

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

[Docket No. FTA-2004-17196]

RIN 2132-AA76

Rail Fixed Guideway Systems; State Safety Oversight**AGENCY:** Federal Transit Administration (FTA), DOT.**ACTION:** Notice of proposed rulemaking (NPRM).

SUMMARY: FTA proposes to revise its regulation for State oversight of rail transit safety and security programs. FTA believes that these changes will clarify and improve the performance of existing requirements; respond to recommendations identified by oversight agencies and rail transit agencies; and address new concerns for security and emergency preparedness. Also, the new rule will include guidance that FTA has issued in the past several years as part of its audit program and technical assistance. Proposed changes are the result of FTA's on-going evaluation of State and rail transit programs performed since 1997 and outreach conducted over the last year.

DATES: Comments on this proposed rule must be submitted by June 7, 2004.

ADDRESSES: Written comments must refer to the docket number appearing above and must be submitted to the United States Department of Transportation (U.S. DOT), Central Docket Office, PL-401, 400 Seventh Street SW., Washington, DC 20590. All comments received will be available for inspection at the above address from 10 a.m. to 5 p.m., Monday through Friday, except Federal holidays. Those desiring the agency to acknowledge receipt of their comments should include a self-addressed stamped postcard with their comments. Commenters may also submit their comments electronically. Instructions for electronic submission may be found at the following web address: <http://dms.dot.gov/submit/>. The public may also review docketed comments electronically. The following web address provides instructions and access to the DOT electronic docket: <http://dms.dot.gov/search/>. The Dockets Management System (DMS) is available 24 hours each day, 365 days each year. Please follow the online instructions for more information and help.

Electronic Access: Electronic access to this rule and a side-by-side table of the current rule and the proposed rule,

along with other safety rules, may be obtained through the FTA Office of Safety and Security home page at <http://transit-safety.volpe.dot.gov>. An electronic copy of this document may be downloaded, using a modem and suitable communications software, from the Government Printing Office's (GPO) Electronic Bulletin Board Service at (202) 512-1661. Internet users may download this document from the **Federal Register's** homepage at <http://www.nara.gov/fedreg> and from the GPO database at <http://www.access.gpo.gov/nara>.

FOR FURTHER INFORMATION CONTACT: Jerry Fisher or Roy Field, Office of Safety and Security, Federal Transit Administration, (202) 366-2896 (telephone) or (202) 366-3765 (fax).

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I. Background and Purpose

In response to congressional concern regarding the potential for catastrophic accidents and security incidents on rail fixed guideway systems, the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) added section 28 to the Federal Transit Act (codified at 49 U.S.C. 5330). This section mandated that FTA issue a rule creating a State-managed oversight program for rail transit safety and security.

On June 25, 1992, FTA issued an Advance Notice of Proposed Rulemaking (ANPRM) soliciting public comment on a range of issues to be addressed in the Notice of Proposed Rulemaking (NPRM). 57 FR 28572. On December 9, 1993, FTA published that NPRM at 58 FR 64855. The final rule, 49 CFR part 659, "Rail Fixed Guideway Systems; State Safety Oversight," was issued on December 27, 1995, at 60 FR 67034; it is also referred to as the state safety oversight rule or Part 659. The safety requirements for Part 659 went into effect on January 1, 1997 and the security requirements went into effect one year later.

When FTA issued its final rule, only five (5) States maintained provisions for safety oversight of rail fixed guideway systems. Today, 22 States and the

District of Columbia have developed and implemented state safety oversight programs affecting 36 rail transit agencies. It is projected that over the next decade, an additional seven (7) States and as many as 16 new start rail transit agencies may be affected by Part 659.

Since Part 659 created a community of oversight agencies where previously few existed, the initial goal of the rulemaking was to ensure that States were provided with sufficient authority to establish programs that met the legislation's minimum requirements. FTA recognized that it would take some time to determine if Part 659 requirements met this goal.

Now, after more than six years of experience in implementing Part 659 and evaluating its performance, FTA believes that significant changes have been identified and are warranted to improve the program. The proposed rule, presented here, conveys FTA's recommendations to clarify State authorities and rail transit agency responsibilities under the statute.

II. Summary of Existing Requirements

Section 5330 of Title 49, U.S.C. applies "only to States that have rail fixed guideway mass transportation systems not subject to regulation by the Federal Railroad Administration." In its implementing regulations, FTA defined a rail fixed guideway system as,

any light, heavy or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that is included in FTA's calculation of fixed guideway route miles or receives funding under FTA's formula program for urbanized areas and is not regulated by the Federal Railroad Administration (FRA). 49 CFR 659.5.

