems. This final rule provides the framework for FTA to monitor, oversee and enforce transit safety, based on the methods and principles of Safety Management Systems.

**DATES:** The effective date of this rule is September 12, 2016.

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**I. Executive Summary***A. Purpose of Regulatory Action*

This final rule establishes substantive and procedural rules to support the Federal Transit Administrator in carrying out the Public Transportation Safety Program (Safety Program), first authorized in the Moving Ahead for Progress in the 21st Century Act (MAP–21) (Pub. L. 112–141 (2012)), and codified at 49 U.S.C. 5329. On December 4, 2015, the President signed into law the Fixing America's Surface Transportation (FAST) Act (Pub. L. 114–94 (2015)). The FAST Act made two amendments to the Safety Program that

affect today's rulemaking and are discussed further, below.

*B. Statutory Authority*

Under 49 U.S.C. 5329 (Section 5329), FTA, through the authority delegated by the Secretary of the Department of Transportation, must create a comprehensive Public Transportation Safety Program. Most notably, Section 5329 provides FTA with the following explicit authorities to administer the Safety Program and to take enforcement actions:

- 49 U.S.C. 5329(f), provides FTA with the authority to inspect and audit a public transportation system; make reports and issue directives with respect to the safety of a public transportation system or the public transportation industry generally; issue subpoenas and take depositions; require the production of documents; prescribe recordkeeping and reporting requirements; investigate public transportation accidents and incidents; enter into and inspect the equipment, rolling stock, operations and relevant records of a public transportation system; and issue regulations.

- 49 U.S.C. 5329(g) authorizes FTA to take enforcement actions against a recipient of Federal financial assistance under 49 U.S.C. chapter 53 that is noncompliant with Federal transit safety law, through issuing directives, requiring more frequent oversight, imposing more frequent reporting requirements, requiring that chapter 53 funds be spent to correct safety deficiencies before those funds are spent on other projects, and withholding funds from a recipient.

- 49 U.S.C. 5329(h) authorizes FTA to impose restrictions and prohibitions on a recipient's operations, where FTA determines that an unsafe practice or condition creates a substantial risk of death or personal injury.

**C. Summary of Major Provisions**

In the Notice of Proposed Rulemaking (NPRM), 80 FR 48794, (August 14, 2015), FTA proposed (1) to add a new part 670, "Public Transportation Safety Program," to title 49 of the Code of Federal Regulations (CFR); (2) to formally adopt a Safety Management Systems (SMS) approach as the foundation of the Safety Program; (3) to establish substantive and procedural rules for FTA's administration of the Safety Program; and (4) to describe the contents of a National Public Transportation Safety Plan (National Safety Plan or Plan).

This final rule will add a new part 670, "Public Transportation Safety Program," to title 49 of the CFR. In

response to public comments, FTA has made a number of nonsubstantive, clarifying edits. In addition, FTA has made the following substantive changes:

1. Amended section 670.23(b) to state that FTA may withhold not more than 25 percent of a recipient's Urbanized Area Formula funds.

2. Amended section 670.27 to provide that the Deputy Administrator may issue special directives, with petitions for reconsideration going to the Administrator.

3. Amended section 670.29 to remove language stating that FTA would consider whether a recipient has complied with an advisory when taking enforcement actions.

*D. Costs and Benefits*

This final rule establishes substantive and procedural rules for FTA's authority to inspect, investigate, audit, examine and test transit agencies' facilities, equipment, and records; direct or withhold Federal transit funds; and issue directives and advisories. The final rule does not impose additional costs on entities other than FTA. The costs to recipients associated with FTA's enforcement authorities are captured in the rulemakings for Public Transportation Agency Safety Plans, State Safety Oversight, and the Public Transportation Safety Certification Training Program. FTA received a number of comments on the cost assumptions in the NPRM, which are summarized in section III, below.

**II. Rulemaking Background**

On October 3, 2013, FTA introduced the transit industry to fundamental changes to the Federal transit safety program authorized by MAP–21 with a consolidated advance notice of proposed rulemaking (ANPRM). 78 FR 61251. FTA issued the ANPRM to provide the public with a better understanding of FTA's proposed approach to implementing the requirements for transit asset management and safety, and to obtain stakeholder input. Throughout the ANPRM, FTA expressed its intention to adopt a comprehensive approach to transit asset management and safety that would be scalable and flexible. In addition, the ANPRM highlighted the inherent linkages between asset condition (state of good repair) and safety performance through the explanation of FTA's anticipated proposal to adopt the principles and methods of SMS as the foundation for the development, implementation, oversight and enforcement of the Safety Program.

In the August 2015 NPRM, FTA proposed a series of specific substantive and procedural rules for FTA's administration of the Safety Program. FTA took the public comments on both the ANPRM and NPRM into consideration in developing today's final rule.

### III. Summary of NPRM Comments and FTA's Responses

FTA received comments from 118 entities, including transit agencies, trade associations, state and local governments, and private citizens. Some comments were outside the scope of this rulemaking, and some pertained to other safety rulemakings. For example, many commenters expressed support for MAP-21's safety objectives, but indicated that FTA appeared to be using language to implement SMS principles that would be more appropriate for the rail transit industry or that do not translate easily to the bus industry. To the extent these comments concerned the applicability of FTA's authority to specific types of transit agencies, please see the below discussion on "Purpose and Applicability." To the extent these comments concerned the scalability of SMS, we believe they are more appropriately handled in the final rule concerning the Public Transportation Agency Safety Plans, which FTA plans to issue in the coming months. In general, this document does not respond to those comments that were not related to the substance of today's rulemaking; however, to assist with understanding the intent of today's rule, FTA does address some comments that are related to other safety rulemakings. Following are summaries of the comments received and FTA's responses.

#### A. General Comments

##### Comments: Costs and Benefits

A number of commenters stated that the rule would have moderate to significant direct cost implications and economic impacts, due to its detailed implementation requirements, including nationwide SMS implementation. Some commenters were concerned that the proposed rule would impose costs and administrative burdens on States and transit agencies. Some commenters suggested that the NPRM would be an "unfunded mandate" because FTA did not identify any specially designated funding that could be used by recipients towards complying with the rule. Some commenters stated that FTA had not properly accounted for the costs to recipients, including State Safety Oversight Agencies (SSOAs), to implement the other rulemakings

required under 49 U.S.C. 5329. Some commenters indicated that it is difficult to evaluate and quantify the costs of implementing each component of the Safety Program rule until FTA issues all of the final rules on safety.

Several commenters requested that FTA cite the research study that provided the data and analysis supporting its assumption that the rule would not have a financial impact on the economy, States, and transit agencies. Some commenters noted that recipients would incur additional costs such as requiring more staff to implement SMS and comply with FTA's safety rulemakings. Other commenters suggested that recipients would incur costs when responding to FTA enforcement actions.

##### FTA Response: Costs and Benefits

FTA has considered the comments and continues to find that this rule does not impose specific costs to recipients. Rather, this final rule establishes substantive and procedural rules to support FTA's own administration of the Safety Program. The final rule does not require recipients to take any specific action. Specific requirements for recipients, such as implementing SMS, have been outlined by FTA in the proposed and final rulemakings (as applicable) for Public Transportation Agency Safety Plans, the State Safety Oversight Program, and the Public Transportation Safety Certification Training Program. The cost projections, underlying assumptions, and research for each requirement are included in the cost benefit analysis section for each of those rulemakings.

##### Comments: Funding

A few commenters stated that adequate funding should be set aside, authorized, and appropriated by Congress prior to implementation of this rulemaking. Further, a few commenters indicated that funding to implement the Safety Program (including reporting requirements) should not come from existing operating and capital improvement grant funds, but rather from new and additional grant funds set aside by FTA. One commenter suggested that FTA create a special category of funding that local agencies could use to pay for the costs to mitigate risks associated with safety inspection findings. One commenter suggested that FTA designate special funding for hazard mitigation.

Some commenters noted that FTA should be aware of existing and increasing funding shortfalls already faced by many recipients, including forced service cuts, fare increases and

layoffs. Commenters noted that the expected cost implications would create significant issues with their prioritization of funding.

Several commenters recommended that FTA work to secure the necessary funding at the Federal, State, and local level and that each State be allowed to distribute the funds. One commenter stated that FTA should examine the process by which other U.S. Department of Transportation agencies secure funding for their safety programs.

##### FTA Response: Funding

The Safety Program is a requirement of 49 U.S.C. 5329. Congress determines the level of funding for the Federal transit program. FTA recognizes the need for increased investments in transit at all levels of government, and recommends funding levels for the Federal transit programs through the annual congressional appropriations process.

##### Comments: Tribal Consultation

FTA received one comment related to Tribal consultation. The commenter indicated that the worthy goal of this rulemaking can only properly be realized in Indian Country following meaningful consultation with Tribal governments and technical discussions and collaboration with the Tribal Transportation Program Coordinating Committee. The commenter noted that most Tribal transit systems operate on a very small scale, and with severe financial and administrative limitations. The commenter stated that for these practical reasons, FTA has an obligation as a prudent policy maker to engage in a meaningful consultation with Tribal nations prior to developing regulations that will apply to Tribally-operated transit systems. The commenter stated that the represented Tribes do not agree with FTA's view that Tribal consultation requirements do not apply to this rule. The commenter recommended that FTA either clarify the scope of the rule so that it does not apply to Tribes or engage in formal Tribal consultation before issuing a final rule.

##### FTA Response: Tribal Consultation

FTA appreciates the comments from Tribal representatives. However, FTA disagrees that this rule will have "substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes." Executive Order 13175, November 6, 2000. This rule establishes substantive

and procedural rules for FTA's administration of the Safety Program. As noted above, this regulation outlines FTA's authorities to conduct reviews, audits, investigations, examinations, inspections and testing, and to issue findings and directives which would require corrective actions by recipients. The rule does not impose specific requirements on Tribes or any other recipients. Therefore, FTA finds that the final rule does not impose substantial direct effects on one or more Indian Tribes and does not impose substantial direct compliance costs on Tribal governments.

