SECTION 8

OPERATIONAL LIMITATIONS

INTRODUCTION

Congress has enacted legislation designed to protect private enterprise from federally subsidized competition. Congress was concerned that federal funding not be used without consideration of the interests of private carriers that compete with federally funded transit providers for patronage. This concern resulted in the creation of certain protections for private carriers, including restricting certain operations by recipients and subrecipients of federal funds.[1] Such legislation seeks to protect two categories of competitors from federally-funded transit operations—private charter bus operators[2] and private school bus operators.[3]

I. STATUTORY AND REGULATORY BACKGROUND

In the early 1970s, Congress became increasingly concerned that federally-funded mass transportation facilities and equipment not be used in unfair competition against private carriers. This concern resulted in restrictions on the use of FTA-assisted equipment and facilities for charter service that first appeared in Section 164(a) of the Federal Aid Highway Act of 1973.[4] Section 164(a), which prohibited all charter service outside an FTA recipient's urban area, read as follows:

> No Federal financial assistance shall be provided under (1) subsection (a) or (c) of section 142, title 23, United States Code, (2) paragraph (4) of subsection (e) of section 103, title 23, United States Code, or (3) the Urban Mass Transportation Act of 1964, for the purchase of buses to any applicant for such assistance unless such applicant and the Secretary of Transportation shall have first entered into an agreement that such applicant will not engage in charter bus operations in competition with private bus operators outside of the area within which such applicant provides regularly scheduled mass transportation service. A violation of such agreement shall bar such applicant from receiving any other Federal financial assistance under those provisions of law referred to in clauses (1), (20), and (30) of this subsection.

Section 164(a) was amended by Section 813(b) of the Housing and Community Development Act of 1974[5], and reflected in Section 3(f) of the Urban Mass Transportation Act of 1964, as amended, as follows:

> No Federal financial assistance under this Act may be provided for the purchase or operation of buses unless the applicant or any public body receiving such assistance for the purchase or operation of buses or any publicly owned operator receiving assistance, shall as a condition of such assistance enter into an agreement with the Secretary that such public body, or any operator of mass transportation for such public body, will not engage in charter bus operations outside the urban area within which it provides regularly scheduled mass transportation service, except as provided in the agreement authorized by this subsection. Such agreement shall provide for fair and equitable arrangements, appropriate in the judgment of the Secretary, to assure that the financial assistance granted under this Act will not enable public bodies and publicly owned operators to foreclose private operators from the intercity charter bus industry where such private operators are willing and able to provide such service…(emphasis added).

Since the 1974 amendments, Congress has made no substantive changes to the charter bus restrictions set forth above, though, as we shall see, there have been regulatory changes inspired by SAFETEA-LU,[6] and, in one instance, an appropriations rider that singled out special treatment for a specific public transit provider.[7]

The Urban Mass Transportation Administration (hereafter FTA) published its first rule regulating charter bus activities by FTA recipients on April 1, 1976.[8] The rule prohibited public transit operators from providing charter bus service outside their urban operating areas unless "fair and equitable arrangements" had been made to protect "willing and able" private intercity charter bus operators. The rule was quite broad, and allowed FTA recipients to compete, within their existing operating areas, against private carriers. FTA recipients were required to certify that their charter service was "incidental," and that revenues generated by such service were equal to or greater than the cost of providing the service. Finally, the regulation required that charter certifications be made available for review and comment by private carriers.

Early charter bus decisions revolved around the definitions of "urban area" and "incidental service," cost certification, and cost allocation plans. Many FTA grantees complained that the rule created undue administrative burdens on them, while private operators voiced concern that publicly funded operators were forcing them out of business with federally-funded equipment. Even the FTA found the rule cumbersome, and on January 19, 1981, issued an advance notice of proposed rulemaking (ANPRM) to revise the rule.[9]

After an especially long period of comment and review, FTA issued a complete revision of its charter regulations on April 13, 1987. The revised regulations established a general prohibition on the use of FTA-

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[1] *See, e.g.*, 49 U.S.C. §§ 5323(1), 5323(d), and 5323(f).

[2] 49 C.F.R. pt. 604.

[3] However, on demand taxicab service is not within the protected category. PAUL DEMPSEY & WILLIAM THOMS, LAW & ECONOMIC REGULATION IN TRANSPORTATION 327 (Quorum 1986). Westport Taxi Service, Inc. v. Adams, 571 F.2d 697 (2d Cir. 1978).

[4] Pub. L. No. 93-87, 87 Stat. 280.

[5] Pub. L. No. 93-383, 88 Stat. 633.

[6] For example, FTA noted in a rulemaking that it proposed to amend its school bus operations regulations to clarify several definitions, amend the school bus operations complaint procedures, and implement Section 3023(f) of SAFETEA-LU. School Bus Operations, 73 Fed. Reg. 68,375 (Nov. 18, 2008).

[7] 49 U.S.C. §§ 5323(d), 5323(f).

[8] Part 604, Charter Bus Operations, 41 Fed. Reg. 14,122 (Apr. 1, 1976).

[9] Charter Bus Operations (ANPRM), 46 Fed. Reg. 5394 (Jan. 19, 1981).

funded equipment and facilities for charter service.[10] Incidental use was allowed only where there were no willing and able private operators or where private operators lacked equipment accessible to the elderly or disabled. Two other exemptions, for hardship situations in nonurbanized areas and special events, could be obtained with FTA approval. On November 3, 1987, FTA issued charter service questions and answers to its April 13, 1987, rulemaking.[11]

FTA amended its charter rule on December 30, 1988, to add three additional exceptions to the general prohibitions described above.[12] The amendment allowed the incidental use of FTA-funded equipment and facilities under certain conditions for: 1) direct charter service with nonprofit social services agencies,[13] 2) provision of service to the elderly by social services agencies in nonurbanized areas, [14] and 3) service agreed upon between FTA recipients and local private operators pursuant to a willing and able determination allowing such service.[15] FTA amended its charter regulations in 2008.

A. Charter Service

The Federal Transit Act prohibits federal funding recipients from providing charter service if there is a private operator that can provide such service.[16] Prior to 2008, charter service was defined as:

transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge (in accordance with the carrier's tariff) for the vehicle or service, have acquired the exclusive use of the vehicle or service to travel together under an itinerary either specified in advance or modified after having left the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment.[17]

In 2008, the FTA revised its definition of charter services as follows:

> "Charter service" means, but does not include demand response service to individuals:
>
> (1) Transportation provided by a recipient at the request of a third party for the exclusive use of a bus or van for a negotiated price. The following features may be characteristic of charter service:
>
> (i) A third party pays the transit provider a negotiated price for the group;
>
> (ii) Any fares charged to individual members of the group are collected by a third party;
>
> (iii) The service is not part of the transit provider's regularly scheduled service, or is offered for a limited period of time; or
>
> (iv) A third party determines the origin and destination of the trip as well as scheduling; or
>
> (2) Transportation provided by a recipient to the public for events or functions that occur on an irregular basis or for a limited duration and:
>
> (i) A premium fare is charged that is greater than the usual or customary fixed route fare; or
>
> (ii) The service is paid for in whole or in part by a third party.[18]

Every applicant for FTA assistance must submit with its grant application an agreement that the recipient will not operate prohibited charter service.[19] This agreement should not be confused with the so-called charter agreement executed between the recipient and all willing and able charter providers in the recipient's service area; the charter agreement specifies which types of charter service the recipient may operate directly. The foregoing rules apply to both recipients and subrecipients.[20] The rules also apply to FTA-funded vans and buses, but not to FTA-funded facilities and equipment such as rail vehicles and ferry boat vehicles.[21]

Incidental charter service is defined as charter service that does not "interfere with or detract from" the provision of mass transportation service, or does not "shorten the mass transportation life of the equipment or facilities" being used.[22] The purpose of the rules is to

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[10] Charter Service, 52 Fed. Reg. 11,916 (Apr. 13, 1987).

[11] Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[12] Charter Service Amendment, 53 Fed. Reg. 53,348 (Dec. 30, 1988).

[13] 49 C.F.R. § 604.9(b)(5).

[14] 49 C.F.R. § 604.9(b)(6).

[15] 49 C.F.R. § 604.9(b)(7).

[16] *See* 49 U.S.C. § 5323(d).

[17] 49 C.F.R. 604.5(e).

[18] 49 C.F.R. § 604.3(c).

[19] For state administered programs, the state must submit the charter agreement and obtain and retain written certification of compliance by its subrecipients. 49 C.F.R. 604.7(a).

[20] As the FTA noted,

> a private operator that receives [FTA] assistance through a recipient, whether under contract to provide specific service or by means of an allocation plan as in New Jersey, was subject to the regulation to the extent that the assisted equipment or facilities were used to provide charter service…. Consequently, all operators for a recipient, whether public or private, under contract or receiving assistance through a recipient, are subject to the charter rule but only to the extent that the operator uses [FTA] funded equipment or facilities to provide charter service…. Therefore, in shorthand, the rule treats all operators for a recipient as a recipient to the extent that they stand in a recipient's shoes.

52 Charter Service, Fed. Reg. 11,916, 11,918-9 (Apr. 13, 1987).

[21] According to FTA, "Since there are so few private rail or ferry boat operators, we believe that not including charter rail and charter ferry boat service within this rule will have little if any adverse effect on operators." Charter Service, 52 Fed. Reg. 11,916 (Apr. 13, 1987). However, charter service provided with FTA-funded rail or ferry boat equipment must be incidental to the provision of mass transportation. Charter Service, 52 Fed. Reg. 11, 916, 11,920 (Apr. 13, 1987).