Each State with a rail fixed guideway system operating within its borders is required to designate an oversight agency with sufficient legal authority and technical capacity to implement Part 659 requirements. The designated oversight agency is required to develop a program standard that defines the relationship between the oversight agency and the rail fixed guideway system. The program standard must, at a minimum, comply with the American Public Transportation Association's (APTA) Manual for the Development of Rail Transit System Safety Program Plans (APTA Manual) and must include specific provisions addressing the personal security of passengers and employees.

The oversight agency must review and approve, in writing, the rail fixed guideway system's system safety program plan and system security plan. After these initial approvals, the

oversight agency must review and approve, as necessary, updates to the rail fixed guideway system's plans.

The oversight agency must require each rail fixed guideway system to report the occurrence of accidents and unacceptable hazardous conditions within a specified period of time and must investigate such events in accordance with established procedures. The oversight agency may conduct its own investigation, use a contractor to conduct an investigation, or review and approve the investigation conducted by the rail fixed guideway system or the National Transportation Safety Board (NTSB), or use a combination of these methods.

The oversight agency must require the rail fixed guideway system to implement corrective action plans, as appropriate, to minimize, control within a specified period, correct, or eliminate hazardous conditions identified during investigations. The oversight agency must monitor implementation of these plans.

The oversight agency must conduct an on-site safety review of the rail fixed guideway system's implementation of its system safety program plan and system security plan at least every three years. Once this review is complete, the oversight agency must issue a report containing its findings and recommendations, an analysis of the rail fixed guideway system's safety and security program, and a determination of whether it should be updated.

The oversight agency must require the rail fixed guideway system to conduct an internal safety audit process that complies with Checklist Number 9 of the APTA Manual. In addition, the rail fixed guideway system must submit an annual report to the oversight agency documenting the results of internal safety audit process.

Lastly, the oversight agency must submit three types of reports to FTA: an Initial Submission; an Annual Submission, and a Periodic Submission.

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

A side-by-side table of the current rule and the proposed rule is available on the FTA Office of Safety and Security home page at <http://transit-safety.volpe.dot.gov>.

III. Need for Rule Revision

Since the rule's requirements went into effect, FTA has monitored oversight agency compliance. During this time, FTA has worked with representatives from oversight agencies, rail transit agencies, FRA, NTSB, and APTA to identify areas in which the program, or the rule itself, can be strengthened to ensure effective safety and security oversight at our nation's rail transit properties, affected by Part 659.

In this activity, FTA utilized five distinct methods from which to evaluate State compliance with Part 659 requirements and to identify areas in which the rule could be improved. Each of these methods, and its specific findings for the rule revision, is described below:

- (1) FTA's audit program for Part 659;
- (2) FTA's State Safety Oversight Program Annual Meetings;
- (3) Quarterly State Safety Oversight Program Teleconferences;
- (4) Working Groups for oversight agencies and rail transit agencies to discuss the performance of the program and make recommendations to FTA for improvements; and
- (5) Coordination with the NTSB.

Audit Program. In 1998, FTA initiated its audit program for state safety oversight agencies. Since that time, FTA has conducted 17 audits that have assisted FTA in determining State compliance with the rule as well as providing meaningful recommendations for strengthening the state safety oversight program. Audit findings indicate that: (1) Oversight agencies have difficulty determining their role and authority in the management of hazards at the rail transit agencies within their jurisdiction; (2) the APTA Manual does not currently provide a clear listing of specific authorities required to manage oversight program provisions; (3) States have difficulty requiring and enforcing the performance of internal safety audits at rail transit agencies; and (4) States and rail transit agencies have difficulty ensuring that program plans remain up-to-date.

Annual Meetings. FTA initiated its annual meetings in 1997 to discuss elements of the rule in detail; provide training for oversight personnel in key areas, such as hazard identification and resolution and the conduct of three-year safety reviews; promote coordination with other federal programs; support working sessions to identify key concerns in rule implementation; and present and discuss findings from its audit program. During the last three annual meetings, States have provided FTA with a listing of their

recommendations regarding FTA activity in the upcoming year. Typical State needs include training, funding, and increased coordination with FRA, NTSB, and FTA's Project Management Oversight Program.

Quarterly Teleconferences. In 2001, FTA began a quarterly teleconference series with oversight agencies to update oversight agencies on FTA activities, to discuss emerging safety and security issues, and plan for the year's annual meeting.