Although not required to under Executive Order 13175, FTA has engaged in active consultation with Tribes in the development of this final rule. In advance of publishing an NPRM, FTA sought comment from the transit industry on a wide range of topics pertaining to the new Public Transportation Safety Program provisions authorized by MAP-21 through an ANPRM. FTA asked specific questions about how FTA should apply the new safety requirements to recipients of the section 5311 Tribal Transit Formula Program and Tribal Transit Discretionary Program. Additionally, FTA continued to engage with the industry following the publication of the NPRM through subsequent outreach efforts, including a webinar for small, rural and Tribal transit providers, which was held on October 27, 2015. FTA also held a listening session at the National Rural Transit Assistance Program Annual Meeting, which historically has been well attended by Tribal representatives.

#### Comments: Other

One commenter suggested that the proposed rule would create federalism issues and asked FTA to explain why it did not believe that the rule would create federalism issues.

#### FTA Response: Other

Pursuant to Executive Order 13132, to the extent practicable and permitted by law, a Federal agency cannot promulgate two types of rules unless it meets certain conditions. The two types of rules are:

1. Rules with Federalism Implications, substantial direct compliance costs on state and local governments, and not required by statute, and

2. Rules with Federalism Implications and that preempt state or local law.

Federalism Implications are defined as having substantial direct effects on States or local governments (individually or collectively), 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 does not believe that this rule has substantial direct effects on States or local governments or the distribution of power and responsibilities among the various levels of government. Further, this rule does not preempt State or local law. This rule merely restates FTA's statutory authority to administer the Safety Program and provides processes to support FTA's administration of the Safety Program.

### B. Section by Section Comments

#### Subpart A General Provisions

##### 670.1 Purpose and Applicability

This section proposed that the purpose of the regulations would be to establish a Public Transportation Safety Program, and that the part would apply to all recipients of Federal transit funds.

#### Comments: Purpose and Applicability

Several commenters requested clarification regarding the applicability of the proposed rule. One commenter asked for clarification regarding the statutory authority that was referenced in the proposed purpose and applicability section.

One commenter stated that the proposed rule could be read to apply to Tribes that are direct recipients and to Tribes that are subrecipients of a State. Some commenters suggested that the rule should not apply to commuter rail operators that are subject to Federal Railroad Administration (FRA) regulations and recommended that FTA amend subpart D to clearly exclude commuter railroads. A few commenters queried whether the proposed rule would apply to bus operations. Two commenters asked if SSOAs would be considered recipients within the scope of this rule. One commenter suggested that FTA clarify whether the proposed rule would apply to third party contractors.

Some commenters indicated that the rule should allow flexibility for a State recipient to determine whether the rules should apply to subrecipients. One commenter asserted that Section 5329 allows FTA to adopt a different approach for the Enhanced Mobility of Seniors and Individuals with Disabilities Formula Program authorized at 49 U.S.C. 5310 (Section 5310) because Section 5329 specifically references the Rural Area Formula Program, 49 U.S.C. 5311, and the Urbanized Area Formula Program, 49 U.S.C. 5307, but makes no reference to Section 5310 grantees. The

commenter recommended that FTA add language under section 670.1 to state that the part would not apply to public transportation systems that only receive Section 5310 funds. The commenter also recommended that FTA allow direct recipients under the Section 5310 program to lay out their approach to safety for their subrecipients in the State or Program Management Plan required under the Section 5310 program circular (C 9070 1G).

#### FTA Response: Purpose and Applicability

With the enactment of MAP-21, Congress directed FTA to develop a Public Transportation Safety Program for all recipients of Federal financial assistance under 49 U.S.C. chapter 53. Section 5329(a) of Title 49 of the United States Code specifically defines recipient as a "State or local governmental authority, or any other operator of a public transportation system." Accordingly, this final rule applies to recipients of Federal financial assistance under 49 U.S.C. chapter 53, regardless of mode, including recipients of funding under 49 U.S.C. 5310 that provide public transportation, States, SSOAs, and Tribes. The rule applies to contractors who function in the capacity of the defined recipients; however, a recipient ultimately is responsible for ensuring its contractors are in compliance with the Safety Program.

FTA recognizes that some recipients, such as commuter rail operators, are subject to the safety regulatory requirements of other Federal agencies. Accordingly, a chapter 53 recipient that operates commuter rail, light rail, and a bus system will continue to have its commuter rail operations governed by the FRA, but its light rail and bus operations will be governed by 49 U.S.C. 5329 and FTA's safety regulations.

FTA has amended this section in the final rule to align with the definition of "recipient" at 49 U.S.C. 5329(a) and to clarify that the rule establishes substantive and procedural rules for FTA's administration of the Safety Program.

##### 670.3 Policy

This section proposed the formal adoption of Safety Management Systems (SMS) as the basis for enhancing the safety of public transportation in the United States.

#### Comments: Policy: Safety Management Systems

A number of commenters indicated support for FTA's adoption of SMS principles and methods as the basis for

the Safety Program. Other commenters were critical of SMS being FTA's sole approach to implementing the Safety Program. Some commenters stated that FTA's approach is focused on urban rail transit systems. These commenters noted that FTA should provide alternative methods for implementing the Safety Program that are consistent with SMS concepts, but are more applicable to smaller bus systems.

Several commenters suggested that FTA adopt an approach that is simple to understand and easy to implement. One commenter expressed confidence that an SMS approach would result in improved and uniform safety standards across the country, but suggested that without further clarification from FTA, the proposed rule could unduly burden smaller public transportation systems by subjecting them to currently unknown facets of SMS that are only necessary or, in practice, applicable to the largest public transportation systems.

#### FTA RESPONSE: Policy: Safety Management System

FTA understands those commenters that expressed concern over FTA's proposed adoption of SMS as the basis for the Safety Program. To clarify, the NPRM did not propose, nor does this final rule require a recipient to adopt SMS. On February 5, 2016, FTA issued a proposed rule for Public Transportation Agency Safety Plans that would require each recipient to develop an agency safety plan based on SMS (See 81 FR 6344–71). The preamble to that rule describes SMS as a scalable and flexible approach that can apply across the transit industry. The comment period for the Public Transportation Agency Safety Plan closed on April 5, 2016. FTA is reviewing the public comments and anticipates publishing a final rule this calendar year.

FTA disagrees with those commenters who suggest that SMS is not a practical approach for the Nation's diverse transit industry. FTA is taking a risk-based, proactive approach to implementation of the Public Transportation Safety Program. Specifically, the SMS pillars of safety risk management and safety assurance are designed to assist in identifying in advance where potential safety risks reside, and developing and implementing mitigations (rules, directives, guidance, best practices) that would prevent the likelihood and minimize the severity of the risk. FTA is committed to developing, implementing, and consistently improving strategies and processes to ensure that transit achieves the highest practicable level of safety. SMS is FTA's

approach to achieving this goal by building a 21st-century safety regime that is flexible, scalable, and responsive to emerging safety issues.

FTA has revised this section in the final rule to clarify that the policy statement specifically applies to actions undertaken by FTA.

#### 670.5 Definitions

This section included proposed definitions for terms used in the NPRM.

##### Comments: Definitions

Commenters generally were concerned that any words or language intended to describe an event or circumstance that would trigger an enforcement action under the proposed rule must be defined clearly and concisely so that all affected recipients are treated equally. Some commenters felt that if the terms were left to the discretion and interpretation of the investigator or FTA representative handling the issue, there would be the potential for an uneven application of the regulation across recipients and subrecipients. In light of this concern, a number of commenters suggested that FTA clarify some of the proposed definitions, including, specifically, Accountable Executive; pattern or practice; audit; examination; inspection; investigation; corrective action plan; advisory; National Public Transportation Safety Plan; recipient; and testing.

In general, FTA appreciates the concerns regarding some of the proposed definitions, and the requests for additional definitions. As appropriate, FTA has incorporated into this rulemaking definitions that appear in other Section 5329 rulemakings, including the definition of hazard. FTA made changes to the following definitions to clarify their meaning: Advisory; audit; corrective action plan; directive; examination; inspection; pattern or practice; and State Safety Oversight Agency.

##### “Accountable Executive”

Several commenters asked whether an “Accountable Executive” would be an agency CEO or general manager. Some commenters also asked for clarification on the qualifications required to fulfill this role, stating that incumbents with this responsibility should possess comparable levels of competence, experience and authority to ensure consistency across the industry. One commenter requested that FTA revised the definition to state that a State Department of Transportation (State DOT), by virtue of providing funds, advice, or administrative planning or

support to a subrecipient agency, is not an Accountable Executive with respect to that agency. Finally, one commenter asked FTA to define “Transit Asset Management Plan,” which appears without elaboration in the definition of Accountable Executive.

**FTA RESPONSE:** FTA has aligned the definition of “Accountable Executive” with the definition established in the final State Safety Oversight rule, now codified at 49 CFR part 674. FTA believes the definition is both broad and specific enough to allow the intended local safety oversight responsibility to function effectively while also allowing for flexibility to scale to the needs of various recipients and their systems. Notably, a State DOT would not be an Accountable Executive; however, there may be situations in which an employee of a State DOT is an Accountable Executive, as when the State DOT provides public transportation service. FTA declines to establish minimum qualifications for Accountable Executives, as the level of experience and authority required may vary from agency to agency. The term “Transit Asset Management Plan” which appears within the definition of “Accountable Executive” is not defined in this rule because it is defined in FTA's recently issued Transit Asset Management rule. (See 81 FR 48890, July 26, 2016.) FTA believes the definition for “National Public Transportation Safety Plan” is sufficient given the additional description of the Plan in section 670.31.

##### “Pattern or practice” and “Finding”

A number of commenters were concerned that the definition of “pattern or practice” is unclear, and does not explicitly define what constitutes a “finding.” In particular, commenters were concerned with the lack of specificity on what minimal and maximal time span between findings would constitute a pattern; whether findings would be limited to only violations found during one investigation or over multiple investigations; and whether findings must be related or be of some specific but undefined level of severity. Commenters suggested that “finding” should be included as a defined term, to clarify how the results of inspections, investigations, audits, examinations and testing relate to “findings” and whether the conclusions from inspections, investigations, audits, examinations and testing constitute “findings” or if a “finding” is something pursuant to a more specific process or particular procedure. Some commenters suggested that pattern or practice should be more

explicitly defined as two or more events within a 12-month period. Finally, a few commenters stated that a pattern or practice should only apply to multiple findings with the same operator and not across multiple operators in an overall public transit system.