[22] 49 C.F.R. 604.5(i).

ensure that FTA-funded equipment and facilities are available for mass transportation.[23] Though the issue of what is "incidental" is determined by FTA on a case-by-case basis, among charter services the FTA explicitly does *not* consider "incidental" are the following:

- Service performed during peak hours;[24]
- Service that does not meet its fully allocated cost;
- Service used to count toward meeting the useful life of any facilities or equipment; and
- Service provided in equipment that is in excess of an FTA-approved spare ratio.[25]

Generally speaking, recipients of FTA funds are prohibited from providing charter services where private companies are available and willing to provide such services (known as "willing and able" providers).[26] A "willing and able" provider is one who has the desire, the physical capability,[27] and the legal authority to provide charter service in the area in which it is proposed.[28] The purpose of the prohibition is to ensure that federal-funded equipment and facilities do not compete unfairly with private charter carriers.[29] All operators—public or private—receiving FTA assistance through the recipient stand in the shoes of the recipient for purposes of the charter prohibition.

A recipient of FTA funding generally may not "provide charter bus transportation service outside the urban area in which it provides regularly scheduled public transportation service."[30] Exceptions to this rule exist where "all registered charter providers [i.e., private sector companies] in the geographic area" agree;[31] where, after receiving notice of the service need, no registered charter provider expresses interest in providing such service;[32] or where recipients have obtained an exception to the charter service regulations from the FTA Administrator.[33] In the latter case, a recipient of federal assistance may petition the Administrator for an exception to the charter service regulations to provide charter service directly to a customer for:

(1) Events of regional or national significance;

(2) Hardship (only for non-urbanized areas under 50,000 in population or small urbanized areas under 200,000 in population); or

(3) Unique and time sensitive events (e.g., funerals of local, regional or national significance) that are in the public's interest.[34]

The Administrator may grant a "permanent or temporary exemption from FTA rules as allowed by law."[35]

B. Exceptions

1. The No "Willing and Able" Private Carriers Exception

Prior to 2008, an applicant seeking FTA financial assistance to acquire or operate transportation equipment or facilities had to submit to FTA a formal written agreement that it would provide charter service only to the extent that there are no private charter service operators willing and able to provide the charter service.[36]

In order to determine whether such private operators exist, a transit operator was required to publish a notice in a local newspaper and send a copy to all local private charter operators and any operator that requested it, as well as to the American Bus Association and the United Bus Owners of America.[37] The notice

[23] Charter service is excluded from mass transportation under the Act, which defines mass transportation as "transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include…charter, or sightseeing transportation." 49 U.S.C. § 5302(a)(7). The DOT has elaborated as to what constitutes mass transportation:

> First, mass transportation is under the control of the recipient. Generally the recipient is responsible for setting the route, rate, and schedule, and deciding what equipment is used. Second, the service is designed to benefit the public at large and not some special organization such as a private club. Third, mass transportation is open to the public and is not closed door. Thus, anyone who wishes to ride on the service must be permitted to do so.

Charter Service, 52 Fed. Reg. 11,916, 11,920 (Apr. 13, 1987).

[24] FTA has defined peak hours as generally running from 6:00-9:00 a.m., and from 4:00-7:00 p.m. 52 Fed. Reg. 11,926 (Apr. 13, 1987).

[25] *Id*. at 11,926.

[26] 49 C.F.R. 604.9(b)(1).

[27] A charter operator need not demonstrate that it has any particular capacity level. It may be deemed willing and able even if it has only one bus, and that bus may be an intercity bus, a transit bus, a school bus, or a trolley bus. However, an operator must have at least one bus or van to be considered "willing and able." Transportation brokers are ineligible for such designation. Charter Service, 52 Fed. Reg. at 11,922. FTA recognized that "it is possible where there is only one willing and able private operator that has precluded the recipient from providing any charter service that the private operator could refuse to provide requested charter service and leave the customer without transportation." However, the agency considered such circumstances unlikely, and concluded "that the market will take care of the situation." *Id.* at 11,922.

[28] 49 C.F.R. § 604.5(p).

[29] Charter Service, 52 Fed. Reg. 11,916–17 (Apr. 13, 1987).

[30] 49 U.S.C. § 5323(d)(1). The purpose of this section is: "to ensure that the [federal] assistance will not enable a governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service." 49 U.S.C. § 5323(d).

[31] 49 C.F.R. § 604.10.

[32] 49 C.F.R. § 604.9.

[33] 49 C.F.R. § 604.11.

[34] 49 C.F.R. § 604.11.

[35] 49 C.F.R. § 601.32(a). Claim for violation of these provisions was dismissed on mootness and ripeness grounds in United Motorcoach Ass'n v. Welbes, 614 F. Supp. 2d 1; 2009 U.S. Dist. LEXIS 37894 (D.D.C. 2009).

[36] 49 U.S.C. § 5323(d) (2000), C.F.R. 604.7.

[37] Notice should be published not less than 60 days prior to the date that the recipient proposes to commence directly pro-

described the charter service sought[38] and gave the private operators not less than 30 days to submit written evidence that they were "willing and able" to provide the service.[39] If there was at least one private charter operator willing and able to provide the charter service directly to the public, the recipient was prohibited from providing such charter service using FTA-funded equipment or facilities.[40]

For example, if the public transit provider announced its desire to provide charter bus and van service, and there were private bus companies that stated that they were "willing and able" but did not have at least one van, the public operator was allowed to directly provide incidental charter service in FTA-funded vans but not buses.[41] The rationale was that the private bus companies, while "willing," were not "able" to operate van service because of the absence of at least a single van.

In 2008, FTA promulgated rules amending its regulations governing the provision of charter service by recipients of federal funds from the FTA so as to comply with SAFETEA-LU, in which Congress urged that FTA establish a committee to develop, through negotiated rulemaking procedures, recommendations for improving the regulation regarding unauthorized competition from recipients of federal financial assistance.[42] The amended regulations clarify the existing requirements, provide a new definition of "charter service," and allow the electronic registration of private charter providers, replacing the former "willing and able" process.[43] The new process determines within 72 hours, through electronic notification and response, if there are private bus charter companies willing and able to provide the proposed service.[44]

viding the charter service. The notice must be published in a general circulation newspaper in the geographic region in which the recipient seeks to provide charter service. If the region is large enough, it may have to be published in more than one newspaper to cover the entire area. A state is free to publish one newspaper notice to cover all its subrecipients, or publish a notice for each subrecipient tailoring the publication to cover only the region in which the subrecipient operates, or it can publish regional notices to cover several subrecipients. Charter Service 52 Fed. Reg. 11,916, 11,926–27 (Apr. 13, 1987).

[38] The notice must describe the days, times of day, geographic region, and vehicles. 49 C.F.R. § 604.11(c)(2) (1999). FTA encourages, but does not require, that the notice indicate the purpose of the charter, or the groups to be transported. Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987). The notice should describe the proposed charter service and request that private charter operators respond with evidence to prove they are willing and able to provide it. Charter Service, 52 Fed. Reg. 11,916, 11,926–27 (Apr. 13, 1987).

[39] If the FTA recipient believes that a private charter operator has falsified its "willing and able" filing, it may file a complaint with the FTA Chief Counsel, who shall direct the parties to informally resolve the dispute; failing that, he or she shall rule on the complaint within approximately 90 days. Charter Service Questions and Answers, 52 Fed. Reg. 42,248, 42,250 (Nov. 3, 1987). The FTA recipient may look behind the evidence where it has reasonable cause to believe that some or all of the evidence submitted has been falsified. According to FTA, "we have no intention of permitting an unscrupulous private operator from affecting the services that a recipient may provide to the ultimate detriment of the customer." Once the recipient determines that an eligible willing and able private operator exists, it may cease reviewing the evidence submitted. According to FTA, "if a private operator satisfies the definitional requirements of desire, ability to obtain the vehicles, and legal authority, the private charter operator is automatically willing and able." Within 60 days of the deadline for filing a "willing and able" statement, the recipient must inform all the private operators that submitted evidence of its decision. Charter Service, 52 Fed. Reg. 11,916 (Apr. 13, 1987).

[40] The rule applies to recipients and subrecipients. 49 C.F.R. 604.9(a).

[41] Charter Service, 52 Fed. Reg. 11,916, 11,920 (Apr. 13, 1987).

[42] *See* Joint Explanatory Statement of the Committee of Conference, Section 3023(d), "Condition on Charter Bus Transportation Service" of SAFETEA-LU.

[43] 49 C.F.R. 604.13(a)

Private charter operators shall provide the following information to be considered a registered charter provider:

(1) Company name, address, phone number, e-mail address, and facsimile number;

(2) Federal and, if available, state motor carrier identifying number;

(3) The geographic service areas of public transit agencies, as identified by the transit agency's zip code, in which the private charter operator intends to provide charter service;

(4) The number of buses or vans the private charter operator owns;

(5) A certification that the private charter operator has valid insurance; and

(6) Whether willing to provide free or reduced rate charter services to registered qualified human service organizations.

(b) A private charter operator that provides valid information in this subpart is a "registered charter provider" for purposes of this part and shall have standing to file a complaint consistent with subpart F.

(c) A recipient, a registered charter provider, or their duly authorized representative, may challenge a registered charter provider's registration and request removal of the private charter operator from FTA's charter registration Web site by filing a complaint consistent with subpart F.

(d) FTA may refuse to post a private charter operator's information if the private charter operator fails to provide all of the required information as indicated on the FTA charter registration Web site.

(e) A registered charter provider shall provide current and accurate information on FTA's charter registration Web site, and shall update that information no less frequently than every two years.

[44] 49 C.F.R. § 604.14: Recipient's notification to registered charter providers.