Working Groups. In 2002, FTA initiated a series of monthly teleconference working sessions with representatives from oversight agencies and rail transit agencies. These teleconferences provide a forum for key stakeholders to present their program recommendations to FTA. The oversight agencies selected seven members to represent the State perspective. APTA worked with the rail transit community to identify five members for its group. Findings from the teleconference calls include: (1) Both oversight agency and rail transit agency representatives requested that FTA address the need for a process-based requirement for the hazard management process; (2) both oversight agency and rail transit agency representatives requested greater consistency with other federal agencies and programs in accident notification and investigation thresholds; (3) oversight agency representatives requested that FTA remove the APTA Manual incorporation by reference and provide a listing of specific authorities required for the management of state safety oversight programs; and (4) some oversight agency representatives suggested greater oversight for safety prior to passenger operations.

National Transportation Safety Board. In September 2002, the NTSB issued recommendations to FTA's Administrator (R-02-18 and -19), stating that the APTA Manual, published on August 20, 1991, does "not contain the necessary specific guidance for assessing the effectiveness of rules compliance programs; as a result, the guidelines are not effective tools for regulatory authorities or transit agencies." The NTSB recommended that rail transit agencies should adopt, in their system safety program plans, specific standards covering rules compliance and efficiency test programs. NTSB also made recommendations to APTA to update the APTA Manual to address this concern, and to FTA to adopt the updated APTA Manual.

Over the last six years, FTA has also developed technical assistance material to address concerns identified by FTA,

the States, and the rail transit agencies. FTA has published technical advisories, safety and security newsletters, and guidelines to address implementation of rule requirements and successful practices. While the guidance has benefited oversight agency and rail transit agency program implementation, FTA recognizes that a number of the identified issues must be resolved by regulation. It is based on the above findings that FTA proposes revisions to the existing state safety oversight rule.

The purpose of this revision is to improve the performance of the state safety oversight program and effect the following outcomes: (1) Enhanced program efficiency and authority; (2) increased responsiveness to recommendations and emerging safety and security issues; (3) improved consistency in the collection and analysis of accident causal factors through increased coordination with other Federal reporting and investigation programs; and (4) improved performance of the hazard management process. In addition, the proposed rule will clarify FTA's position with regard to oversight management objectives and streamline current reporting requirements including a move from paper reporting to electronic reporting. Finally, the proposed rule would address heightened concerns for rail transit security and emergency preparedness.

IV. Overview of the Proposed Rule

At the time when Part 659 was published, FTA believed strongly that in order to establish a nation-wide baseline standard for safety, it was necessary to incorporate the APTA Manual by reference. FTA has learned in the last six years, however, that while the APTA Manual still provides a valuable tool for rail transit agencies in their development of system safety program plans, it does not assist in State compliance with rule requirements. To address this situation, the proposed rule provides minimum requirements that should support the development of an oversight program and guide its oversight activities. These requirements are located in § 659.13 of the proposed rule.

Removing reference to the APTA Manual also requires that FTA identify minimum requirements to be addressed by the rail transit agency in its system safety program plan. In preparing these requirements, FTA used the APTA Manual and materials developed by oversight agencies. These requirements are located in § 659.15 of the proposed rule.

In the proposed rule, the oversight agency would require the rail transit agency to develop its system safety program plan and system security plan as separate documents. All oversight agency reviews of the system security plan would occur on-site at the rail transit agency, or according to another procedure developed by the rail transit agency in its system security plan. These requirements are located in § 659.17 of the proposed rule.

The proposed rule would require the oversight agency to oversee an annual review by rail transit agency of its system safety program plan and system security plan and modify or update as necessary. The proposed regulation would require the oversight agency to review and approve any modification or update. These changes are located in § 659.19 of the proposed rule.

The proposed rule would stipulate that the rail transit agency conduct ongoing internal safety and security reviews of its safety and security programs and notify the oversight agency at least 30 days prior to its conduct. The proposed regulation would require the State to review and approve an annual report on rail transit agency internal safety and security reviews and require the rail transit agency executive director or general manager to submit a letter certifying rail transit agency compliance with its own system safety program plan and system security plan. These requirements are located in § 659.21 of the proposed rule.