**FTA RESPONSE:** FTA has chosen not to make substantive changes to the proposed definition of “pattern or practice.” A narrow definition of this term would limit FTA’s ability to administer its safety oversight responsibilities. Moreover, a pattern or practice triggering an enforcement action will differ from one recipient to the next, and will depend, in part, on a recipient’s mode of operation, the size and complexity of the recipient’s operations, and the recipient’s unique operating environment. This same rationale applies to many other definitions FTA is leaving unchanged. Finally, terms such as “finding” that are not defined by statute or regulation will be interpreted in accordance with the definition set forth in dictionaries of common usage.

“Examination,” “Inspection,” “Audit” and “Investigation”

Several commenters stated the differences between the definitions of “examination,” “inspection,” “audit” and “investigation” were minor and not well-defined, particularly the differences between examination and inspection. Some questioned why an inspection might lead to a finding of a pattern or practice of safety violations, but examinations and audits would not. One commenter suggested deleting “examination” since it was very similar to “inspection.”

**FTA RESPONSE:** In response to concerns over the lack of obvious distinctions between the definitions of examinations, inspections, audits and investigations, FTA has revised the definition of “inspection” in the final rule to elaborate on the activities and distinguishing characteristics of an inspection versus an “examination.” Specifically, the final rule clarifies that an inspection is a physical act of observation whereas an examination is a process. Each of these functions—investigations, inspections, audits, and examinations—are authorized by 49 U.S.C. 5329(g), and each is a separate but integral part of the overall mechanism and process for collecting relevant information for purposes of safety oversight. FTA has chosen not to define the phrase “reasonable time and manner” as it applies to this information collection process, as a narrow definition of this term would impede FTA’s ability to effectively carry

out its congressionally mandated safety oversight role.

“Unsafe Condition or Practice” and “Safety Violation”

With respect to the definition of “pattern or practice” and in general response to the proposed rule’s sections on enforcement actions, several commenters asked FTA to define “unsafe condition or practice” and “safety violation.” Some also suggested adding the term “serious” or “serious safety violation” as a definition to clarify what constituted “serious” safety violations, and what the relative and actionable difference was between a “serious” safety violation and a safety violation that was not “serious.”

**FTA RESPONSE:** FTA does not believe that it is appropriate to define “serious safety violation” through regulation. As previously mentioned, FTA’s approach to the administration of the safety program is both scalable and flexible. A narrow definition of “serious safety violation” would impede FTA’s ability to provide flexible oversight of the Safety Program. For example, a serious safety violation could include a violation of Federal transit safety law that leads to death or serious injury of a passenger or transit employee. A serious safety violation also could include a violation of Federal transit safety law that could lead to death or serious injury of a passenger or transit employee. Further, a serious safety violation could include a rail transit agency’s failure to comply with a corrective action plan or a small bus operator’s failure to develop and implement a transit agency safety plan, once the rule requiring such plans becomes final. FTA does not believe that the aforementioned examples, however, encompass the full scope of what FTA could consider a serious safety violation, and therefore does not agree that it should define the term in this rule.

“Recipient”

Some commenters stated that although the definition of “recipient” implies inclusion of SSOAs as recipients of Chapter 53 funding, the description of actual affected entities throughout the NPRM suggested that it applied to public transit agencies and not SSOAs. Those commenters asked for clarification on whether SSOAs were implicitly included in the definition. Those commenters further stated that if FTA intended to include SSOAs, there would be a disincentive for SSOAs to participate in the formula grant program, and recommended that FTA

explicitly exclude SSOAs from the definition of “recipient.”

**FTA RESPONSE:** In response to comments, FTA has revised the definition of “recipient” to align with the statutory definition of that term at 49 U.S.C. 5329(a). We have also clarified that the term “recipient” includes State Safety Oversight Agencies.

“More Frequent Oversight”

A few commenters asked FTA to define what it meant by “more frequent oversight” as part of the suite of enforcement actions that FTA could initiate under section 670.21.

**FTA RESPONSE:** FTA does not agree that it should provide a definition for the term “more frequent oversight.” The frequency of enhanced oversight of a recipient by FTA will vary on a case-by-case basis.

“Reportable Incident” and “Occurrence”

One commenter asked if the definitions from FTA’s SSO rule, codified at 49 CFR 674, of “reportable incident” and “occurrence” would be incorporated into the current proposed rule.

**FTA RESPONSE:** Definitions for “reportable incident” and “occurrence” were not included in the NPRM, and therefore, will not be included in this final rule.

“Corrective Action Plan”

A few commenters asked FTA to enhance the existing “corrective action plan” definition to capture the broader processes or mechanisms associated with the ongoing management of corrective action plans by recipients and oversight agencies.

**FTA RESPONSE:** FTA has revised the definition of “corrective action plan” to align with the definition of that term in the final rule for State Safety Oversight at 49 CFR part 674.

Other Terms

One commenter asked for definitions of the following individual terms: “hazard”; “assessment”; “evaluation”; “light rail” and “heavy rail”; “enforcement”; “employee accident and injury”; and “near miss”. Commenters also suggested that FTA define the following additional terms: analysis; safety deficiency; noncompliance; public transportation system; and state of good repair.

**FTA RESPONSE:** FTA is not including definitions for the following terms that were not included in the NPRM proposals: “light rail,” “heavy rail,” “employee accident and injury,” and “near miss.” The following terms

are not defined in this rule, statute or regulation and will be interpreted in accordance with the definition set forth in dictionaries of common usage: “assessment”; “evaluation”; “analysis”; and “noncompliance.”

FTA does not agree that it needs to define the term “public transportation system.” FTA believes that it is clear that the term means a transit system operated by a recipient of funds under 49 U.S.C. chapter 53 and “recipient” is a defined term under the rule.

FTA does not agree that it should define the term “safety deficiency.” What amounts to a “safety deficiency” will vary on a case-by-case basis.

As required by 49 U.S.C. 5326(b)(1), FTA has defined the term “state of good repair” in the Transit Asset Management final rule, which was published on July 26, 2016. (81 FR 48889).

#### Subpart B—Compliance Assessments

In this final rule, FTA has changed the heading of this subpart from “Compliance Assessments” to “Inspections, Investigations, Audits, Examinations and Testing” to better describe the subject matter of this subpart.

##### 670.11 General

In this final rule, FTA has changed the title of this section from “Inspections, Investigations, Audits, Examinations and Testing” to “General.” In the NPRM, this section set forth FTA’s statutory authority to conduct inspections, investigations, audits, examinations and testing. In the NPRM, FTA asked how it should define “reasonable time and manner” for entering into and inspecting a recipient’s equipment, facilities, rolling stock, operations, and relevant records.

##### Comments: General

With respect to “reasonable time,” commenters suggested: (1) At least forty-eight hours; (2) twenty-four hours; (3) a few days (4); five days; (5) thirty days; and (6) sixty days. A few commenters also recommended that FTA adopt the investigation processes currently used by other Federal agencies. A few commenters indicated the need for more clarity and requested that FTA propose specific language to define the terms “reasonable time” and “reasonable manner.” One commenter requested clarity regarding “written notice” as it is used in section 670.11(b). Another commenter asked what would trigger an inspection: passage of time; a particular incident; or an industry-wide issue. The commenter stated that uncertainties would lead to confusion about what is

expected as transit agencies seek to accommodate FTA’s efforts and requirements. Another commenter requested that FTA define the SSOA’s role and responsibilities when FTA takes enforcement actions.

One commenter stated that FTA should clarify whether it has the authority to enter a transit property even without the consent of the recipient. The commenter noted that even with written notification, a recipient may object to external auditors entering its property for various reasons, including insufficient training (such as roadway worker protection) and administrative issues, such as schedule conflicts. Other commenters requested that FTA clarify the following: (1) Whether its representatives must be escorted by authorized transit agency representatives while on the property for the purposes of conducting an audit or inspection; and (2) whether FTA representatives must receive agency-required safety training (such as roadway worker protection) in order to enter a rail right-of-way. Several commenters noted that FTA should require its representatives to follow all of a recipient’s applicable safety rules and procedures during the course of conducting an audit or inspection.

Regarding the process for providing notice, some commenters stated that FTA should provide advance written notice to a recipient stating the purpose for the inspection. Several commenters noted that the written notice should reference the specific information that FTA would be seeking. A few commenters recommended that FTA also provide notice to an SSOA prior to inspecting a rail transit agency. Many commenters suggested that the written notice should be directed to a recipient’s general manager, chief executive officer, or other Accountable Executive, with a copy provided to the SSOA. A few commenters stated that notification should include an official letter emailed to the Accountable Executive or their designated point of contact and a phone call. Several commenters suggested that FTA require some form of delivery/read receipt to confirm a recipient’s receipt of the notification.

One commenter recommended that FTA work cooperatively and collaboratively with a recipient to establish an agenda for the site visit. Other commenters acknowledged that emergency situations would eliminate the need for notification. Two commenters noted that there should be limits on the number of times FTA can audit a transit agency unless there are significant safety findings during an

audit or investigation. One commenter indicated support for unannounced FTA inspections, testing, and records reviews, but noted that the Federal process should not prevent the transit agency from providing its routine transit service safely, nor put any of the FTA, SSOA, transit agency personnel, or members of the public at risk during the process.

Some commenters recommended that Federal personnel should receive the recipient’s approved track safety training prior to conducting activities within a recipient’s transit system. One commenter stated that Federal personnel should provide a recipient with details of their safety training and certification.

One commenter stated that a final rule explicitly should allow host agencies to determine reasonable and safe options for granting an FTA request to inspect or test equipment, or to enter restricted or otherwise potentially hazardous areas. Additionally, the commenter suggested that a final rule should allow the host agency’s lead representative to call an emergency “stop” to activities, at his or her discretion, for fire-life-safety reasons, if unsafe behavior is observed that could potentially place a person in danger, or if required personal protective equipment is not worn or not used appropriately.

Commenters requested additional details regarding how, why and when FTA would enter a public transportation system to conduct a safety inspection. Commenters also requested that FTA define its role, responsibilities and authority in the testing and inspection of a public transportation system’s equipment, facilities, rolling stock and operations.