(a) Upon receiving a request for charter service, a recipient may:

2. The Contract Exception

An FTA recipient may provide charter service or vehicles under contract or lease to a private charter operator.[45] Typically, this would be under circumstances where the private operator does not have sufficient equipment to satisfy the capacity demands of the charterer,[46] or when the private operator is unable to provide "equipment accessible to elderly and disabled persons."[47] In both circumstances, the FTA recipient is under contract with the private operator and not with the passengers.[48] During the contract or lease term, the private charter operator must be responsible for the direction and control of the public transit provider's equipment.[49] However, the regulations do not require the recipient to lease its FTA-funded vehicles to the private charter operator. Moreover, the private charter operator's drivers may operate the recipient's vehicles. Nor do the regulations require that the recipient forego its safety rules, operating procedures, and accident reporting requirements. In effect, the private charter operator becomes a broker for the charter operations of the federally funded FTA recipient.

3. The Hardship Exception

FTA recipients in non-urbanized areas may petition the agency for a "hardship exception" that allows the recipient to provide charter service directly to the customer if willing and able private operators impose minimum trip durations that exceed the proposed charter trip, or willing and able private operators are located so far from the origin of the charter service that the costs of the service would be onerous.[50] In either situation, the process for seeking a hardship exception is the same.

First, after determining that there is one or more willing and able private charter operators, the recipient must provide those operators with (1) a written explanation why FTA should grant a hardship exception in that particular case, and (2) a 30-day comment period within which the private operators may respond. Second, after the comment period closes, the recipient must send FTA's Chief Counsel[51] a copy of the notice it sent to the willing and able operators and copies of all comments received. Reporting requirements, however, were significantly reduced by FTA in its regulations promulgated in 2008. The Chief Counsel reviews the materials submitted and grants or denies the request in whole or in part. Because hardship exceptions are effective for only 12 months, such exceptions, where warranted, must be resubmitted on a yearly basis.[52]

4. The Special Events Exception

Upon petition,[53] a waiver may also be granted to an FTA-funded public transit operator, allowing it to provide charter service for special events to the extent that private charter operators are incapable of providing the service.[54] The rules do not define "special events," but FTA has expressed its intention that they "include only events of an extraordinary, special and singular nature such as the Pan American Games and the visits of foreign dignitaries."[55] Though no public notice is required, FTA expects recipients applying for such an exemption to have contacted private carriers in the area to deter-

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(1) Decline to provide the service, with or without referring the requestor to FTA's charter registration Web site

(2) Provide the service under an exception provided in subpart B of this part; or

(3) Provide notice to registered charter providers as provided in this section and provide the service pursuant to § 604.9.

Charter Service, 73 Fed. Reg. 2326 (Jan. 14, 2008); *see also* Charter Service, 73 Fed. Reg. 44,927 (Aug. 1, 2008); and Charter Service, 73 Fed. Reg. 46,554 (Aug. 11, 2008).

[45] 49 C.F.R. § 604.9(b)(2). The FTA has concluded that

the charter rules do not apply to private charter operators when providing charter services using private charter vehicles not under contract with a public transit agency. The charter regulations apply to private charter providers when providing public transportation services under contract with a transit agency receiving Federal funds whether using privately owned vehicles or federally funded vehicles. This means a private charter operator, when providing public transportation in accordance with the terms of its contract with a public transit agency, must abide by the charter regulations for those vehicles engaged in public transportation services. For example, XYZ Charter Company contracts with ABC transit agency to provide fixed route service from 7 a.m. to 6:30 p.m. Monday through Friday. At 6:31 p.m. each night, XYZ Charter Company's privately owned vehicles are available for charter and such service is not subject to the charter regulations.

Charter Service, 73 Fed. Reg. 2326 (Jan. 14, 2008).

[46] Charter Service, 52 Fed. Reg. 11,916, 119,21 (Apr. 13, 1987).

[47] 49 C.F.R. § 604.9(b)(2)(ii).

[48] Charter Service, 52 Fed. Reg. 11,916 (Apr. 13, 1987).

[49] Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[50] 49 C.F.R. § 604.9(3).

[51] As a practical matter, hardship requests are processed through FTA's regional counsel in the particular region where the request arises.

[52] Charter Service, 52 Fed. Reg. 11,916, 11,925 (Apr. 13, 1987).

[53] Petitions must be filed at least 90 days prior to the proposed service. They must describe the event, and explain how it is special, and why private charter operators are incapable of providing it. *Id*.

[54] 49 C.F.R. § 604.9(b)(4). The incapability of private operators to meet the needs of the special event is the central issue in determining whether the exception will be granted. FTA has indicated that "private charter operators would not be capable of providing charter service if, for example, their fleets, even when pooled together, would not equal or even approximate the level of service required by the event." 52 Fed. Reg. 11,925 (Apr. 13, 1987).

[55] Charter Service, 52 Fed. Reg. 11,916 (Apr. 13, 1987).

mine whether they are unable to provide such service.[56] In other words, the recipient has the option of providing broad public notice or notifying the local private carriers individually. FTA has made it clear that special events waivers will be sparingly granted and that the recipient applying for such a waiver will have a heavy burden to prove that the requested charter service cannot be provided by private charter operators. Generally, such exceptions are limited to events of national or international importance where private operators would be unable to provide the necessary level of service.[57]

5. The Nonprofit and Government Agencies Exception

The legislative history of the Department of Transportation and Related Agencies Appropriations Act of 1988[58] indicates that in response to complaints of transit agencies that the charter bus regulations restricted charter service too greatly, Congress asked that a rulemaking be undertaken to amend the charter regulations to "permit non-profit social service agencies with clear needs for affordable and/or handicapped-accessible equipment to seek bids for charter services from publicly funded operators."[59] The Congress expressed its concerns that the charter regulations may have been adversely affecting the "transportation disadvantaged"—those people of limited physical or financial means who depend on transit to meet their mobility needs.[60] It suggested that "these non-profit agencies…be limited to government entities and those entities subject to section 501(c) 1, 3, [4] and 19 of the Internal Revenue Code."[61]

In response, FTA promulgated regulations allowing recipients to contract directly for charter services with social service agencies that serve elderly and disabled patrons or receive funding from U.S. Department of Health and Human Services (HHS) programs,[62] provided that the social service agency with which the FTA recipient contracts is either a governmental institution, or an organization exempt from taxation under Sections 501(c) 1, 3, 4, or 19 of the Internal Revenue Code.[63]

Though a major catalyst for these regulations was the mobility needs of the disabled, one must recognize that FTA takes the position that exclusive service for elderly disabled riders is considered to be "mass transportation" service under the Federal Transit Act, and not charter service, even if provided only on an incidental basis, so long as it is open to all elderly and disabled persons in a geographic service area, and not restricted to a particular group.[64]

6. The Non-Urbanized Area Exception

Similar to the nonprofit and government agencies exception, the non-urbanized area exception[65] allows FTA recipients to contract directly with eligible entities for charter services where more than 50 percent of the passengers on a trip will be elderly. As its name implies, this exception applies only in non-urbanized areas of less than 50,000.

7. The Agreement with Private Operators Exception

An FTA-funded transit provider may directly provide charter service where it has reached a written agreement allowing it to do so with all "willing and able" private carriers.[66] To qualify, the recipient must provide for such an agreement in its annual charter notice, and complete the review process on all the replies it receives in response to the notice.[67] The agreement may define the exempted charter service in any terms to which the parties agree. FTA's approval or concurrence is not required, but notice of the agreement must be published.[68]

8. Charter Service with Locally Funded Equipment and Facilities

The charter prohibition applies only to FTA-funded equipment and facilities. FTA takes the position that

[56] Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[57] Charter Service, 52 Fed. Reg. 11,916, 11,925 (Apr. 13, 1987).

[58] Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987).

[59] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987). FTA interpreted this as limited to two types of circumstances: (1) where the government entities and tax-exempt organizations need charter service that may be difficult for them, or their constituents, to afford; and (2) where the government entities and tax-exempt organizations need transportation equipment accessible to elderly or disabled patrons. 53 Fed. Reg. 18,964 (May 25, 1988).

[60] H.R. REP. NO. 100-498, CONG. REC. H12787 (Dec. 21, 1987).

[61] Charter Service, Amendments, 53 Fed. Reg. 53,348 (Dec. 30, 1988). Congress also recommended that an exemption be provided to "those public transit authorities which purchased charter rights entirely with non-federal funds prior to the enactment of the Urban Mass Transportation Act of 1966." The agency declined to adopt the latter recommendation, believing that it would be contrary to the governing statutory requirements. *Id*.

[62] It should be emphasized that the exemption is limited to the very narrow category of HHS-funded agencies. Recipients may not provide charter service to the Girl Scouts, to a University, or to the Junior League. Transit systems fought hard for this right in the rulemaking process; FTA rejected these arguments and limited the exemption to HHS-funded organizations. Thus, being a Section 501(c)(1) or a 501(c)(3) organization is not enough.

[63] Charter Service, 53 Fed. Reg. 18,964 (May 25, 1988).

[64] Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[65] 49 C.F.R. § 604.9(b)(6).

[66] A recipient of FTA funds may provide charter service directly to the customer where a formal agreement has been executed between the recipient and all willing and able private charter operators. 49 C.F.R. § 604.9(b)(7) (1999).

[67] Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[68] 49 C.F.R. § 604.9(b)(4).

where a recipient establishes a separate company using equipment and facilities purchased, maintained, and operated exclusively with local funds, any charter operations by that company are exempt from FTA's charter bus prohibitions. Alternatively, a recipient can establish a separate charter division that receives no federal funds, does not use federally funded equipment, and does not use federally funded facilities.[69] Note, however, that the operator must do more than simply identify certain equipment in its fleet as locally funded.