The proposed rule would clarify the State's role in the oversight of hazard management activities performed by the rail transit agency. The current rule specifies use of a hazard resolution matrix to categorize hazards. Those hazards categorized as unacceptable are to be investigated and culminate in the development to corrective action plans to mitigate the unacceptable hazardous condition. The proposed rule would clarify that hazards are managed using a hazard identification and resolution process, similar to that prescribed in the APTA Manual. The proposed rule would outline the process to be developed by the rail transit agency that guides its hazard identification and resolution activities, as well as coordination with the oversight agency. These requirements are located in § 659.25 of the proposed rule.

The proposed rule also addresses inconsistencies in accident notification and investigation thresholds between the state safety oversight program and FTA's National Transit Database (NTD) reporting thresholds, and the NTSB's notification and investigation thresholds. The proposed rule would

allow FTA to standardize accident causal information obtained through the state safety oversight program by ridership and accident data reported by rail transit agencies to the NTD. The increased consistency would create a direct relationship between reported accidents, identified causal factors, and corrective actions and support consistent analysis of industry performance and needs. Moreover, the proposed rule would support consistency between those accidents requiring investigation under the state safety oversight program and those investigated by the NTSB. These requirements are located in § 659.27, § 659.29, and § 659.31 of the proposed rule.

V. Section-by-Section Analysis

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

Definitions (§ 659.5)

In the existing rule, FTA identifies thresholds for accident notification and investigation in the rule's definitions. In the proposed rule, FTA has opted to incorporate these thresholds directly in their applicable sections (§ 659.27—Notification and § 659.29—Investigations). FTA requests that comments made on these thresholds be directed at the appropriate sections of the proposed rule.

To clarify where events requiring notification and investigation may occur, FTA has added definitions for "rail transit vehicle" and "rail-transit controlled property." Likewise, to identify who may be affected by these events, FTA has added a definition of "individual."

FTA has replaced the definition of hazardous condition with the term "hazard" and proposes a definition that is more widely used in the state safety oversight program and industry. FTA proposes to strike the definition of "unacceptable hazardous condition" in the current rule and replace this categorization threshold with a proposed hazard management process, specified in section § 659.25.

FTA has added a definition of "corrective action plan" and "system security plan" to clarify existing requirements, and has revised its definition of "system safety program standard" and "system safety program plan" to reflect changes to the proposed rule regarding the removal of the incorporation by reference of the APTA Manual.

To address on-going questions resulting from the existing rule's use of the term "revenue operations," FTA proposes the addition of the term "passenger operations." This definition would clarify the point in time when approved oversight agency and rail transit agency programs must be in effect.

The proposed rule would modify the definition of rail fixed guideway system by clarifying that the rule applies to systems that are included in FTA's calculation of fixed guideway route miles to receive funding under the formula program for urbanized areas (49 U.S.C. 5336). FTA also added a caveat to address a system's intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336). With this change, States with a rail transit project that is funded without federal monies but expects to receive operating funds would be covered by the program at the initiation of passenger operations. Finally, in the revised rule, FTA proposes to use the term "rail transit agency" to refer to an entity that operates a rail fixed guideway system.

Designation of Oversight Agency (§ 659.9)

FTA's proposed rule contains several changes that would affect the existing requirement for a State to designate an oversight agency for each rail transit agency affected by Part 659 within its jurisdiction. FTA is basing these proposed changes on lessons learned as the state oversight community has grown. This proposed section would only apply to States with rail fixed guideway systems in their jurisdiction that have not designated an oversight agency by the date of the publication of the final rule.

Part 659 currently stipulates that States designate an agency "to serve as the oversight agency and to implement the requirements of [Part 659]." During the rulemaking effort for the current rule, FTA interpreted this requirement as meaning that the State was not required to designate an oversight agency during the planning, design, and construction of a new start rail system. As explained in the preamble to the current rule, FTA believes that the language of section 5330 "covers only operating systems or systems about to commence operations."

Since 1998, FTA has worked with Utah, Wisconsin, and Puerto Rico to ensure both the designation of oversight agencies for new start rail projects and compliance with rule requirements at the time of passenger operations. From

this experience, FTA has learned the importance of clarifying the designation time frame for States with new start systems "about to commence operations." Without specific authority to require and approve a designation submission that includes a schedule for ensuring all program requirements are met by the time of operations, it is difficult for FTA to ensure that sufficient time is provided to address and resolve program concerns prior to passenger operations.

The proposed rule, therefore, would require that the State's designation, at a minimum, coincides with the execution of any grant between FTA and the rail transit agency for the new start project. FTA anticipates that, in most cases, this requirement will correspond to execution of a Full Funding Grant Agreement for a new start rail project.