A number of commenters questioned how FTA and SSOAs would coordinate activities with a rail transit agency when FTA exercises its authority under the section. Some commenters recommended that FTA develop program standards for conducting activities under the section and submit them for public comment. Several commenters also noted that the proposed regulatory text did not include notification to the State when FTA would notify a recipient of its intent to exercise authority under the section. A few other commenters recommended that FTA focus its oversight on rail safety, asserting that bus-only systems are already safe.

One commenter asked how FTA’s inspections, oversight, safety standards, or directives would complement, supplement, or possibly conflict with those of SSOAs. The commenter recommended that FTA clarify the

nature of coordination, if any, between FTA and an SSOA. The commenter also suggested that FTA's authority to conduct random safety inspections at any time without notice or coordination with a rail transit agency could consequently divert critical staff resources away from operations or maintenance activities or interfere with the smooth functioning of daily transit operations.

Commenters also asked whether FTA would delegate its authority to carry out this section to an SSOA. Similarly, a commenter stated that since SSOAs and FTA are safety oversight partners, there should be a mechanism for FTA to work with an SSOA and factor SSOA findings into any FTA enforcement action. The commenter recommended that there should be a detailed process for monitoring corrective actions between FTA and SSOAs.

FTA also received comments regarding how this section aligned with FTA's available online SMS Awareness training. One commenter noted, and asked for an explanation of, an apparent discrepancy between FTA's SMS Awareness training, which specifically says that investigations are not a function of SMS, and the NPRM, which indicates that the inspections, investigations, audits, examinations and testing are directly a part of an SMS approach.

Several commenters noted that the SMS reviews and audits should be part of the triennial or state management reviews, unless there has been an accident that the National Transportation Safety Board (NTSB) is investigating. These commenters recommended that FTA define the specific types of incidents or complaints that could result in an FTA audit or investigation. Another commenter suggested that FTA state the frequency it proposes to inspect, audit or perform a "compliance assessment" of each property. This commenter also recommended that for efficiency purposes, FTA's inspection cycle should correspond with the SSOA triennial reviews of local rail transit operators. Commenters stated that if a property is undertaking a robust SMS, then the FTA assessment cycle should be longer. For clarity, commenters recommended that FTA include language which describes the new compliance assessments contemplated by this rulemaking, and describes how they will correspond with existing oversight programs and grant management procedures.

With regard to proposed section 670.11(b), commenters queried whether the prescription of "recordkeeping and

reporting requirements" was meant to apply solely to the production of documents for the purposes of the inspection or audit at hand, or if FTA would be able to direct agency-wide recordkeeping and reporting practices at any time.

#### FTA Response: General

FTA appreciates those commenters who responded to our request for comment on how "reasonable time" and "reasonable manner" should be defined for the purpose of FTA entering into and inspecting equipment, facilities, rolling stock, operations and relevant records. Upon consideration of the comments, FTA has decided not to define "reasonable time" or "reasonable manner" in regulatory text. FTA does not believe that narrowly defining "reasonable time and manner" would enable FTA to sufficiently oversee the safety of our Nation's transit systems. For instance, there are a number of scenarios that may require FTA to enter into and inspect a recipient's property with minimal notification.

Accordingly, under the final rule, the Administrator has discretion in determining what amounts to a reasonable time and manner, on a case-by-case basis. FTA believes it should have flexibility with regard to how it will notify a recipient. Thus, the medium utilized to convey notice should not be limited by regulatory text. FTA will use reasonable means of communication to include telephonic and electronic media. FTA will work with transit systems and appropriate State entities to ensure that adequate notice is provided so that Federal personnel do not unduly impede operations.

FTA does not agree with those commenters who indicated that a host agency should be able to place limitations on FTA's exercise of its statutory authority when conducting compliance activities associated with this rule. Further, FTA does not agree with commenters who suggested that it should prescribe through regulation how and when it would conduct safety inspections, investigations, audits, examinations and testing. FTA's actions will be based on consideration of particular sets of facts. FTA does not believe that limiting the scope of the actions it has the authority to take via rulemaking contributes to improving public transportation safety. Relatedly, FTA does not believe it is appropriate to define through regulation its role, responsibilities, and authority in the inspecting, investigating, auditing, examining, and testing of a public transportation system's equipment,

facilities, rolling stock and operation, as each activity may require flexibility on behalf of FTA and the recipient.

FTA agrees with those commenters who suggested that FTA and its designees comply with a recipient's safety and training protocols and requirements. FTA will coordinate with recipients to ensure its activities are carried out in a safe manner. In addition, when FTA conducts safety activities at a rail transit agency, FTA will coordinate with the relevant SSOA as necessary and to the extent practicable. However, it may not always be feasible for an FTA representative to undergo agency-specific training or verify his or her training to a recipient before conducting safety activities on behalf of FTA under this rule.

In general, FTA disagrees with those commenters who suggested that FTA provide more prescriptive processes. FTA believes that a certain level of flexibility is necessary in order for the agency to effectively administer the Safety Program. For example, FTA does not believe that it should be limited to only engaging in activities under this section upon the consent of a recipient. To do so would be unreasonable, considering there will likely be occasions when inspections and investigations are required when FTA becomes aware of an accident. In addition, FTA does not agree with commenters who suggested that FTA formally establish a schedule for conducting activities under this section or that FTA align its activities under this section with existing audit processes. FTA may establish a formal schedule for conducting activities under this section in the future, but a schedule is not appropriate for this rule.

In exercising its enhanced statutory authority for safety oversight, FTA recognizes the critical role of State and local safety oversight partners. To that end, FTA will work with SSOA and transit system personnel to accommodate operational and staffing challenges that may occur as it exercises its authority. However, FTA does not agree that it should delegate its authority to the SSOAs. In response to the comment regarding SMS Awareness training, FTA notes that implementation of SMS principles in no way contradicts or conflicts with its authority to engage in inspections, investigations, or other regulatory compliance processes.

One commenter asked whether the proposed provision to impose more frequent reporting requirements applied to documents requested for purposes of an audit or inspection, or if FTA would be able to direct agency-wide recordkeeping and reporting practices at

any time. As proposed, FTA could impose more frequent reporting requirements that would not necessarily be tied to an audit or inspection. FTA maintained this provision in the final rule without substantive change.

FTA made a few nonsubstantive, clarifying edits to this section in the final rule. In addition, FTA eliminated the 30-day response timeframe for document requests because there may be instances where FTA needs requested information more quickly. Also, as stated above, FTA refined the notice provision in this section to provide that the Administrator will decide on a case-by-case basis what "reasonable time and manner" would be for FTA to enter into and inspect or test equipment, facilities, rolling stock, operations, and relevant records.

#### 670.13 Request for Confidential Treatment of Records

This section proposed procedures for a recipient to request confidential treatment of any record filed with or otherwise provided to FTA in connection with its administration of the Safety Program.

#### Comments: Request for Confidential Treatment of Records

Many commenters questioned the authority by which FTA would be able to protect information it received from recipients from public disclosure. Commenters asked how FTA would ensure the integrity of confidential information during all phases of the reporting and information retention process. A few commenters stated that the proposed regulatory text was insufficient to provide automatic blanket protection for any information pertaining to public safety or that is safety-critical or safety-sensitive. Several commenters stated that FTA's proposed confidentiality clause would add nothing to existing law, and only narrow the exemption window through overly technical requirements which would allow automatic full disclosure of potentially security sensitive information if a transit agency accidentally neglects to submit the correct format.

A few commenters suggested that FTA clarify that the Freedom of Information Act (FOIA) exemptions apply to all recipients, whether or not they are subject to FOIA. One commenter further noted FTA should explicitly recognize confidentiality provisions under other FOIA-like policies that are adopted by transit agencies. However, a number of commenters asserted that State law could overrule Federal confidentiality

protection, and that the language of the proposed rule was not sufficient to prevent documents from being discovered in a civil action or being disclosed in response to a public records request at the State level. Commenters suggested that FTA should recognize that States are unable to afford transit agencies this protection, even if FTA determines a record is confidential. The commenters recommended that FTA provide protection for any sensitive or confidential information, and ensure that Federal confidentiality supersedes any State disclosure requirements.

Another commenter asked that FTA describe the objective process FTA would use to determine if records are subject to public disclosure. One commenter was concerned that a recipient may use the provision to report directly to FTA and bypass and withhold information from its SSOA, which is obligated (as a State/local agency) under State law to disclose any investigative reports or safety information.

A few commenters expressed concern that FTA proposed to reserve the right to make its own final determination of whether a confidentiality request would be granted. Commenters asked for clarification on the circumstances under which FTA would not keep records confidential, as requested. The commenters also stated such authority to make final determinations would overrule existing State laws and authorities, as well as Sensitive Security Information (SSI) guidelines.

One large transit agency commented that 18 U.S.C. 1905 applies only to Federal employees or Federal agencies, and not to transit agencies since they are not Federal entities. The commenter suggested that this section should therefore include clarification that the disclosure provisions of 18 U.S.C. 1905 will apply to transit agencies that submit records pursuant to a request for confidentiality, even though they are not Federal entities. Another commenter stated that since an agency is required to submit any record for which it is seeking confidential status, the act of that submittal destroys or constitutes a waiver of a transit agency's right to confidentiality of records for which it claims attorney-client or work product privilege. The commenter suggested that a transit agency could instead provide pertinent information regarding date, time, location and a brief explanation of the basis for asserting attorney-client or work product privilege.

Several commenters suggested that FTA allow a transit agency 30 working days to evaluate and respond to a

decision by the Administrator to deny a confidentiality request. Commenters recommended that a final rule provide a reasonable appeal mechanism for transit agencies that disagree with the Administrator's decision to release records. Other commenters recommended that the minimum amount of time given to an agency to respond to an FTA denial of confidential treatment should be changed to at least 10 days, due to the harm that such release could cause.

#### FTA Response: Request for Confidential Treatment of Records

To clarify, the proposed confidentiality provision was not intended to protect information from public disclosure. The provision was intended to provide recipients with the opportunity to alert FTA of the alleged confidentiality of a requested record. Unlike other Federal safety regulatory agencies, FTA does not have statutory authority to protect safety-related information. However, under the State Safety Oversight (SSO) rules at 49 CFR 674.27(a)(7), an SSOA's program standard must include procedures for protecting the confidentiality of investigation reports.