However, in a case involving the Manchester, New Hampshire, transit authority, FTA took the position that, if there is a "willing and able" charter provider, a transit authority may not allow its separate charter operator to use an FTA-funded garage in connection with charter operations even on an incidental basis. FTA-funded facilities also include offices and other administrative locales. However, a transit provider could lease space in an FTA-funded garage to a private carrier on an incidental basis. FTA also recommends that, where a transit operator establishes a charter subsidiary, affiliate, or division, that the maintenance work be contracted out rather than performed in-house in an FTA-funded garage.[70] This reflects FTA's view that charter service should be provided by private charter operators to the maximum extent practicable. FTA, in furtherance of its policy, strictly construes the charter regulations and will find that any nexus to FTA funds (e.g., an FTA-funded garage) will prohibit the recipient's proposed charter operation.

A person who believes that an FTA recipient is in violation of the regulations may submit a written complaint to the FTA Regional Administrator (in the case of charter operations), who shall first attempt to conciliate the dispute. The Regional Administrator shall send a copy of the complaint to the respondent, and allow it 30 days to file written evidence that no violation has occurred. The complainant has 30 days to rebut the response in writing. The Regional Administrator has the discretion to engage in further investigation and/or grant a party's request for oral hearing. The Regional Administrator shall attempt to issue a written decision within 30 days of receiving all the evidence.[71] Should the Regional Administrator determine, on complaint or *sua sponte,* that a violation has occurred, he or she may order such remedies as are appropriate.[72] If the Regional Administrator determines that there has been a continuing pattern of violation, he or she may bar the respondent from the receipt of further financial assistance for mass transportation facilities and equipment.[73] The losing party may appeal the Regional Administrator's decision to the FTA Administrator within 10 days of receipt.[74] FTA's final decision on a charter bus appeal is subject to judicial review.[75]

9. Other Exceptions

On December 16, 2009, President Obama signed the Appropriations Act into law, providing funding for DOT and other agencies for 2010. Section 172 of the Act (the Murray Amendment) provides:

> None of the funds provided or limited under this Act may be used to enforce regulations related to charter bus service under part 604 of title 49, Code of Federal Regulations, for any transit agency who during fiscal year 2008 was both initially granted a 60-day period to come into compliance with part 604, and then was subsequently granted an exception from said part.[76]

King County Transit (Metro) in Seattle is the only transit agency in the nation that meets this description. Hence, the Murray Amendment prohibits application of the Charter Rule against Metro A federal district court found the Murray Amendment unconstitutional under the First and Fifth Amendment Free Speech and Equal Protection Clauses.[77] But this decision was reversed in the 10th Circuit of the U.S. Court of Appeals in *ABA v. Rogoff*,[78] where the court said, "This appeal raises the following question: Can Congress constitutionally permit a federally-subsidized transit system to take the residents of Seattle out to the ball game? We conclude that Congress can, and we therefore reject the plaintiffs' challenge to a Washington Senator's effort to help her constituents get to Seattle Mariners games."

10. Cease and Desist Procedures

Rules promulgated by FTA in 2008 include a new provision allowing private charter operators to request a cease and desist order and establish more detailed complaint, hearing, and appeal procedures.[79]

II. SCHOOL BUS OPERATIONS

A. The General Prohibition

Similar to the charter bus prohibitions, federal law limits federal funding to those recipients that agree not

[69] If a recipient sets up a separate company that has only locally funded equipment and facilities and operates with only local funds, or the recipient is able to maintain separate accounts for its charter operators to show that the charter service is truly a separate division that receives no benefits from the mass transportation division, then the charter rule would not apply.

Charter Service Questions and Answers, 52 Fed. Reg. 42,248 (Nov. 3, 1987).

[70] Id. 52 Fed. Reg. at 42,252 (Nov. 3, 1987).

[71] 49 C.F.R. § 604.15.

[72] 49 C.F.R. § 604.17(a).

[73] 49 C.F.R. § 604.17(b).

[74] 49 C.F.R. § 604.19(a).

[75] 5 U.S.C. §§ 701–706. 49 C.F.R. 604.21.

[76] Consolidated Appropriations Act, 2010, 111 Pub. L. No. 117, 123 Stat. 3034, 3065–66.

[77] American Bus Ass'n. v Rogoff, 717 F. Supp. 2d 73 (D.D.C. 2010).

[78] 649 F.3d 734 (D.C. Cir. 2011).

[79] Charter Service, 73 Fed. Reg. 2326 (Jan. 14, 2008); *see also* Charter Service, 73 Fed. Reg. 44,927 (Aug. 1, 2008), and Charter Service, 73 Fed. Reg. 46,554 (Aug. 1, 2008); *See* 49 C.F.R. pt. 694 subpt. E.

to provide school bus transportation in competition with private school bus operators.[80] Federal public transportation fund recipients may not use those funds to engage in "schoolbus transportation."[81] This section protects private school bus operators from competition by federally funded mass transportation providers.[82] Neither an FTA recipient nor any transit operator performing work in connection with such a recipient may engage in school transportation operations in competition with private school transportation operators, except as permitted under the Federal Transit Act.[83]

Section 3(g) of the Urban Mass Transportation Act of 1964 prohibited federal financial assistance for transit operations unless the recipient entered into an agreement with DOT that it would not engage in school bus operations "exclusively for the transportation of students and school personnel, in competition with private school bus operators."[84] Several subsequent pieces of legislation affirmed this prohibition, and expanded it from applicability to the purchase of buses to all grants for the construction or operation of transit facilities and equipment.[85] The purpose of the legislation was to prevent competition with private school bus operators, competition that Congress perceived to be unfair.[86] But only exclusive school bus operations were prohibited, for Congress did not intend to prohibit use of public transit for school-related purposes, or prohibit school-bound riders from boarding transit vehicles.[87]

An applicant seeking FTA financial assistance to acquire or operate transportation facilities and equipment must certify that it will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by the Federal Transit Act; and (2) comply with the requirements of the applicable regulations before providing any school transportation.[88] The Federal Transit Act permits federal financial assistance for the use of mass transit equipment to provide school bus service so long as "the applicant agrees not to provide school bus transportation that exclusively transports students and school personnel in competition with a private school bus operator."[89] The FTA MA contractually obligates the recipient to comply with these provisions.[90] In 2005, Congress strengthened FTA's powers to impose penalties for school bus violations.[91]

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[80] 49 U.S.C. § 5323(f).

[81] *See* 49 U.S.C. §§ 5302(a)(10) ("The term 'public transportation' …does not include schoolbus...transportation"), 5323(f)(1) (applicant for public-transportation financial assistance must "agree[] not to provide schoolbus transportation ..."). Under 49 U.S.C. § 5323(f)(1), federal financial assistance to public transportation providers may be used "only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator."

[82] Area Transportation v. Ettinger, 75 F. Supp. 2d 862 (1999).

[83] 49 U.S.C. § 5323(f) (2000); FTA regulations, "School Bus Operations," 49 C.F.R. pt. 605.

[84] 49 U.S.C. § 1602(g) (1964).

[85] A similar provision was included in Section 164(b) of the Federal-Aid Highway Act of 1973, though the "grandfather" provisions authorizing continuation of preexisting school bus operations differ. The Urban Mass Transportation Act set a Nov. 26, 1974, cut-off date, while the Federal-Aid Highway Act of 1973 set an Aug. 13, 1973, date. Section 109(a) of the National Mass Transportation Assistance Act of 1974 (Pub. L. No. 93-503, 88 Stat. 1565 (1974)) added a new Section 3(g) to the Urban Mass Transportation Act of 1964 (49 U.S.C. § 1602(g)) and applies to all grants for the construction or operation of mass transportation facilities and equipment under the Federal Transit Laws, as amended. No federal financial assistance may be provided for the construction or operation of facilities and equipment for use in providing public mass transportation service unless the applicant and the Administrator enter into an agreement that the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel, in competition with private school operators. 49 C.F.R. § 605.1 (2003); Codification of Requirements, 41 Fed. Reg. 14128 (Apr. 1, 1976); Federal Mass Transit Act of 1964, as amended (49 U.S.C. § 1601 *et seq*.); 23 U.S.C. § 103(e)(4) (2000); 23 U.S.C. § 142(a) and (c) (2000); and 49 C.F.R. 1.51.

[86] Chicago Transit Auth. v. Adams, 607 F.2d 1284, 1291 (7th Cir. 1979).

[87] Lamers v. City of Green Bay, 998 F. Supp. 971, 989 (E.D. Wis. 1998), quoting the legislative history as saying,

> [T]he intent and legal effect of this section will not prevent those cities which have their own mass transit buses to allow them to be used by riders of school age to travel at reduced fares, nor to prohibit the routing of a public transit bus adjacent to school facilities, as a part of the regularly scheduled bus system service for any passenger. 119 Cong. Rec. 28102 (1973) (statement of Rep. Kluczynski, Chairman of the Transportation Subsommittee).

[88] 49 U.S.C. § 5323(f) (2000), and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14. As required by 49 U.S.C. § 5323(f) (2000) and FTA regulations, "School Bus Operations," at 49 C.F.R. § 605.14 (2003), the applicant for FTA funding must agree that it and all its recipients will: (1) engage in school transportation operations in competition with private school transportation operators only to the extent permitted by 49 U.S.C. § 5323(f), and implementing regulations; and (2) comply with the requirements of 49 C.F.R. pt. 605 before providing any school transportation using equipment or facilities acquired with federal assistance awarded by FTA and authorized by 49 U.S.C. ch. 53 or tit. 23 U.S.C. for transportation projects.

[89] 49 U.S.C. § 5323(f). 49 C.F.R. pt. 605. The transit provider must enter into a written agreement with the FTA providing that "the applicant will not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators." 49 C.F.R. § 605.14. The contents of the agreement are set forth in 49 C.F.R. § 605.15.

[90] MA § 29, available for review at www.fta.dot.gov/documents/18-Master.pdf (visited July 2014).

[91] H.R. CONF. REP. 109-203 (July 28, 2005), at 952, 954. *See also* 49 C.F.R. pt. 605 [Docket No. FTA–2008–0015]—Final Policy Statement on FTA's School Bus Operations Regulations issued at 73 Fed. Reg. 53,384 (Sept. 16, 2008).