Designation means that the Governor for the affected State would identify an agency, and a point of contact from that agency, that will likely assume oversight responsibility for the rail transit agency. Designation, for purposes of the proposed rule, may occur prior to the passage of enabling legislation or other activities that may be necessary for the oversight agency to assume its responsibilities for implementing Part 659 requirements.

Upon designation, the State would have 60 days to provide FTA with a designation submission. The designation submission would include (1) identification of the agency most likely to provide oversight; (2) a description of its current authorities relative to rail transit safety and security oversight; (3) identification of any potential conflicts of interest between the designated agency and the rail transit agency based on financial or shared management responsibilities; (4) a point of contact within the designated agency to coordinate with FTA regarding the development of the program, and (5) a proposed schedule detailing major milestones to ensure implementation of the State's oversight program with revenue operations of the rail transit agency.

This proposal would formalize a practice that is already in place and described in FTA's Compliance Guidelines for States with New Starts Projects. Currently, FTA asks that the Governor of each State affected by Part 659 to request designation of the oversight agency, as well as a point of contact within the State-designated agency with whom FTA may work to establish a line of communication as the agency develops its oversight program. It is in working with the State point of contact that FTA is able to provide

technical assistance and outreach to support the development of the State's oversight program. Timely designation of the oversight agency also provides FTA with the opportunity to formally invite State representatives to participate in new start system meetings, held under FTA's Project Management Oversight Program, to assess quarterly the progress of capital projects subject to Part 659.

These changes to the rule's designation provisions also enhance consistency with two other FTA programs. FRA and FTA published Shared Use of the Tracks of the General Railroad System by Conventional Railroads and Light Rail Transit Systems. 65 Fed. Reg. 42525 (July 10, 2000). This joint statement addresses safety issues related to light rail transit operations that plan to take place on the tracks of the general railroad system, and the role of the state safety oversight program in supporting the rail transit agency's waiver process with FRA.

Also, in a recent revision to FTA's Full Funding Grant Agreement Guidance (FTA Circular 5100.1A, issued on December 5, 2002), FTA now requires greater coordination between FTA's Project Management Oversight Program and the state safety oversight program. New start projects receiving a \$25 million or greater share of federal funds must include a Safety and Security Management Plan as part of the Project Management Plan used to evaluate project progress and authorize the release of funds. A component of this plan includes implementation schedules for meeting State Safety Oversight requirements and waiver applications to FRA for transit operations sharing corridors with the general railroad system. These submissions must be coordinated with the State and the designated oversight agency to ensure the continued receipt of FTA funds.

To support early state safety oversight program development, FTA makes funds available to support the designation of an oversight agency and the development of the oversight program under FTA's interpretation of Section 5309 of title 49, U.S.C. (FTA Guidance on Eligibility of Start-up Costs, September 5, 1997). State oversight agencies are able to receive funding from the rail transit agency, so long as the oversight agency state safety oversight expenses are incurred during the pre-revenue service phase of the capital project, are reasonable, and directly support activation and pre-revenue operations of the new service implemented under a capital grant.

The proposed rule would also address those new start projects that are not funded by FTA grants, but intend to eventually receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336). For these projects, when an entity declares its intent to FTA to receive formula funding (typically conveyed through the State transportation planning process), an oversight agency must be designated. Again, 60 days is provided for the State to make its designation submission to FTA.

For rail transit agencies that operate, or will operate, in more than one State, the affected States may each designate an agency of the State to implement state safety oversight requirements, or may agree to designate one agency of one State, or an agency representative of both States. Whatever designation determination is made by the affected States, a single program standard, adopted by each State, would be developed to implement state safety oversight program requirements. In this manner, the rail transit agency would not be unduly burdened with requirements from two or more States, but would be able to develop a seamless program that is equally applicable in all affected States.

For commenters addressing this section, FTA specifically requests information regarding (1) the amount of time required to prepare the designation submission described in this section; and (2) any additional requirements that may be appropriate to support coordination with FTA's Project Management Oversight Program and FRA's Joint Policy on Shared Use Track Systems.

System Safety Program Standard (§ 659.13)

The current rule requires oversight agencies to develop and adopt a program standard that, at a minimum: (1) Complies with the APTA Manual, and (2) requires the rail transit agency to address the personal security of its passengers and employees.

The proposed rule would remove the reference to the APTA Manual from the requirements for a state safety oversight system safety program standard. FTA believes that this change is necessary for several reasons.