Documents submitted to FTA are subject to FOIA and are generally releasable to the public upon request. FTA may maintain the confidentiality of accident investigations, incident reports, and other safety-related information to the maximum extent permitted under Federal law, including the nine exemptions under FOIA. FTA will evaluate whether or not a document may be withheld from public disclosure under the Department of Transportation's FOIA rules at 49 CFR part 7.

FTA agrees that its confidential treatment of information would not preempt State law; therefore, recipients should exercise their use of this provision accordingly.

FTA made nonsubstantive, clarifying edits to this section in the final rule.

#### Subpart C Enforcement

##### 670.21 General

This section of the NPRM set forth the Administrator's enforcement authorities under 49 U.S.C. 5329.

In general, FTA's responses to comments received on this section are addressed in other sections throughout the preamble. For example, comments related to reporting requirements are addressed in the response to comments under section 670.11, above. Responses to comments related to withholding of funds immediately follow this section, below.



FTA has made two changes to this section as a result of FAST Act amendments made to 49 U.S.C. 5329. First, FTA revised section 670.21(e) to limit withholding of a recipient's 49 U.S.C. 5307 funds to no more than twenty-five (25) percent. Second, FTA added a new section 670.21(g) to explicitly incorporate into this rule FTA's authority to issue restrictions and prohibitions on a recipient's operations, if through testing, inspection, investigation, audit or research the Administrator determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, exist such that there is a substantial risk of death or personal injury. The language in the rule is identical to the language in the statute. Further, the proposed rule included the authority for FTA to issue special directives in the event an unsafe practice or condition caused an emergency situation involving a hazard of death, personal injury, damage to property or equipment, or significant harm to the environment. The authority under new section 670.21(g) may be considered a specific type of special directive, applicable in certain circumstances, and thus is materially related to FTA's proposal to issue special directives. Moreover, FTA finds good cause to include reference to its authority to issue restrictions and prohibitions in the final rule. In the NPRM, section 670.21(a)–(f) included a list of the authorities provided to FTA by Congress in MAP–21 to carry out the Safety Program. In this final rule, FTA has added a new subsection 670.21(g) which merely adds to the list of authorities provided to FTA under MAP–21, to reflect the authority to issue restrictions and prohibitions that was added under the FAST Act. Accordingly, FTA has “good cause” under the Administrative Procedure Act (5 U.S.C. 553(b)) to finalize these provisions at this time because additional public comment is “unnecessary” as the rule merely restates the statutory provision.

#### 670.23 Use or Withholding of Funds

This section proposed procedures for FTA to direct the use of Chapter 53 funds where safety deficiencies are identified by the Administrator or an SSOA. This section also proposed procedures for withholding of Chapter 53 funds from a recipient or State for non-compliance, where the Administrator determines that there has been a pattern or practice of serious violations of the Safety Program or any regulation or directive issued under those laws for which the Administrator

exercises enforcement authority for safety.

#### Comments: Use or Withholding of Funds

Many commenters expressed concern about the potential loss of Federal funding as a result of safety violations, as many safety violations may be due to preexisting and chronic underinvestment, with any loss of funding resulting in a worsening of transit agencies' financial situations and greater safety deficiencies. In addition, several commenters stated that the connection between States, SSOAs and transit agencies was unclear, and that the NPRM did not explain how a State would be held responsible for a safety deficiency at a transit agency. These commenters asked that the rule clarify what is meant by a State, and to clearly differentiate how the notification, appeal, and withholding actions and procedures would affect the various entities.

One commenter stated that SSOAs should not be subject to this section because, although the definition of “recipient” in section 670.5 implies inclusion of SSOAs, the description of actual affected entities throughout the NPRM instead suggests only public transit agencies. The commenter suggested that SSOA funding be excluded from the definition of “recipient” under section 670.5.

Several commenters expressed concern that funding could be withheld from the entire State or SSOA, due to the action (or inaction) of a single subrecipient, thus penalizing all the subrecipients in the State. The commenters asked that FTA add language to section 670.23 to either explain the rationale and process for holding a State liable for the deficiencies of a particular transit agency, or add language which would limit enforcement actions to the particular subrecipient instead of the entire State. Similarly, one commenter stated that there should be a process to ensure that a rail transit agency in one State does not cause FTA to withhold chapter 53 funds from an SSOA or rail transit agency in another State.

Several commenters stated that section 670.23(b)(3) only allows, but does not compel, FTA to consider a recipient's response to a notice of violation. Commenters suggested that FTA should have to consider a recipient's response to a notice of violation. These commenters also stated that this section did not adequately provide an opportunity for notice and comment. In addition, commenters stated that this section did not provide

a sufficient process for a transit agency to appeal an erroneous notice of violation, which could result in a significant loss of funding. One commenter further stated that withholding of funds should be considered only after consultation with the SSOA and after a rail transit agency has been given ample opportunity to address the safety concern and respond to FTA. One commenter suggested that FTA should not withhold funding from a recipient who corrects an identified deficiency by implementing FTA's required remedial action and mitigates the deficiency within the 90 days following the initial notice of violation.

Some commenters stated that because of the similarities between this section and section 670.27, special directives should be invoked as a remedy for program deficiencies before withholding funds, and that this sequence should be clearly required in the rule. Another commenter requested that section 670.23 be incorporated into section 670.27, due to its more developed appeal process, so that transit agencies would have more recourse in the case of an FTA decision to withhold funding.

Several commenters asked what would happen if FTA failed to adhere to the established 30-day decision timeline under section 670.23(b)(3) and queried whether the violation would be automatically dismissed if the deadline passed or whether FTA would be subject to consequences for missing the deadlines. One commenter stated that an FTA decision to redirect or withhold funds amounts to an unfunded mandate.

#### FTA Response: Use or Withholding of Funds

FTA understands that many transit operators, especially smaller transit operators, have limited financial resources. However, FTA believes that the decision to withhold funds should be at the discretion of the FTA Administrator, in consideration of the nature and severity of the safety violation at issue. FTA may consult with an SSOA before withholding any funding or issuing a violation to a rail transit agency. However, FTA does not believe that it needs to prescribe such a process in regulatory text.

FTA will not hold an SSOA directly accountable for a safety deficiency at a rail transit agency. However, FTA may hold an SSOA accountable for failing to adequately oversee a rail transit system. Accordingly, FTA does not believe that SSOAs should be excluded from this rule. FTA agrees that all subrecipients in a State should not be held accountable for one subrecipient's actions, and we have removed the word

“State” from 670.23(c)(ii). FTA will not withhold funds from a rail transit agency because of a safety issue related to another rail transit agency.

In the NPRM, FTA proposed a process for a recipient to respond to a notice of violation. FTA proposed to issue a response to the recipient within 30 days of its receipt of the recipient's response. FTA has changed “may” to “shall” to indicate the Administrator will consider a recipient's response. FTA intends to make a decision within 30 days of receiving a response from a recipient, but FTA will not automatically dismiss violations if it misses the deadline.

FTA's enforcement tools under the Safety Program include directing the use of funds, withholding funds, and issuing directives. Intentionally, FTA did not define specific circumstances that would trigger FTA to take one action over another or prescribe specific timeframes that a recipient would need to comply with a special directive. An enforcement action that may be appropriate to address one recipient's safety issue may not be appropriate to address the same issue at another recipient's transit system. FTA's recipients range in diversity of mode, operating environment, sophistication, expertise and resources. FTA believes it is important to establish and implement the Safety Program in a manner that is both scalable and flexible. FTA does not agree that requiring that funding be redirected or withheld is an unfunded mandate.

In the final rule, FTA has reorganized this section for clarity. In addition, FTA has revised this section to limit the amount that may be withheld to not more than 25% of section 5307 funds in accordance with 49 U.S.C. 5329(g).

#### 670.25 General Directives and 670.27 Special Directives

In section 670.25, FTA proposed procedures for the issuance of a general directive by the Administrator. In section 670.27, FTA proposed procedures for the issuance of a special directive to one or more named recipients.

#### Comments: General Directives and Special Directives

FTA received a number of comments related to the proposed rule for general and special directives. Some commenters asked for clarifications on the proposed procedures for both types of directives. Some comments requested that FTA specify which directives require general manager and Board response, stipulate timelines for response due dates, and clarify the notice and appeal processes. One

commenter stated that there was no process identified for FTA to notify a recipient in a timely way that its response to a directive is satisfactory, which could delay a recipient's implementation of a corrective action and put the transit system in a position of increased liability or undermine public confidence. One commenter noted that State and local agencies would need time to implement a general or special directive and recommended that FTA provide a time period for implementation.

Several commenters noted that the processes for responding to or appealing the FTA Administrator's decisions under part 670 are inconsistent depending on whether it is a general directive, a special directive, or a withholding of funds. One commenter suggested that FTA devote one section solely to responding to or appealing the Administrator's decisions.

A number of commenters noted that the rule did not define emergency situations that might give rise to the issuance of a general directive. Commenters suggested that FTA define “emergency situation.”

Some commenters stated that FTA did not have the authority to take enforcement action because of a “significant harm to the environment.”

One commenter requested that FTA provide specific details about the enforcement action that could be taken under each section. A commenter asked how FTA would identify the need for a general or special directive and how FTA would ensure that qualified persons were involved in the development of a directive.

One commenter noted that under proposed section 670.27(d), a recipient would be required to “observe” a special directive during FTA's review of a petition for reconsideration. The commenter also noted that proposed section 670.27(f)(4) did not provide a timeframe from when FTA would make a decision to when a recipient would be notified of FTA's decision, during which time a recipient would still be required to “observe” the special directive. The commenter asked what “observe” meant and how FTA would enforce the provision if a recipient could not meet the requirements of a special directive.

One commenter suggested that petitions for reconsideration should, at a minimum, be handled by the original authority, a peer, or a superior authority, instead of the FTA Chief Counsel, asserting that the Chief Counsel should not be placed in the position of appellate authority over his or her Administrator.

#### FTA Response: General Directives and Special Directives

Intentionally, FTA did not define specific circumstances that would trigger FTA to take one action over another or prescribe specific timeframes that a recipient would need to comply with either a general or special directive. As stated above, an enforcement action that may be appropriate to address one recipient's safety issue may not be appropriate to address the same issue at another recipient's transit system. FTA's recipients range in diversity of mode, operating environment, sophistication, expertise and resources. FTA believes that it is important to establish and implement the Safety Program in a manner that is both scalable and flexible.