B. Exceptions

A federally-funded transit provider seeking to engage in school bus operations must hold public hearings assessing the economic, social, and environmental consequences of such service, and notify private school bus operators of its intentions.[92] It must also demonstrate to FTA that: (1) it operates an urban school system and a separate and exclusive bus program for that school system; (2) the private school bus operators are unable to provide service safely, and at a reasonable rate; or (3) that it or its predecessor was engaged in providing school bus operations in the year preceding August 13, 1973 (in the case of a grant involving the purchase of buses), or November 26, 1974 (in the case of an FTA grant involving facilities and equipment).[93] An exception from the prohibition on school bus service is "tripper service."[94]

C. Tripper Service

In 1982, FTA amended its regulations to authorize tripper service as an extension of the statutory prohibition of only "exclusive" school bus operations.[95] Tripper service is defined as "regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems."[96] Buses used in such service must be clearly marked as open to the public and not carry the designation "school bus" or "school special." They may stop only at a regular transit stop. The routes must be in regular route service in its published route schedule.[97] However, the routes need not be extensions of preexisting routes, and the transit provider may design separate routes to accommodate students. Trippers are routes that start and stop based on the school year calendar and do not operate over the summer. Some transit operators have a number of student pass programs that give students significant discounts. In some instances, transit providers have agreements with school districts that fund pass programs for their students, which allow the district to reduce its own yellow bus service significantly, though this works only for schools in more urban areas. According to one court, "From the perspective of private school bus operators, this is a loophole you can drive a bus through."[98] One might also argue that transit bus service provides enhanced safety and service, and better trained operators.

Investigating a complaint from a union representing bus drivers employed by Laidlaw, in 2007, FTA ordered the Rochester-Genesee Regional Transportation Authority (RGRTA) to cease providing school bus operations in the City of Rochester, deeming they were "prohibited school bus operations" impermissibly competing with private-sector school bus operators.[99] FTA concluded that the operations in question did not constitute "tripper service."[100] On appeal, the federal district court

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[92] 49 C.F.R. § 605.4. The notice requirements to the public and to private school bus operators are set forth in 49 C.F.R. § 605.16. The private school bus operators may file written comments at the time of the public hearing, and the transit provider shall submit the comments and a transcript of the public hearing to the FTA. 49 C.F.R. § 605.18. The filing requirements are elaborated in 49 C.F.R. § 605.19. If there are no private school bus operators in the area, the transit provider may so certify to FTA, in lieu of meeting the notice requirements of § 605.16. 49 C.F.R. § 605.17.

[93] 49 C.F.R. § 605.11.

[94] *See* 49 C.F.R. § 605.13. "Tripper service" is defined as "regularly scheduled mass transportation service which is open to the public, and which is designed or modified to accommodate the needs of school students and personnel, using various fare collections or subsidy systems. Buses used in tripper service must be clearly marked as open to the public and may not carry designations such as "school bus" or "school special." These buses may stop only at a grantee or operator's regular service stop. All routes traveled by tripper buses must be within a grantee's or operator's regular route service as indicated in their published route schedules." 49 C.F.R. § 605.3.

[95] Charter Bus and School Bus Operations (ANPRM), 47 Fed. Reg. 44795, 44803.

[96] 49 C.F.R. § 605.3.

[97] *Id*.

[98] Lamers v. City of Green Bay, 998 F. Supp. 971, 991.u.10 (E.D. Wis. 1998).

[99] Earlier conflicts between FTA and RGRTA over charter services arose in 2002. In that year, the FTA Regional Administrator found that RGRTA's university bus service constituted prohibited charter service, because it was "designed and under the control of [the Institute]," and that the Institute retained control over several important features of the operation including when buses would be added to the schedule, the schedule the buses would operate, and whether the service would continue. RGRTA appealed. In a 2003 advisory opinion, the FTA Administrator concurred with the Regional Administrator's findings and noted that open door service by itself does not mean that the service is not charter. In response, RGRTA made several modifications in order to bring its service into compliance with the Charter Service regulations. The actions it took included placement of standard bus stop signs along the university route, the use of bus shelters identical to those used on other public routes, stops linking noncampus routes to the campus routes, and Web links for campus bus schedules. Moreover, the subsidy agreement was modified to provide that RGRTA would retain control of the service. Based on these changes, the FTA Deputy Chief Counsel concluded that RGRTA's Rochester Institute of Technology Service was "now in compliance with FTA's charter service regulation." "Because the Regional Administrator specifically concluded in this case that RGRTA retained control over its service, her decision that the service was mass transportation is not inconsistent with other agency decisions which have found services to be charter service." Blue Bird Coach Lines v. Thompson, 2005 U.S. Dist. LEXIS 26694 (S.D.N.Y. 2005).

[100] 49 U.S.C. § 5323(f) provides:

> Schoolbus transportation.--
>
> (1) Agreements.—Financial assistance under this chapter [dealing with public transportation] maybe used for a capital project, or to operate public transportation equipment or a public transportation facility, only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator.

initially concluded that tripper service constitutes mass transportation designed to meet students' needs, finding that tripper service "is not designed for school children and then given the label or some indicia of public transportation. The school service in question is not designed to be generally available to the public. The routes are specifically designed for school children and only incidentally serve members of the general public."[101] However, on further review, the court found that FTA's decision finding that RGRTA's proposed Express Service routes would not constitute valid tripper service was arbitrary and capricious. The court found that FTA improperly relied on certain factors—and in particular, RGRTA's intent—not provided for in the governing statute or regulations. The court also found that the subjective test that FTA adopted conflicted with FTA's regulatory definition of "tripper service," which focuses on objective characteristics of the service in question, such as its availability to the general public. Moreover, FTA's decision was inconsistent with its prior decisions, and FTA failed to explain its reasons for departing from the standards and reasoning set forth therein.[102]

D. Distinguishing School Bus from Charter Operations

In *Chicago Transit Authority v. Adams,*[103] the Seventh Circuit addressed the differences between school bus and charter operations. At issue was whether the Chicago Transit Authority could provide daily bus service in vehicles purchased with federal funds from a common departure point at a neighborhood school each morning and back to the school at the end of the school day. The service was used to transfer students to less crowded schools and to schools offering special facilities or programs, and to facilitate racial desegregation. FTA took the position that such service was not forbidden school bus operations, but instead constituted permissible incidental charter service.[104] The U.S. Court of Appeals for the Seventh Circuit disagreed:

Since the transportation here is daily service to and from school at the beginning and end of the school day, it is indistinguishable from undisputed school bus operations except for the common point of pick-up and delivery….[w]e believe that the language of the charter regulation describes a single trip or series of trips for school students rather than daily transportation at the beginning and end of each school day when it speaks of groups traveling under a "single contract" and "under an itinerary, either agreed on in advance or modified after having left the place of origin. The school bus operations regulation, on the other hand, speaks of transportation "to and from school," language which we have concluded describes the daily transportation of students to and from their schools of regular attendance at the beginning and end of the school day.[105]

The court also noted that the regulations limited charter bus operations for school students to "incidental use."[106] The court agreed with FTA that the legislation restricted the use of federally-funded buses in school bus or charter operations to nonpeak hours when those vehicles are least likely to be needed for regularly scheduled mass transportation service to the public. Though federal funds may not be used to finance the purchase of buses used primarily in charter service, a transit provider is not prohibited from using such buses for charter service during idle or off-peak periods when the buses are not needed for scheduled runs.[107] Only buses not purchased with federal funds can be used for more than incidental charter operations for school service.[108] Under FTA's regulations, incidental charter service is defined as charter service that does not "(1) interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or (2) does not shorten the mass transportation life of the equipment or facilities."[109] However, this prohibition on the use of federally-funded equipment does not apply to tripper service, described above.[110]

E. Complaints, Remedies, and Appeals

Section 5323(f) limits federal funding to those mass transportation providers that agree not to provide school bus transportation in competition with private school bus operators. Private school bus operators fall within the class of persons protected by this provision and therefore enjoy an implied private right of action.[111]

In the case of alleged school bus violations, the complaint procedures are similar to those for alleged charter bus violations but involve the filing of a written complaint directly to the FTA Administrator.[112] The Administrator allows the respondent 30 days to show cause, in writing, why a hearing should not be held, and may hold one or more evidentiary hearings.[113] The Administrator makes a written determination of whether

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[101] Rochester-Genesee Regional Transp. Auth. v. FTA, 506 F. Supp. 2d 207 (W.D.N.Y. 2007).

[102] Rochester-Genesee Regional Transp. Auth. v. Hynes-Cherin, 531 F. Supp. 2d 494 (W.D.N.Y. 2008).

[103] Chicago Transit Auth. v. Adams, 607 F.2d 1284 (7th Cir. 1979).

[104] *Id*. The charter regulations authorized "the incidental use of buses for the exclusive transportation of school children." 607 F.2d at 1291. (The provision now reads, "the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment." 49 C.F.R. § 604.5(e) (2003)).

[105] *Id*. at 1292 [citation omitted].

[106] *Id*. at 1294.

[107] 49 C.F.R. pt. 605, App. A.

[108] *Id*. at 1293–94. 49 C.F.R. § 605.12.

[109] 49 C.F.R. § 604.5(i).

[110] 49 C.F.R. § 605.13.

[111] Area Transportation v. Ettinger, 75 F. Supp. 2d 862 (N.D. Ill. 1999).

[112] 49 C.F.R. § 605.30.