First, to provide guidance for a dynamic and growing program, FTA, working through the established public comment process, needs the ability to change, modify, or revise the minimum requirements of the program standard. Reliance on the 1991 version, or subsequent versions, of the APTA Manual does not provide this capability

because FTA does not manage this document.

Second, the APTA Manual provides guidance for developing a rail transit agency system safety program plan but does not provide guidelines for how a State agency should oversee a rail transit agency safety and security program or meet state safety oversight requirements. While this situation was also the case when FTA issued the current rule in December 1995, the state safety oversight community had yet to be created (only five of the existing 22 oversight agencies had been designated). At that time, based on public comment, it was appropriate to reference a known industry standard rather than to attempt to create a new one for State organizations that had not yet been established.

Six years later, however, a more mature and experienced oversight community has expressed concerns with using the APTA Manual as the basis the program standard. In outreach sessions, oversight agencies have requested that, instead of the APTA Manual, FTA provide a specific list of minimum requirements for the program standard which can be referenced in State enabling legislation, administrative code, executive directives, and other means through which responsibility and authority is conveyed to the oversight agency. To this end, in the proposed rule, FTA has prepared a list of ten (10) elements that would be included in a program standard, including minimum requirements that would address oversight agency authority and specific interfaces with the rail transit agency. The ten sections identified in the proposed rule correspond closely to the organization and content already used by many States in their standards—offering a tailored list of authorities and activities required for oversight programs. FTA believes that this modified approach will strengthen and clarify the enforceability of the program and provide minimum requirements that focus on the management of the State's oversight program.

It is important to note that in removing the program's incorporation by reference of the APTA Manual, FTA is not intending to lessen the importance of this document to the rail transit industry. To the contrary, FTA believes the APTA Manual provides a valuable resource for rail transit agencies and supports their compliance with the Part 659 requirement for system safety program plan development. Further, FTA plans to collaborate with APTA to ensure that future implementation guidelines are a

product of a partnership between FTA, APTA, oversight agencies, and rail transit agencies. FTA urges APTA to consider this proposed rule in its subsequent revisions to the APTA Manual.

System Safety Program Plan (§ 659.15)

The current rule stipulates that the oversight agency must require the rail transit agency to develop and implement a written system safety program plan that complies with the oversight agency's program standard. The proposed rule would maintain this requirement, though instead of the APTA Manual, the proposed rule would identify 21 elements that must be included in the rail transit agency's system safety program plan.

These 21 elements are derived from the industry's experience with both the APTA Manual and the state safety oversight program. A rail transit agency relying on the current APTA Manual to develop its system safety program plan will have successfully addressed the 21 minimum elements identified by FTA in the proposed rule, provided the rail transit agency makes modifications to address specific changes proposed in the revised rule. These changes follow.

(1) Develop a hazard management process in compliance with hazard management process (§ 659.25) of the proposed rule—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 7 to include coordination with the oversight agency.

(2) Provide additional detail on the processes used by the rail transit agency to address safety in system modifications and safety certification for major projects—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 15.

(3) Describe accident notification, investigation and corrective action management processes in keeping with the proposed rule requirements (§ 659.27 and § 659.29)—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 8 and the current rule.

(4) Describe the process by which the rail transit agency will evaluate its emergency management program, such as an annual field exercise. FTA strongly believes that in order to address heightened concerns from recent events, an annual field exercise would support a rail transit agency's evaluation of its level of preparedness for an emergency event. In the last two years, FTA has provided funding to support the conduct of emergency preparedness

drills at the majority of the rail transit agencies around the nation. Lessons learned from this activity indicate its value in assuring preparedness and promoting integration of local responders into rail transit agency emergency preparedness programs. This represents a modification to the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 14.

(5) Document an internal safety and security review process which addresses greater coordination with the oversight agency regarding notification of reviews, oversight agency review of checklists and procedures, and submission of an annual report to the oversight agency documenting findings and status of recommendations, as specified in § 659.21 of the proposed rule—modifying the rail transit agency's description of this process prepared in response to APTA Manual's Checklist Number 9;

(6) Provide additional detail on the employee safety program (to include employee/contractor right-of-way safety)—modifying the rail transit agency's description of these processes prepared in response to APTA Manual's Checklist Numbers 19 and 22.

(7) Identify the specific requirements to address rail transit agency procedures for rules compliance and performance testing to assess employee knowledge of compliance with operating rules—modifying the rail transit agency's description prepared in response to APTA Manual's Checklist Number 12.