In section 670.25, FTA proposed to issue general directives that could apply to all recipients or a subset of recipients and that would be effective upon notice provided by the Administrator in the **Federal Register**. A general directive would be subject to a public comment period. Following the public notice and comment period, FTA would publish a response to the comments in the **Federal Register**. The **Federal Register** notice also would include a final iteration of the general directive.

Upon further consideration, FTA has determined that general directives and the **Federal Register** process are not appropriate means with which to address an emergency situation. However, FTA believes that providing notice and an opportunity for comment through the **Federal Register** is an appropriate method of addressing safety issues that require mitigation, but need not be addressed immediately upon notice. Accordingly, under the final rule, FTA would not use a general directive to address an emergency situation.

Special directives are the more appropriate tool to address emergency situations. In the NPRM, FTA proposed to issue a special directive to one or more named recipients to address a safety issue specific to the recipient's transit systems. A special directive would become effective upon direct notice from FTA to a recipient. FTA has retained the NPRM provisions related to when FTA would issue a special directive.

FTA agrees with the commenter who suggested that FTA's Chief Counsel should not be placed in the position of appellate authority over the Administrator. Under this rule, the Deputy Administrator will issue special directives, and the Administrator will

serve as the final appellate authority for special directives. Within 90 days of the receipt of a petition for reconsideration, the Administrator would either grant or deny a petition, in whole or in part, and provide notice to a recipient of his or her decision.

Because FTA will issue special directives when it FTA finds a substantial risk of death or personal injury, or damage to property or equipment, a recipient will be required to “observe” the actions required under a special directive while its petition was being reviewed by the Administrator. Within this context, “observe” means that the recipient must implement the requirements under the special directive during the review period. FTA will provide guidance to a recipient on what specific steps need be taken to implement the requirements of the special directive during the review period.

FTA agrees with commenters who suggested that FTA not take action under this rule to address a “significant harm to the environment.” FTA’s primary goal under the Safety Program is to ensure the safety of passengers and transit workers. Readers should note, however, that FTA does have the authority to address environmental issues related to a public transportation system that have an impact on passenger or worker safety. FTA has revised the final rule to remove the language related to harm to the environment.

#### 670.29 Advisories

This section described how the Administrator would issue advisories, which would recommend corrective actions to resolve or mitigate an unsafe condition.

#### Comments: Advisories

Several commenters noted that, as proposed, compliance by a recipient with an advisory would be discretionary. Commenters also noted that advisories issued by other Federal agencies are not discretionary and include required actions. Accordingly, a commenter suggested that FTA use “bulletin” instead of “advisory.”

Commenters asked why FTA did not propose to submit an advisory to a public notice and comment process similar to what was proposed for a general directive. One commenter recommended that FTA establish a formal process for issuing advisories. Several commenters requested clarification on how an advisory would be issued and whether a recipient would have an opportunity to respond.

There were a number of comments related to proposed section 670.29(b). In that section, FTA proposed that the Administrator could take a recipient’s noncompliance with an advisory into consideration when deciding to take an enforcement action. One commenter noted that this section was inconsistent with SMS. The commenter noted that each agency would determine whether or not the hazard or risk referenced in the advisory was relevant, and if so, determine an appropriate strategy to reduce risk to an acceptable level, which could include an alternative mitigation than what was recommended in the advisory.

Some commenters asked whether the subject matter of an advisory could lead to the issuance of a special directive. One commenter asked whether FTA planned to issue civil penalties against a recipient which did not comply with an advisory, and noted that other U.S. DOT administrations do not assess civil penalties under such circumstances.

Several commenters sought clarification on the difference between an advisory and a directive. One commenter suggested that FTA strike the section on advisories because FTA should address unsafe conditions with a general directive.

#### FTA Response: Advisories

In the NPRM, FTA proposed that advisories would include recommended actions. Directives require a recipient to take mandatory action to mitigate a specific safety risk. FTA believes it is important to establish several tools that may be used to address different levels of safety risks, from low to high. An advisory would be used to address lower level safety risks or in situations where FTA lacks sufficient data to accurately assess the risk.

Commenters were accurate in their assertions that “compliance” with an advisory would be at a recipient’s discretion. FTA agrees that each agency should determine whether or not the hazard or risk addressed in an advisory is relevant to its system and determine appropriate mitigations. Due to the nature of an advisory, a recipient need not “comply” with an advisory, but instead would decide whether or not to adopt the recommended actions. Accordingly, FTA has revised this section in the final rule to remove the language stating that the Administrator would take a recipient’s noncompliance with an advisory into consideration when taking enforcement actions. FTA is aware that other Federal agencies use advisories to impose mandatory requirements on their regulated communities. FTA has elected to

impose mandatory requirements through the use of directives, and recommendations through the use of advisories.

FTA does not have the authority to issue civil penalties. However, FTA could issue a directive subsequent to an advisory if FTA finds that the hazard or risk identified in the advisory requires further mitigation.

FTA does not agree that it should submit mere recommendations through the public notice and comment process or establish another formal process for issuing an advisory. FTA will notify recipients of an advisory by publishing a notice in the **Federal Register**. FTA will continue to post advisories to its public Web site and incorporate them into the National Safety Plan.

#### 670.31 Purpose and Content of the National Public Transportation Safety Plan

This section described the statutory mandates and proposed components of a National Public Transportation Safety Plan (National Safety Plan).

#### Comments: National Safety Plan

Several commenters supported FTA’s proposals for a National Safety Plan. Some commenters requested additional information and clarification about the contents of a National Safety Plan in order to be able to comply with the Plan’s requirements. One commenter asked how FTA would update a National Safety Plan and whether each update would be subject to notice and comment.

One commenter stated that a National Safety Plan must be implemented via rulemaking if SSOAs would be expected to ensure that rail transit agencies are complying with the Plan. The commenter stated that a National Safety Plan should not be updated periodically because any changes may require an SSOA to establish new rules, which would be cumbersome, time consuming and expensive. Further, the commenter noted that many small transit providers adopt rules, policies and safety plans through Board actions. Therefore, if a National Safety Plan is changed periodically, transit agencies would need several months to comply with any changes, and to allow an opportunity for comment.

One commenter requested that FTA coordinate the development of safety criteria and standards with the other U.S. DOT modal administrations, such as the FRA, to avoid conflicting standards. One commenter encouraged FTA to coordinate with transit agencies in the development of standards and criteria. The commenter suggested that

a National Safety Plan include a description of safety outcomes and goals, and methods for identifying risks and targeting priorities to achieve safety goals.

Several commenters noted that it was difficult to comment on a National Safety Plan because FTA had not published final rules for other components of the Public Transportation Safety Program. Some commenters requested additional information from FTA on the nexus between state of good repair and safety.

One commenter suggested that FTA adopt the framework for a National Safety Plan that was recommended by the Transit Advisory Committee for Safety (TRACS). The commenter noted that the proposed rule included a few of the TRACS recommendations, but would benefit from a more detailed description of the necessary elements that contribute to a more robust framework.

Several commenters suggested other issues that FTA should address in a National Safety Plan, including employee issues such as driver assaults, restroom breaks, and blind spots. To ensure the safety of transit operators, a commenter recommended that a National Safety Plan require that buses be equipped with clear plastic partitions, a driver side door or window, and an emergency alarm. A commenter also recommended that a National Safety Plan require increased use of wayside fare collection, which the commenter suggested is a safer means to collect payment. Another commenter stated that a National Safety Plan must address blind spots, which make safe operation of transit buses difficult. Other commenters suggested that a National Safety Plan address pedestrian and bicycle safety.

#### FTA Response: National Safety Plan

FTA intends for the National Safety Plan to serve as both the primary tool for FTA to communicate with the transit industry about its safety performance, and as a repository of guidance, best practices, technical assistance, tools and other information. FTA believes that a flexible approach to implementing a National Safety Plan would be the most effective way to disseminate information. Therefore, FTA intends to publish proposed substantive updates to the National Safety Plan, such as new performance criteria, for public notice and comment, but does not believe that the National Safety Plan needs to be a rule. FTA will incorporate guidance, technical assistance, and other tools into the Plan as they become available.

In the NPRM, FTA proposed the initial contents of a National Safety Plan. The list of proposed contents was not exhaustive. On February 5, 2016, FTA published its first proposed National Safety Plan for public notice and comment. *See* 81 FR 6372. The proposed Plan includes four safety performance criteria, an SMS implementation guide, and other guidance. The proposed Plan also includes proposed voluntary standards. FTA will coordinate with relevant U.S. DOT modal administrations and the transit industry in the adoption of any mandatory standards. In addition, the proposed Plan discusses safety outcomes and goals, the nexus between state of good repair and safety, pedestrian and bicycle safety, and the role of TRACS. The comment period for the proposed Plan closed on April 5, 2016, and FTA expects to publish its first National Safety Plan in the near future.

FTA revised this section in the final rule to reflect changes to 49 U.S.C. 5329(b) as amended by the FAST Act, which require a National Safety Plan to include standards to ensure the safe operation of transit systems.

#### IV. Regulatory Analyses and Notices

##### Executive Order 12866 and 13563; USDOT Regulatory Policies and Procedures

Executive Orders 12866 and 13563 direct Federal agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits—including potential economic, environmental, public health and safety effects, distributive impacts, and equity. Also, Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. As stated above, FTA does not believe that this rule imposes direct costs on entities other than FTA.

FTA has determined this rulemaking is a nonsignificant regulatory action within the meaning of Executive Order 12866 and is nonsignificant within the meaning of the U.S. Department of Transportation's regulatory policies and procedures. FTA has determined that this rulemaking is not economically significant. The rule will not result in an effect on the economy of \$100 million or more. The rule will not adversely affect the economy, interfere with actions taken or planned by other agencies, or generally alter the

budgetary impact of any entitlements, grants, user fees, or loan programs.

##### Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354; 5 U.S.C. 601-612), FTA has evaluated the likely effects of the rule on small entities, and has determined that they will not have a significant economic impact on a substantial number of small entities.

##### Unfunded Mandates Reform Act of 1995

This rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4; 109 Stat. 48).