[113] 49 C.F.R. § 605.32.

a violation has occurred, and if it has, he or she may impose such remedial measures as he or she may deem appropriate, including barring a grantee from receipt of further FTA financial assistance.[114] Parties have the right to judicial review under the APA[115] once these administrative procedures have been exhausted.[116]

Several courts have noted that where a statute clearly reflects an intent to protect a competitive interest, the protected party has standing to bring suit to require compliance.[117] But standing can be a problem for a private carrier alleging that a public transit provider is engaging in unlawful operations. For example, in *Area Transportation, Inc. v. Ettinger,*[118]a school bus operator in Flint, Michigan, filed a complaint with FTA alleging that a competitor was providing prohibited, exclusive school bus service in violation of federal law. FTA agreed, and ordered the public transit provider to "cease and desist any such further service," but imposed no requirement that prior federal grants be returned, or that future federal funds be withheld. The private carrier sought a declaratory order that: (1) FTA lacks discretion to determine the appropriate sanction for a statutory violation; (2) FTA must declare the public transit provider ineligible for future federal transit assistance grants; and (3) FTA must require the recipient to repay the grants it received for each year it was in violation.

In *Ettinger,* the court noted that to establish standing under the APA, a plaintiff must prove (1) an "injury in fact," as required by the case or controversy requirement under Article III of the Constitution, and (2) that he or she falls within the "zone of interests" contemplated by the relevant statute. The court found the latter requirement met, and proceeded to evaluate whether the plaintiff had suffered an "injury in fact" for Article III purposes. The court noted that Article III standing requires a plaintiff to prove: (1) he or she suffered an "injury in fact"—an invasion of a concrete and particularized legally recognized interest; (2) there was a causal connection between defendant's action and plaintiff's injury, such that the injury is fairly traceable to defendant's action and not caused by some third party not before the court; and (3) a favorable decision will likely redress the injury. The court found that the private carrier alleged an injury in fact (that the public transit provider enjoyed a competitive advantage because of the federal grant), but that it failed to prove its injury was fairly traceable to the FTA's decision (the injury instead was caused by illegal school bus service performed by a third party not before the court). The court also held the remedy sought (the repayment of federal grants to FTA) would not redress its injury, but would instead injure the public transit provider. Therefore, plaintiff lacked Article III standing. The FTA had not cut off the private carrier's future funding, nor required repayment of earlier sums collected unlawfully; it merely ordered the private carrier to cease and desist from the unlawful activity.[119] The court also observed that the Federal Transit Act does not explicitly require payment of federal funds where recipients are found to have engaged in unlawful activities; in effect, leaving wide discretion to the FTA as to remedies.[120]

APPENDIX – FREQUENTLY ASKED QUESTIONS

Appendix C to Part 604—Frequently Asked Questions

(a) Applicability (49 CFR Section 604.2)

(1) Q: If the requirements of the charter rule are not applicable to me for a particular service I provide, do I have to report that service in my quarterly report?

A: No. If the service you propose to provide meets one of the exemptions contained in this section, you do not have to report the service in your quarterly report.

(2) Q: If I receive funds under 49 U.S.C. Sections 5310, 5311, 5316, or 5317, may I provide charter service for any purpose?

A: No. You may only provide charter service for "program purposes," which is defined in this regulation as "transportation that serves the needs of either human service agencies or targeted populations (elderly, individuals with disabilities, and/or low income individuals) …49 CFR Section 604.2(e). Thus, your service only qualifies for the exemption contained in this section if the service is designed to serve the needs of targeted populations. Charter service provided to a group, however, that includes individuals who are only incidentally members of those targeted populations, is not "for program purposes" and must meet the requirements of the rule (for example, an individual chartering a vehicle to take his relatives including elderly aunts and a cousin who is a disabled veteran to a family reunion).

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[114] 49 C.F.R. §§ 605.33, 605.34.

[115] 5 U.S.C. §§ 701–706 (2000); 49 C.F.R. § 605.35.

[116] Suburban Trails, Inc. v. N.J. Transit Corp., 800 F.2d 361 (3d Cir. 1986); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976); TPI Construction Servs. v. City of Chicago, 1980 U.S. Dist. Lexis 17135 (N.D. Ill. 1980).

[117] City of Evanston v. Regional Transp. Auth., 825 F.2d 1121, 1123 (7th Cir. 1987); South Suburban Safeway Lines, Inc. v. City of Chicago, 416 F.2d 535, 539 (7th Cir. 1969); Bradford School Bus Transit, Inc. v. Chicago Transit Auth., 537 F.2d 943 (7th Cir. 1976). However, some courts have found that the Federal Transit Act was intended to benefit the public at large and not create special benefits for particular classes of persons. *See, e.g.,* A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), and Dopico v. Goldschmidt*,* 687 F.2d 644 (2d Cir. 1982).

[118] 75 F. Supp. 2d 862 (N.D. Ill. 1999), 1999 U.S. Dist. Lexis 18503 (N.D. Ill. 1999).

[119] *Id*. at 864.

[120] *Id.*

(3) Q: If I am providing service for program purposes under one of the FTA programs listed in 604.2.(e), do the human service organizations have to register on the FTA Charter Registration Web site?

A: No. Because the service is exempt from the charter regulations, the organization does not have to register on the FTA Charter Registration Web site.

(4) Q: What if there is an emergency such as an apartment fire or tanker truck spill that requires an immediate evacuation, but the President, Governor, or Mayor never declares it as an emergency? Can a transit agency still assist in the evacuation efforts?

A: Yes. One part of the emergency exemption is designed to allow transit agencies to participate in emergency situations without worrying about complying with the charter regulations. Since transit agencies are often uniquely positioned to respond to such emergencies, the charter regulations do not apply. This is true whether or not the emergency is officially declared.

(5) Q: Do emergency situations involve requests from the Secret Service or the police department to transport its employees?

A. Generally no. Transporting the Secret Service or police officers for non-emergency preparedness or planning exercises does not qualify for the exemption under this section. In addition, if the Secret Service or the police department requests that a transit agency provide service when there is no immediate emergency, then the transit agency must comply with the charter service regulations.

(6) Q: Can a transit agency provide transportation to transit employees for an event such as the funeral of a transit employee or the transit agency's annual picnic?

A: Yes. These events do not fall within the definition of charter, because while the service is exclusive, it is not provided at the request of a third party and it is not at a negotiated price. Furthermore, a transit agency transporting its own employees to events sponsored by the transit agency for employee morale purposes or to events directly related to internal employee relations such as a funeral of an employee, or to the transit agency's picnic, is paying for these services as part of the transit agency's own administrative overhead.

(7) Q: Is sightseeing service considered to be charter?

A: "Sightseeing" is a different type of service than charter service. "Sightseeing" service is regularly scheduled round trip service to see the sights, which is often accompanied by a narrative guide and is open to the public for a set price. Public transit agencies may not provide sightseeing service with federally funded assets or assistance because it falls outside the definition of "public transportation" under 49 U.S.C. Section 5302(a) (10), unless FTA provides written concurrence for that service as an approved incidental use. While, in general, "sightseeing" service does not constitute charter service, "sightseeing" service that also meets the definition of charter service would be prohibited, even as an incidental use.

(8) Q: If a private provider receives Federal funds from one of the listed programs in this section, does that mean the private provider cannot use its privately owned equipment to provide charter service?

A: No. A private provider may still provide charter services even though it receives Federal funds under one of the programs listed in this section. The charter regulations only apply to a private provider during the time period when it is providing public transportation services under contract with a public transit agency.

(9) Q: What does FTA mean by the phrase "non-FTA funded activities"?

A: Non-FTA funded activities are those activities that are not provided under contract or other arrangement with a public transit agency using FTA funds.

(10) Q: How does a private provider know whether an activity is FTA-funded or not?

A: The private provider should refer to the contract with the public transit agency to understand the services that are funded with Federal dollars.

(11) Q: What if the service is being provided under a capital cost of contracting scenario?

A: When a private operator receives FTA funds through capital cost of contracting, the only expenses attributed to FTA are those related to the transit service provided. The principle of capital cost of contracting is to pay for the capital portion of the privately owned assets used in public transportation (including a share of preventive maintenance costs attributable to the use of the vehicle in the contracted transit service). When a private operator uses that same privately owed vehicle in non-FTA funded service, such as charter service, the preventive maintenance and capital depreciation are not paid by FTA, so the charter rule does not apply.

(12) Q: What if the service is provided under a turn-key scenario?

A: To the extent the private charter provider is standing in the shoes of the public transit agency, the charter rules apply. Under a turn-key contract, where the private operator provides and operates a dedicated transit fleet, then the private provider must abide by the charter regulations for the transit part of its busi-

ness. The charter rule would not apply, however, to other aspects of that private provider's business. FTA also recognizes that a private operator may use vehicles in its fleet interchangeably. So long as the operator is providing the number, type, and quality of vehicles contractually required to be provided exclusively for transit use and is not using FTA funds to cross-subsidize private charter service, the private operator may manage its fleet according to best business practice.

(13) Q: Does FTA's rule prohibit a private provider from providing charter service when its privately owned vehicles are not engaged in providing public transportation?

A: No. The charter rule is only applicable to the actual public transit service provided by the private operator. As stated in 49 CFR 604.2(c), the rule does not apply to the non-FTA funded activities of private charter operators. The intent of this provision was to isolate the impacts of the charter rule on private operators to those instances where they stood in the shoes of a transit agency.

(14) Q: May a private provider use vehicles whose acquisition was federally funded to provide private charter services?

A: It depends. A private provider, who is a subrecipient or sub-grantee, when not engaged in providing public transit using federally funded vehicles, may provide charter services using federally funded vehicles only in conformance with the charter regulations. Vehicles, whose only federal funding was for accessibility equipment, are not considered to be federally funded vehicles in this context. In other words, vehicles, whose lifts are only funded under FTA programs, may be used in charter service.

(15) Q: May a public transit agency provide "seasonal service" (e.g., service May through September for the summer beach season)?