FTA proposes this last change to address recommendations issued to FTA's Administrator on September 26, 2002 by the NTSB (R-02-18 and -19). In these recommendations, the NTSB concluded that the APTA Manual, published on August 20, 1991, does "not contain the necessary specific guidance for assessing the effectiveness of rules compliance programs; as a result, the guidelines are not effective tools for regulatory authorities or transit agencies." The NTSB recommended that rail transit agencies should adopt, in their system safety program plans, specific standards covering rules compliance and efficiency test programs. NTSB also made recommendations to APTA to update the APTA Manual to address this concern, and to FTA to adopt the updated APTA Manual. Since FTA's revised rule proposes not to reference the APTA Manual in its program, FTA believes that it is important to address the NTSB recommendation regarding performance testing in the minimum requirements for the system safety program plan.

System Security Plan (§ 659.17)

To address the need to protect security information from public disclosure, FTA believes that it is important to make certain that the system safety program plan and the system security plan are separate documents with different protocols for review and management. The current rule allows the two plans to be combined into a single system safety and security program plan, and relies on the submission of these documents directly to the oversight agency via hard or electronic copy.

FTA is proposing a change to this practice which, first, would call for a separate system security plan, and, second, ensure that this plan and its supporting procedures would only be reviewed on-site at the rail transit agency, or according to some other procedure specified by the rail transit agency in its system security plan. FTA believes that recent events resulting from the September 11, 2001, attacks and potential changes in security policy that may be promulgated by the Transportation Security Administration warrant these modifications.

FTA considered the requirement for the designation of "transit security sensitive information" and the creation of procedures for the management and storage of this type of information at the oversight agency. However, FTA decided that the inconvenience of requiring on-site review of a rail transit agency's system security plan and supporting procedures was a less complex regulatory matter than attempting to create new policies for classifying and managing specific types of information at state agencies.

Therefore, FTA's proposed rule would identify minimum requirements for the system security plan, and specify that the State must require the rail transit agency to make available to the oversight agency, for review and approval, its system security plan and accompanying procedures. The oversight agency would then conduct its review of the system security plan and supporting procedures on-site at the rail transit agency, or following some other procedure specified by the rail transit agency in its system security plan and approved by the oversight agency. Throughout this process, the transit system and the oversight agency must comply with all regulations related to the non-disclosure of sensitive information, including the Transportation Security Administration's regulations at 49 CFR Part 1520.

Rail Transit Agency Annual Review of Its System Safety Program Plan and System Security Plan (§ 659.19)

FTA concluded from its audit program that the current rule does not provide sufficient guidance with regard to a recommended schedule for rail transit agency review and revision of its system safety program plan and system security plan. FTA found that rail transit agency reviews varied between one and three years and created situations where a rail transit agency may be implementing procedures or practices that are not reflected in its system safety program plan or system security plan. To address this potential for out-of-date plans, the proposed regulation would specify that the oversight agency must require the rail transit agency to conduct an annual review of its system safety program plan and system security plan. This review may simply result in the determination that no update is necessary in either plan, or it may address specific issues, such as the need for revised organization charts or roles and responsibilities matrices, or it may result in more substantive changes to one or both plans.

In the event that the system safety program plan is modified, the rail transit agency would be required to submit the modified plan and any subsequently modified procedures to the oversight agency for review and approval. Upon approval of the plan, the oversight agency would be required to issue a formal letter of approval to the rail transit agency.

In the event the rail transit agency's system security plan is modified, the rail transit agency would be required to make available to the oversight agency for on-site review at the rail transit agency, the modified plan and accompanying procedures. Upon approval of the plan, the oversight agency would be required to issue a formal letter of approval to the rail transit agency.

Rail Transit Agency Internal Safety and Security Reviews (§ 659.21)

Results from FTA's audit program and outreach with both oversight agencies and rail transit agencies indicate that the internal safety audit process requirement specified in the APTA Manual (Checklist Number Nine), and referenced in the current rule, has been perhaps the most challenging element of the program. Rail transit agencies have struggled with obtaining sufficient resources and management support to ensure that all elements identified in the APTA Manual are reviewed consistently

over a three-year timeframe. State oversight agencies have expressed the difficulty of obtaining schedules, checklists and procedures by which the rail transit agency plans to conduct these reviews. State oversight agencies have also indicated that the indirect authority provided by the current rule, which requires only an annual report documenting the rail transit agency's performance of the internal safety audit process, makes it difficult for them to address this issue more actively with the rail transit agencies.

FTA always intended that oversight agencies would play an important role in ensuring that the internal safety audit process identified by the rail transit agencies in their system safety program plans and system security plans is carried out. However, FTA agrees that in practice, the current rule does not sufficiently support oversight agency authority to monitor implementation of this program in an on-going manner.