##### Executive Order 13132 (Federalism)

FTA has analyzed this rule in accordance with the principles and criteria established by Executive Order 13132, and determined that this rule will not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. FTA has also determined that this rule will not preempt any State law or State regulation or affect the States' abilities to discharge traditional State governmental functions. Moreover, consistent with Executive Order 13132, FTA has determined that the rule does not impose direct compliance costs on State and local governments.

##### Executive Order 12372 (Intergovernmental Review)

The regulations effectuating Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this rulemaking.

##### Paperwork Reduction Act

This rulemaking will not impose additional collection requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq.*, or the OMB regulation at 5 CFR 1320.8(d). To the extent that there are any costs and burdens associated with any collections under this rule, the information collection will be incorporated into the rulemakings for Public Transportation Agency Safety Plans, State Safety Oversight, and the Safety Certification Training Program.

##### National Environmental Policy Act

The National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.*, requires Federal agencies to analyze the potential environmental effects of their proposed actions in the form of a categorical exclusion, environmental assessment, or environmental impact statement. This rule is categorically

excluded under FTA's environmental impact procedure at 23 CFR 771.118(c)(4), pertaining to planning and administrative activities that do not involve or lead directly to construction, such as the promulgation of rules, regulations, and directives. FTA has determined that no unusual circumstances exist in this instance, and that a categorical exclusion is appropriate for this rulemaking.

#### **Executive Order 12630 (Taking of Private Property)**

This rulemaking will not affect a taking of private property or otherwise have taking implications under Executive Order 12630 (March 15, 1998), Governmental Actions and Interference with Constitutionally Protected Property Rights.

#### **Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations)**

Executive Order 12898 (February 8, 1994) directs every Federal agency to make environmental justice part of its mission by identifying and addressing the effects of all programs, policies, and activities on minority populations and low-income populations. The USDOT environmental justice initiatives accomplish this goal by involving the potentially affected public in developing transportation projects that fit harmoniously within their communities without compromising safety or mobility. Additionally, FTA has issued a program circular addressing environmental justice in public transportation, C 4703.1, "Environmental Justice Policy Guidance for Federal Transit Administration Recipients." This circular provides a framework for FTA grantees as they integrate principles of environmental justice into their transit decision-making processes. The Circular includes recommendations for State Departments of Transportation, Metropolitan Planning Organizations, and public transportation systems on how to: (1) Fully engage environmental justice populations in the transportation decision-making process; (2) determine whether environmental justice populations would be subjected to disproportionately high and adverse human health or environmental effects of a public transportation project, policy, or activity; and (3) avoid, minimize, or mitigate these effects.

#### **Executive Order 12988 (Civil Justice Reform)**

This action meets the applicable standards in sections 3(a) and 3(b)(2) of

Executive Order 12988 (February 5, 1996), Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### **Executive Order 13045 (Protection of Children)**

FTA has analyzed this rule under Executive Order 13045 (April 21, 1997), Protection of Children from Environmental Health Risks and Safety Risks. FTA certifies that this rule will not cause an environmental risk to health or safety that may disproportionately affect children.

#### **Executive Order 13175 (Tribal Consultation)**

FTA has analyzed this action under Executive Order 13175 (November 6, 2000), and believes that it will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal summary impact statement is not required.

#### **Executive Order 13211 (Energy Effects)**

FTA has analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use (May 18, 2001). FTA has determined that this action is not a significant energy action under the Executive Order, given that the action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### **Privacy Act**

Anyone is able to search the electronic form of all comments received into any of FTA's dockets by the name of the individual submitting the comment or signing the comment if submitted on behalf of an association, business, labor union, or any other entity. You may review USDOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000, at 65 FR 19477-8.

#### **Statutory/Legal Authority for This Rulemaking**

This rulemaking is issued under the authority of 49 U.S.C. 5329(f)(7), which authorizes the Secretary to issue rules to carry out the mandate for a Public Transportation Safety Program at 49 U.S.C. 5329.

#### **Regulation Identification Number**

A Regulation Identification Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of

Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN set forth in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects in 49 CFR Part 670**

Public Transportation, Safety.

Issued in Washington, DC, under authority delegated in 49 CFR 1.91.

**Carolyn Flowers,**

*Acting Administrator.*

For the reasons set forth in the preamble, and under the authority of 49 U.S.C. 5329(f)(7), and the delegations of authority at 49 CFR 1.91, FTA hereby amends Chapter VI of Title 49, Code of Federal Regulations, by adding part 670 as set forth below:

### **PART 670—PUBLIC TRANSPORTATION SAFETY PROGRAM**

#### **Subpart A—General Provisions**

Sec.

670.1 Purpose and applicability.

670.3 Policy.

670.5 Definitions.

#### **Subpart B—Inspections, Investigations, Audits, Examinations, and Testing**

670.11 General.

670.13 Request for confidential treatment of records.

#### **Subpart C—Enforcement**

670.21 General.

670.23 Use or withholding of funds.

670.25 General directives.

670.27 Special directives.

670.29 Advisories.

#### **Subpart D—National Public Transportation Safety Plan**

670.31 Purpose and contents of the National Public Transportation Safety Plan.

**Authority:** 49 U.S.C. 5329, 49 CFR 1.91.

#### **Subpart A—General Provisions**

##### **§ 670.1 Purpose and applicability.**

This part carries out the mandate of 49 U.S.C. 5329 to improve the safety of public transportation systems. This part establishes substantive and procedural rules for FTA's administration of the Public Transportation Safety Program. This part applies to recipients of Federal financial assistance under 49 U.S.C. chapter 53.

##### **§ 670.3 Policy.**

The Federal Transit Administration (FTA) has adopted the principles and methods of Safety Management Systems (SMS) as the basis for enhancing the

safety of public transportation in the United States. FTA will follow the principles and methods of SMS in its development of rules, regulations, policies, guidance, best practices and technical assistance administered under the authority of 49 U.S.C. 5329.

#### § 670.5 Definitions.

As used in this part:

*Accountable Executive* means a single, identifiable individual who has ultimate responsibility for carrying out the Public Transportation Agency Safety Plan of a public transportation agency; responsibility for carrying out the agency's Transit Asset Management Plan; and control or direction over the human and capital resources needed to develop and maintain both the agency's Public Transportation Agency Safety Plan in accordance with 49 U.S.C. 5329(d), and the agency's Transit Asset Management Plan in accordance with 49 U.S.C. 5326.

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

*Advisory* means a notice that informs or warns a recipient of hazards or risks to the recipient's public transportation system. An advisory may include recommendations for avoiding or mitigating the hazards or risks.

*Audit* means a review or analysis of records and related materials, including, but not limited to, those related to financial accounts.

*Corrective action plan* means a plan developed by a recipient that describes the actions the recipient will take to minimize, control, correct or eliminate risks and hazards, and the schedule for taking those actions. Either a State Safety Oversight Agency of FTA may require a recipient to develop and carry out a corrective action plan.

*Deputy Administrator* means the Federal Transit Deputy Administrator or his or her designee.

*Directive* means a written communication from FTA to a recipient that requires the recipient to take one or more specific actions to ensure the safety of the recipient's public transportation system.

*Examination* means a process for gathering or analyzing facts or information related to the safety of a public transportation system.

*FTA* means the Federal Transit Administration.

*Hazard* means any real or potential condition that can cause injury, illness, or death; damage to or loss of the facilities, equipment, rolling stock, or infrastructure of a recipient's public transportation system; or damage to the environment.

*Inspection* means a physical observation of equipment, facilities, rolling stock, operations, or records for the purpose of gathering or analyzing facts or information.

*Investigation* means the process of determining the causal and contributing factors of an accident, incident or hazard for the purpose of preventing recurrence and mitigating risk.

*National Public Transportation Safety Plan* means the plan to improve the safety of all public transportation systems that receive Federal financial assistance under 49 U.S.C. Chapter 53.

*Pattern or practice* means two or more findings by FTA of a recipient's violation of the requirements of 49 U.S.C. 5329 or the regulations thereunder.

*Recipient* means a State or local governmental authority, or any other operator of public transportation that receives financial assistance under 49 U.S.C. Chapter 53. The term "recipient" includes State Safety Oversight Agencies.

*Record* means any writing, drawing, map, recording, diskette, DVD, CD-ROM, tape, film, photograph, or other documentary material by which information is preserved. The term "record" also includes any such documentary material stored electronically.

*Risk* means the composite of predicted severity and likelihood of the potential effect of a hazard.

*Safety Management System (SMS)* means a formal, top-down, organization-wide data-driven approach to managing safety risk and assuring the effectiveness of a recipient's safety risk mitigations. SMS includes systematic procedures, practices and policies for managing risks and hazards.

*State* means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands.

*State Safety Oversight Agency* means an agency established by a State that meets the requirements and performs the functions specified by 49 U.S.C. 5329(e) and the regulations set forth in 49 CFR part 659 or 49 CFR part 674.

*Testing* means an assessment of equipment, facilities, rolling stock or operations of a recipient's public transportation system.

### Subpart B—Inspections, Investigations, Audits, Examinations and Testing

#### § 670.11 General.

(a) The Administrator may conduct investigations, inspections, audits and

examinations, and test the equipment, facilities, rolling stock and operations of a recipient's public transportation system.

(b) To the extent practicable, the Administrator will provide notice to a recipient prior to initiating any activities carried out under the authorities listed in paragraph (a) of this section.

(c) The Administrator will conduct activities carried out under this section at reasonable times and in a reasonable manner, as determined by the Administrator.

(d) In carrying out this section, the Administrator may require the production of relevant documents and records, take evidence, issue subpoenas and depositions, and prescribe recordkeeping and reporting requirements.

#### § 670.13 Request for confidential treatment of records.

(a) The Administrator may grant a recipient's request for confidential treatment of records produced under § 670.11, on the basis that the records are—

(1) Exempt from the mandatory disclosure requirements of the Freedom of Information Act (5 U.S.C. 552);

(2) Required to be held in confidence by 18 U.S.C. 1905; or

(3) Otherwise exempt from public disclosure under Federal or State laws.

(b) A recipient must submit the record that contains the alleged confidential information with the request for confidential treatment.

(c) A recipient's request for confidential treatment must include a statement justifying nondisclosure and provide the specific legal basis upon which the request for nondisclosure should be granted.