A: "Seasonal service" that is regular and continuing, available to the public, and controlled by the public transit agency meets the definition of public transportation and is not charter service. The service should have a regular schedule and be planned in the same manner as all the other routes, except that it is run only during the periods when there is sufficient demand to justify public transit service; for example, the winter ski season or summer beach season. "Seasonal service" is distinguishable from charter service provided for a special event or function that occurs on an irregular basis or for a limited duration, because the seasonal transit service is regular and continuing and the demand for service is not triggered by an event or function. In addition, "seasonal service" is generally more than a month or two, and the schedule is consistent from year to year, based on calendar or climate, rather than being scheduled around a specific event.

(b) Definitions (49 CFR Section 604.3)

(16) Q: The definition of charter service does not include demand response services, but what happens if a group of individuals request demand response service?

A: Demand response trips provide service from multiple origins to a single destination, a single origin to multiple destinations, or even multiple origins to multiple destinations. These types of trips are considered demand response transit service, not charter service, because even though a human service agency pays for the transportation of its clients, trips are scheduled and routed for the individuals in the group. Service to individuals can be identified by vehicle routing that includes multiple origins, multiple destinations, or both, based on the needs of individual members of the group, rather than the group as a whole. For example, demand response service that takes all of the members of a group home on an annual excursion to a baseball game. Some sponsored trips carried out as part of a Coordinated Human Services Transportation Plan, such as trips for Head Start, assisted living centers, or sheltered workshops may even be provided on an exclusive basis where clients of a particular agency cannot be mixed with members of the general public or clients of other agencies for safety or other reasons specific to the needs of the human service clients.

(17) Q: Is it charter if a demand response transit service carries a group of individuals with disabilities from a single origin to a single destination on a regular basis?

A: No. Daily subscription trips between a group living facility for persons with developmental disabilities to a sheltered workshop where the individuals work, or weekly trips from the group home to a recreation center is "special transportation" and not considered charter service. These trips are regular and continuous and do not meet the definition of charter.

(18) Q: If a third party requests charter service for the exclusive use of a bus or van, but the transit agency provides the service free of charge, is it charter?

A: No. The definition of charter service under 49 CFR Section 604.3(c)(1), requires a negotiated price, which implies an exchange of money. Thus, free service does not meet the negotiated price requirement. Transit agencies should note, however, that a negotiated price could be the regular fixed route fare or when a third party indirectly pays for the regular fare.

(19) Q: If a transit agency accepts a subsidy for providing shuttle service for an entire baseball season, is that charter?

A: Yes. Even though there are many baseball games over several months, the service is still to an event or function on an irregular basis or for a limited duration for which a third party pays in whole or in part. In order to provide the service, a transit agency must first provide notice to registered charter providers.

(20) Q: If a transit agency contracts with a third party to provide free shuttle service during football games for persons with disabilities, is that charter?

A: Yes. Even though the service is for persons with disabilities, the transit agency receives payment from a third party for an event or function that occurs on an irregular basis or for a limited duration. In order for a transit agency to provide the service, it must provide notice to the list of registered charter providers first.

(21) Q: What if a business park pays the transit agency to add an additional stop on its fixed route to include the business park, is that charter?

A: No. The service is not to an event or function and it does not occur on an irregular basis or for a limited duration.

(22) Q: What if a university pays the transit agency to expand its regular fixed route to include stops on the campus, is that charter?

A: No. The service is not to an event or function and it does not occur on an irregular basis or for a limited duration.

(23) Q: What if a university pays the transit agency to provide shuttle service that does not connect to the transit agency's regular routes, is that charter?

A: Yes. The service is provided at the request of a third party, the university, for the exclusive use of a bus or van by the university students and faculty for a negotiated price.

(24) Q: What if the university pays the transit agency to provide shuttle service to football games and graduation, is that charter?

A: Yes. The service is to an event or function that occurs on an irregular basis or for a limited duration. As such, in order to provide the service, a transit agency must provide notice to the list of registered charter providers.

(25) Q: What happens if a transit agency does not have fixed route service to determine whether the fare charged is a premium fare?

A: A transit agency should compare the proposed fare to what it might charge for a similar trip under a demand response scenario.

(26) Q: How can a transit agency tell if the fare is "premium"?

A: The transit agency should analyze its regular fares to determine whether the fare charged is higher than its regular fare for comparable services. For example, if the transit agency proposes to provide an express shuttle service to football games, it should look at the regular fares charged for express shuttles of similar distance elsewhere in the transit system. In addition, the service may be charter if the transit agency charges a lower fare or no fare because of a third party subsidy.

(27) Q: What if a transit agency charges a customer an up front special event fare that includes the outbound and inbound trips, is that a premium fare?

A: It depends. If the transit agency charges the outbound and inbound fares up front, but many customers don't travel both directions, then the fare may be premium. This would not be true generally for park and ride lots, where the customer parks his or her car, and, would most likely use transit to return to the same lot. Under that scenario, the transit agency may collect the regular outbound and inbound fare up front.

(28) Q: What if a transit agency wishes to create a special pass for an event or function on an irregular basis or for a limited duration that allows a customer to ride the transit system several times for the duration of the event, is that charter?

A: It depends. If the special pass costs more than the fare for a reasonable number of expected individual trips during the event, then the special pass represents a premium fare. FTA will also consider whether a third party provides a subsidy for the service.

(29) Q: Is it a third party subsidy if a third party collects the regular fixed route fare for the transit agency?

A. Generally no. If the service provided is not at the request of a third party for the exclusive use of a bus or van, then a third party collecting the fare would not qualify the service as charter. But, a transit agency has to consider carefully whether the service is at the request of an event planner. For example, a group offers to make "passes" for its organization and then later work out the payment to the transit agency. The transit agency can only collect the regular fare for each passenger.

(30) Q: If the transit agency is part of the local government and an agency within the local government pays for service to an event or function of limited duration or that occurs on an irregular basis, is that charter?

A: Yes. Since the agency pays for the charter service, whether by direct payment or transfer of funds through

internal local government accounts, it represents a third party payment for charter service. Thus, the service would meet the definition of charter service under 49 CFR Section 604.3(c)(1).

(31) Q: What if an organization requests and pays for service through an in-kind payment such as paying for a new bus shelter or providing advertising, is that charter?

A: Yes. The service is provided at the request of a third party for a negotiated price, which would be the cost of a new bus shelter or advertising. The key here is the direct payment for service to an event or function. For instance, advertising that appears on buses for regular service does not make it charter.

(32) Q: Under the definition of "Government Officials," does the government official have to currently hold an office in government?

A: Yes. In order to take advantage of the Government Official exception, the individual must hold currently a government position that is elected or appointed through a political process.

(33) Q: Does a university qualify as a QHSO?

A: No. Most universities do not have a mission of serving the needs of the elderly, persons with disabilities, or low income individuals.

(34) Q: Do the Boy Scouts of America qualify as a QHSO?

A: No. The Boy Scouts of America's mission is not to serve the needs of the elderly, persons with disabilities, or low income individuals.

(35) Q: What qualifies as indirect financial assistance?

A: The inclusion of "indirect" financial assistance as part of the definition of "recipient" covers "subrecipients." In other words, "subrecipients" are subject to the charter regulation. FTA modified the definition of recipient in the final rule to clarify this point.

(c) Exceptions (49 CFR Subpart B)

(36) Q: In order to take advantage of the Government Officials exception, does a transit agency have to transport only elected or appointed government officials?

A: No, but there has to be at least one elected or appointed government official on the trip.

(37) Q: If a transit agency provides notice regarding a season's worth of service and some of the service will occur in less than 30 days, does a registered charter provider have to respond within 72 hours or 14 days?

A: A transit agency should provide as much notice as possible for service that occurs over several months. Thus, a transit agency should provide notice to registered charter providers more than 30 days in advance of the service, which would give registered charter provider 14 days to respond to the notice. Under pressure to begin the service sooner, the transit agency could provide a separate notice for only that portion of the service occurring in less than 30 days.

(38) Q: Does a transit agency have to contact registered charter providers in order to petition the Administrator for an event of regional or national significance?

A: Yes. A petition for an event of regional or national significance must demonstrate that not only has the public transit agency contacted registered charter providers, but also demonstrate how the transit agency will include registered charter providers in providing the service to the event of regional or national significance.

(39) Q: Where does a transit agency have to file its petition?

A: A transit agency must file the petition with the ombudsman at ombudsman.charterservice@dot.gov. FTA will file all petitions in the Petitions to the Administrator docket (FTA–2007–0022) at http://www.regulations.gov.

(40) Q: What qualifies as a unique and time sensitive event?

A: In order to petition the Administrator for a discretionary exception, a public transit agency must demonstrate that the event is unique or that circumstances are such that there is not enough time to check with registered charter providers. Events that occur on an annual basis are generally not considered unique or time sensitive.

(41) Q: Is there any particular format for quarterly reports for exceptions?

A: No. The report must contain the information required by the regulations and clearly identify the exception under which the transit agency performed the service.

(42) Q: May a transit agency lease its vehicles to one registered charter provider if there is another registered charter provider that can perform all of the requested service with private charter vehicles?

A: No. A transit agency may not lease its vehicles to one registered charter provider when there is another registered charter provider that can perform all of the requested service. In that case, the transit vehicles would enable the first registered charter provider to charge less for the service than the second registered charter provider that uses all private charter vehicles.

(43) Q: Where do I submit my reports?

A: FTA has adapted its electronic grants making system, TEAM, to include charter rule reporting. Grantees should file the required reports through TEAM. These reports will be available to the public through FTA's charter bus service Web page at: http://ftateamweb.fta.dot.gov/Teamweb/CharterRegistration/QueryCharterReport.aspx. State Departments of Transportation are responsible for filing charter reports on behalf of its subrecipients that do not have access to TEAM.