(d) A recipient's justification statement must indicate whether the recipient is requesting confidentiality for the entire record, or whether non-confidential information in the record can be reasonably segregated from the confidential information. If a recipient is requesting confidentiality for only a portion of the record, the request must include a copy of the entire record and a second copy of the record where the purportedly confidential information has been redacted. The Administrator may assume there is no objection to public disclosure of the record in its entirety if the requestor does not submit a second copy of the record with the confidential information redacted at the time that the request is submitted.

(e) A recipient must mark any record containing any information for which confidential treatment is requested as

follows—“CONFIDENTIAL” or “CONTAINS CONFIDENTIAL INFORMATION” in bold letters.

(f) The Administrator will provide notice to a recipient of his or her decision to approve or deny a request, in whole or in part, no less than five (5) days prior to the public disclosure of a record by FTA. The Administrator will provide an opportunity for a recipient to respond to his or her decision prior to the public disclosure of a record.

### Subpart C—Authorities

#### § 670.21 General.

In addition to actions described in §§ 670.23 through 670.29, in exercising his or her authority under this part, the Administrator may—

(a) Require more frequent oversight of a recipient by a State Safety Oversight Agency that has jurisdiction over the recipient;

(b) Impose requirements for more frequent reporting by a recipient;

(c) Order a recipient to develop and carry out a corrective action plan; and

(d) Issue restrictions and prohibitions, if through testing, inspection, investigation, audit or research carried out under Chapter 53, the Administrator determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, exist such that there is a substantial risk of death or personal injury.

#### § 670.23 Use or withholding of funds.

(a) *Directing the use of funds.* The Administrator may require a recipient to use Chapter 53 funds to correct safety violations identified by the Administrator or a State Safety Oversight Agency before such funds are used for any other purpose.

(b) *Withholding of funds.* Except as provided under 49 CFR part 674, the Administrator may withhold not more than twenty-five (25) percent of funds apportioned under 49 U.S.C. 5307 from a recipient when the Administrator has evidence that the recipient has engaged in a pattern or practice of serious safety violations, or has otherwise refused to comply with the Public Transportation Safety Program, as codified at 49 U.S.C. 5329, or any regulation or directive issued under those laws for which the Administrator exercises enforcement authority for safety.

(c) *Notice.* The Administrator will issue a notice of violation that includes the amount the Administrator proposes to redirect or withhold at least ninety (90) days prior to the date from when the funds will be redirected or withheld. The notice will contain—

(1) A statement of the legal authority for its issuance;

(2) A statement of the regulatory provisions or directives FTA believes the recipient has violated;

(3) A statement of the remedial action sought to correct the violation; and

(4) A statement of facts supporting the proposed remedial action.

(d) *Reply.* Within thirty (30) days of service of a notice of violation, a recipient may file a written reply with the Administrator. Upon receipt of a written request, the Administrator may extend the time for filing for good cause shown. The reply must be in writing, and signed by the recipient's Accountable Executive or equivalent entity. A written reply may include an explanation for the alleged violation, provide relevant information or materials in response to the alleged violation or in mitigation thereof, or recommend alternative means of compliance for consideration by the Administrator.

(e) *Decision.* The Administrator will issue a written decision within thirty (30) days of his or her receipt of a recipient's reply. The Administrator shall consider a recipient's response in determining whether to dismiss the notice of violation in whole or in part. If a notice of violation is not dismissed, the Administrator may undertake any other enforcement action he or she deems appropriate.

#### § 670.25 General directives.

(a) *General.* The Administrator may issue a general directive under this part that is applicable to all recipients or a subset of recipients for the following reasons—

(1) The Administrator determines that an unsafe condition or practice, or a combination of unsafe conditions and practices, exists such that there is a risk of death or personal injury, or damage to property or equipment; or

(2) For any other purpose where the Administrator determines that the public interest requires the avoidance or mitigation of a hazard or risk.

(b) *Effective date.* A general directive is effective upon final notice provided by the Administrator under paragraph (e) of this section.

(c) *Notice.* The Administrator will provide notice of a general directive to recipients in the **Federal Register**. The notice will include at minimum—

(1) A reference to the authority under which the directive is being issued;

(2) A statement of the purpose of the issuance of the directive, including a description of the subjects or issues involved and a statement of the remedial actions sought; and

(3) A statement of the time within which written comments must be received by FTA.

(d) *Consideration of comments received.* The Administrator will consider all timely comments received. Late filed comments will be considered to the extent practicable.

(e) *Final notice.* After consideration of timely comments received, the Administrator will publish a notice in the **Federal Register** that includes both a response to comments and a final general directive or a statement rescinding, revising, revoking or suspending the directive.

#### § 670.27 Special directives.

(a) *General.* The Deputy Administrator may issue a special directive under this part to one or more named recipients for the following reasons—

(1) The Deputy Administrator has reason to believe that a recipient is engaging in conduct, or there is evidence of a pattern or practice of a recipient's conduct, in violation of the Public Transportation Safety Program or any regulation or directive issued under those laws for which the Administrator exercises enforcement authority for safety;

(2) The Deputy Administrator determines that an unsafe condition or practice, or a combination of unsafe conditions and practices exists such that there is a substantial risk of death or personal injury, or damage to property or equipment; or

(3) For any other purpose where the Deputy Administrator determines that the public interest requires the avoidance or mitigation of a hazard or risk through immediate compliance.

(b) *Effective date.* A special directive is effective upon notice provided by the Deputy Administrator under paragraph (c) of this section.

(c) *Notice.* The Deputy Administrator will provide notice to a recipient that is subject to a special directive. The Deputy Administrator may initially provide notice through telephonic or electronic communication; however, written notice will be served by personal service or by U.S. mail following telephonic or electronic communication. Notice will include the following information, at minimum—

(1) The name of the recipient or recipients to which the directive applies;

(2) A reference to the authority under which the directive is being issued; and

(3) A statement of the purpose of the issuance of the directive, including a description of the subjects or issues involved, a statement of facts upon

which the notice is being issued, a statement of the remedial actions being sought, and the date by which such remedial actions must be taken.

(d) *Petition for reconsideration.*

Within thirty (30) days of service of a notice issued under paragraph (c) of this section, a recipient may file a petition for reconsideration with the Administrator. Unless explicitly stayed or modified by the Administrator, a special directive will remain in effect and must be observed pending review of a petition for reconsideration. Any such petition:

(1) Must be in writing and signed by a recipient's Accountable Executive or equivalent entity;

(2) Must include a brief explanation of why the recipient believes the special directive should not apply to it or why compliance with the special directive is not possible, is not practicable, is unreasonable, or is not in the public interest; and

(3) May include relevant information regarding the factual basis upon which the special directive was issued, information in response to any alleged violation or in mitigation thereof, recommend alternative means of compliance for consideration, and any other information deemed appropriate by the recipient.

(e) *Request for extension.* Upon written request, the Administrator may extend the time for filing a request for reconsideration for good cause shown.

(f) *Filing a petition for reconsideration.* A petition must be submitted to the Office of the Administrator, Federal Transit Administration, using one of the following methods—

(1) Email to FTA, sent to an email address provided in the notice of special directive;

(2) Facsimile to FTA at 202–366–9854; or

(3) Mail to FTA at: FTA, Office of the Administrator, 1200 New Jersey Ave. SE., Washington, DC 20590.

(g) *Processing of petitions for reconsideration—(1) General.* Each petition received under this section will be reviewed and disposed of by the Administrator no later than ninety days (90) after receipt of the petition. No hearing, argument or other proceeding will be held directly on a petition before its disposition under this section.

(2) *Grants.* If the Administrator determines the petition contains adequate justification, he or she may grant the petition, in whole or in part.

(3) *Denials.* If the Administrator determines the petition does not justify modifying, rescinding or revoking the

directive, in whole or in part, he or she may deny the petition.

(4) *Notification.* The Administrator will issue notification to a recipient of his or her decision.

(h) *Judicial review.* A recipient may seek judicial review in an appropriate United States District Court after a final action of FTA under this section, as provided in 5 U.S.C. 701–706.

**§ 670.29 Advisories.**

In any instance in which the Administrator determines there are hazards or risks to public transportation, the Administrator may issue an advisory which recommends corrective actions, inspections, conditions, limitations or other actions to avoid or mitigate any hazards or risks. The Administrator will issue notice to recipients of an advisory in the **Federal Register**.

**Subpart D—National Public Transportation Safety Plan**

**§ 670.31 Purpose and contents of the National Public Transportation Safety Plan.**

Periodically, FTA will issue a National Public Transportation Safety Plan to improve the safety of all public transportation systems that receive funding under 49 U.S.C. Chapter 53. The National Public Transportation Safety Plan will include the following—

(a) Safety performance criteria for all modes of public transportation, established through public notice and comment;

(b) The definition of *state of good repair*;

(c) Minimum safety performance standards for vehicles in revenue operations, established through public notice and comment;

(d) Minimum performance standards for public transportation operations established through public notice and comment;

(e) The Public Transportation Safety Certification Training Program;

(f) Safety advisories, directives and reports;

(g) Best practices, technical assistance, templates and other tools;

(h) Research, reports, data and information on hazard identification and risk management in public transportation, and guidance regarding the prevention of accidents and incidents in public transportation; and

(i) Any other content as determined by FTA.

[FR Doc. 2016–18920 Filed 8–10–16; 8:45 am]

**BILLING CODE P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 219**

[Docket No. 150413360–6558–04]

RIN 0648–BF02

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Northeast Fisheries Science Center Fisheries Research**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS' Office of Protected Resources (hereinafter "OPR" or "we" or "our"), upon request of NMFS' Northeast Fisheries Science Center (NEFSC), hereby issues a regulation to govern the unintentional taking of marine mammals incidental to fisheries research conducted in a specified geographical region, over the course of five years. This regulation, which allows for the issuance of a Letter of Authorization for the incidental take of marine mammals during the described activities and specified timeframes, prescribes the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective from September 12, 2016 through September 9, 2021.

**ADDRESSES:** A copy of the NEFSC's application, application addendum, and supporting documents, as well as a list of the references cited in this document, are available on the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm>. In case of problems accessing these documents, please call the contact listed below this section (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Ben Laws, Office of Protected Resources, NMFS, (301) 427–8401.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

This regulation, under the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*), establishes a framework for authorizing the take of marine mammals incidental to the NEFSC's fisheries research activities in a specified geographical region (the