(d) Registration and Notification (49 CFR Subpart C)

(44) Q: May a private provider register to receive notice of charter service requests from all 50 States?

A: Yes. A private provider may register to receive notice from all 50 States; however, a private provider should only register for those states for which it can realistically originate service.

(45) Q: May a registered charter provider select which portions of the service it would like to provide?

A: No. A registered charter provider may not "cherry pick" the service described in the notice. In other words, if the e-mail notification describes service for an entire football season, then a registered charter provider that responds to the notice indicating it can provide only a couple of weekends of service would be non-responsive to the e-mail notice. Public transit agencies may, however, include several individual charter events in the e-mail notification. Under those circumstances, a registered charter provider may select from those individual events to provide service.

(46) Q: May a transit agency include information on "special requests" from the customer in the notice to registered charter providers?

A: No. A transit agency must strictly follow the requirements of 49 CFR Section 604.14, otherwise the notice is void. A transit agency may, however, provide a generalized statement such as "Please do not respond to this notice if you are not interested or cannot perform the service in its entirety."

(47) Q: What happens if a transit agency sends out a notice regarding charter service, but later decides to perform the service free of charge and without a third party subsidy?

A: If a transit agency believes it may receive the authority to provide the service free of charge, with no third party subsidy, then it should send out a new e-mail notice stating that it intends to provide the service free of charge.

(48) Q: What happens if a registered charter provider initially indicates interest in providing the service described in a notice, but then later is unable to perform the service?

A: If the registered charter provider acts in good faith by providing reasonable notice to the transit agency of its changed circumstances, and that registered charter provider was the only one to respond to the notice, then the transit agency may step back in and provide the service.

(49) Q: What happens if a registered charter provider indicates interest in providing the service, but then does not contact the customer?

A: A transit agency may step back in and provide the service if the registered charter provider was the only one to respond affirmatively to the notice.

(50) Q: What happens if a registered charter provider indicates interest in providing the service, contacts the customer, and then fails to provide a price quote to the customer?

A: If the requested service is 14 days or less away, a transit agency may step back in and provide the service if the registered charter provider was the only one to respond affirmatively to the notice upon filing a complaint with FTA to remove the registered charter provider from the FTA Charter Registration Web site. If the complaint of "bad faith" negotiations is not sustained by FTA, the transit agency may face a penalty, as determined by FTA. If the requested service is more than 14 days away, and the transit agency desires to step back in, then upon filing a complaint alleging "bad faith" negotiations that is sustained by FTA, the transit agency may step back in.

(51) Q: What happens if a transit agency entered into a contract to perform charter service before the effective date of the final rule?

A: If the service described in the contract occurs after the effective date of the final rule, the service must be in conformance with the new charter regulation.

(52) Q: What if the service described in the notice requires the use of park and ride lots owned by the transit agency?

A: If the transit agency received Federal funds for those park and ride lots, then the transit agency should

allow a registered charter provider to use those lots upon a showing of an acceptable incidental use (the transit agency retains satisfactory continuing control over the park and ride lot and the use does not interfere with the provision of public transportation) and if the registered charter provider signs an appropriate use and indemnification agreement.

(53) Q: What if the registered charter provider does not provide quality charter service to the customer?

A: If a registered charter provider does not provide service to the satisfaction of the customer, the customer may pursue a civil action against the registered charter provider in a court of law. If the registered charter provider also demonstrated bad faith or fraud, it can be removed from the FTA Charter Registration Web site.

(e) Complaint & Investigation Process

(54) Q: May a trade association or other operators that are unable to provide requested charter service have the right to file a complaint against the transit agency?

A: Yes. A registered charter operator or its duly authorized representative, which can include a trade association, may file a complaint under section 604.26(a). Under the new rule, a private charter operator that is not registered with FTA's charter registration Web site may not file a complaint.

(55) Q: Is there a time limit for making complaints?

A: Yes. Complaints must be filed within 90 days of the alleged unauthorized charter service.

(56) Q: Are there examples of the likely remedies FTA may impose for a violation of the charter service regulations?

A: Yes. Appendix D contains a matrix of likely remedies that FTA may impose for a violation of the charter service regulations.

(57) Q: When a complaint is filed, who is responsible for arbitration or litigation costs?

A: FTA will pay for the presiding official and the facility for the hearing, if necessary. Each party involved in the litigation is responsible for its own litigation costs.

(58) Q: What affirmative defenses might be available in the complaint process?

A: An affirmative defense to a complaint could state the applicability of one of the exceptions such as 49 CFR Section 604.6, which states that the service that was provided was within the allowable 80 hours of government official service.

(59) Q: What can a transit agency do if it believes that a registered charter provider is not bargaining in good faith with a customer?

A: If a transit agency believes that a registered charter provider is not bargaining in good faith with the customer, the transit agency may file a complaint to remove the registered charter provider from FTA's Charter Registration Web site.

(60) Q: Does a registered charter provider have to charge the same fare or rate as a public transit agency?

A: No. A registered charter provider is not under an obligation to charge the same fare or rate as public transit agency. A registered charter provider, however, must charge commercially reasonable rates.

(61) Q: What actions can a private charter operator take when it becomes aware of a transit agency's plan to engage in charter service just before the date of the charter?

A: As soon as a registered charter provider becomes aware of an upcoming charter event that it was not contacted about, then it should request an advisory opinion and cease and desist order. If the service has already occurred, then the registered charter provider may file a complaint.

(62) Q: When a registered charter provider indicates that there are no privately owned vehicles available for lease, must the public transit agency investigate independently whether the representation by the registered charter provider is accurate?

A: No. The public transit agency is not required to investigate independently whether the registered charter provider's representation is accurate unless there is reason to suspect that the registered charter provider is committing fraud. Rather, the public transit agency need only confirm that the number of vehicles owned by all registered charter providers in the geographic service area is consistent with the registered charter provider's representation.

(63) Q: How will FTA determine the remedy for a violation of the charter regulations?

A: Remedies will be based upon the facts of the situation, including but not limited to, the extent of deviation from the regulations and the economic benefit from providing the charter service. See section 604.47 and Appendix D for more details.

(64) Q: Can multiple violations in a single finding stemming from a single complaint constitute a pattern of violations?

A: Yes. A pattern of violations is defined as more than one finding of unauthorized charter service under this part by FTA beginning with the most recent finding of unauthorized charter service and looking back over a period not to exceed 72 months. While a single complaint may contain several allegations, the complaint must allege more than a single event that included unauthorized charter service in order to establish a pattern of violations.

(f) Miscellaneous

(65) Q: If a grantee operates assets that are locally funded are such assets subject to the charter regulations?

A: It depends. If a recipient receives FTA funds for operating assistance or stores its vehicles in a FTA-funded facility or receives indirect FTA assistance, then the charter regulations apply. The fact that the vehicle was locally funded does not make the recipient exempt from the charter regulations. If both operating and capital funds are locally supplied, then the vehicle is not subject to the charter service regulations.

(66) Q: What can a public transit agency do if there is a time sensitive event, such as a presidential inauguration, for which the transit agency does not have time to consult with all the private charter operators in its area?

A: 49 Section 604.11 provides a process to petition the FTA Administrator for permission to provide service for a unique and time sensitive event. A presidential inauguration, however, is not a good example of a unique and time sensitive event. A presidential inauguration is an event with substantial advance planning and a transit agency should have time to contact private operators. If the inauguration also includes ancillary events, the public transit agency should refer the customer to the registration list.

(67) Q: Are body-on-van-chassis vehicles classified as buses or vans under the charter regulation?

A: Body-on-van-chassis vehicles are treated as vans under the charter regulation.

(68) Q: When a new operator registers, may recipients continue under existing contractual agreements for charter service?

A: Yes. If the contract was signed before the new private operator registered, the arrangement can continue for up to 90 days. During that 90 day period, however, the public transit agency must enter into an agreement with the new registrant. If not, the transit agency must terminate the existing agreement for all registered charter providers.

(69) Q: Must a public transit agency continue to serve as the lead for events of regional or national significance, if after consultation with all registered charter providers, registered charter providers have enough vehicles to provide all of the service to the event?

A. No. If after consultation with registered charter providers, there is no need for the public transit vehicles, then the public transit agency may decline to serve as the lead and allow the registered charter providers to work directly with event organizers. Alternatively, the public transit entity may retain the lead and continue to coordinate with event organizers and registered charter providers.

(70) Q: What happens if a customer specifically requests a trolley from a transit agency and there are no registered charter providers that have a trolley?

A: FTA views trolleys as buses. Thus, all the privately owned buses must be engaged in service and unavailable before a transit agency may lease its trolley. Alternatively, the transit agency could enter into an agreement with all registered charter providers in its geographic service area to allow it to provide trolley charter services.

(71) Q: How does a transit agency enter into an agreement with all registered charter providers in its geographic service area?

A: A public transit agency should send an email notice to all registered charter providers of its intent to provide charter service. A registered charter provider must respond to the email notice either affirmatively or negatively. The transit agency should also indicate in the email notification that failure to respond to the email notice results in concurrence with the notification.

(72) Q: Can a registered charter provider rescind its affirmative response to an email notification?

A: Yes. If after further consideration or a change in circumstances for the registered charter provider, a registered charter provider may notify the customer and the transit agency that it is no longer interested in providing the requested charter service. At that point, the transit agency may make the decision to step back in to provide the service.

(73) Q: What happens after a registered charter provider submits a quote for charter services to a customer? Does the transit agency have to review the quote?

A: Once a registered charter provider responds affirmatively to an email notification and provides the customer a commercially reasonable quote, then the transit agency may not step back in to perform the service. A transit agency is not responsible for reviewing the quote submitted by a registered charter provider. FTA recommends that a registered charter provider include in the quote an expiration date for the offer.

[Charter Service, 73 Fed. Reg. 44,926, 44,931, Aug. 1, 2008]