To address these concerns, FTA proposes revising the existing rule to provide specific requirements that must be carried out by the oversight agency with regard to this process. To this end, FTA proposes that oversight agencies would require the rail transit agencies within their jurisdiction to develop a process for the performance of on-going internal safety and security reviews. This process would be included in the system safety program plan (for safety-related items) and the system security plan (for security-related items), and be reviewed and approved by the oversight agencies.

Further, the proposed rule would require that this process must: (1) Describe the method used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended; and (2) ensure that all elements of the system safety program plan and system security plan are reviewed in an on-going manner and completed over a three-year cycle.

This process must also ensure that the rail transit agency would notify the oversight agency at least thirty (30) days prior to the conduct of scheduled internal safety and security reviews, and that the rail transit agency would submit to the oversight agency, at the time of notification, any checklists or procedures it will use during the review. Any checklists or procedures the rail transit agency would use for the security portion of its review must be made available to the oversight agency for on-site review. At the request of the rail transit agency, the oversight agency may participate in these reviews, though

the proposed rule would not require their participation.

In the proposed rule, the oversight agency must require the rail transit agency to submit an annual report documenting internal safety and security review activities and the status of subsequent findings and recommendations. The security portion of this report would only be made available for on-site review at the rail transit agency. The annual report would be accompanied by a formal letter of certification signed by the rail transit agency's executive director or general manager indicating that the rail transit agency is in compliance with its system safety program plan and system security plan. The oversight agency would be required to formally review and approve this report.

FTA believes that this amended process will greatly improve the coordination between the rail transit agencies and the oversight agencies regarding this element of the program.

Oversight Agency Safety and Security Reviews (§ 659.23)

The current rule requires that, at least every three years, the oversight agency must conduct an on-site review of the rail transit agency's implementation of its system safety program plan and system security plan. It also requires that the oversight agency prepare and issue a report containing findings and recommendations resulting from that review, which, at a minimum, must include an analysis of the efficacy of the system safety program plan and a determination of whether it should be updated. Based on the results of this on-site review, the oversight agency would require the rail transit agency to develop corrective action plans to address review findings.

Both oversight agencies and rail transit agencies have expressed general satisfaction with these reviews. However, those States that conduct these reviews in an on-going manner over the three-year period (rather than as a single review) requested that FTA clarify their authority to conduct the reviews in this manner. Therefore, this section has been amended to specify that the rail transit agency's system safety program plan may be reviewed in an on-going manner, over the three-year timeframe, or in a comprehensive on-site review at the rail transit agency, occurring once every three years.

Hazard Management Process (§ 659.25)

In the revised rule, FTA is proposing that the oversight agency require the rail transit agency to develop a process to identify and resolve hazardous

conditions during operation, system extensions, modifications, or changes. This process would replace the current requirements for the notification and investigation of "unacceptable hazardous conditions," and ensure that the oversight agency has an on-going role in the rail transit agency's hazard identification and resolution process. FTA believes that such a role would enhance the program's capability to monitor the identification and resolution of hazards at the rail transit agency.

As proposed in the revised rule, the oversight agency must require the rail transit agency to develop, as part of the system safety program plan, a hazard management process to be reviewed and approved by the oversight agency. This process must, at a minimum: (1) Define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process; (2) specify the sources of, and the mechanisms to support, the on-going identification of hazards; (3) define the process by which identified hazards will be evaluated and prioritized for elimination or control; (4) identify the mechanism used to track to resolution the identified hazard(s); (5) define minimum thresholds for the notification and reporting to oversight agencies of hazardous conditions; and (6) specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the oversight agency.

The proposed regulation would not require industry-wide conformance to a single hazard management methodology. Rail transit agencies may propose methods that are specified in the APTA Manual or in military or other system safety references, or they may wish to limit application of matrix-based assessments in favor of trend analysis or other tools. Whatever approach is ultimately selected by the rail transit agency, it must be accurately identified and documented in the hazard management process, submitted as part of the system safety program plan, and reviewed and approved by the oversight agency.

Likewise, specific mechanisms for the on-going communication of the results of the hazard management process with the oversight agencies would be left open, to be determined by the specific rail transit agency and oversight agency. Some rail transit agencies may wish to invite their oversight agencies to monthly or quarterly meetings of Hazard Resolution Committees and to document hazard management activity in meeting minutes or notes from these

sessions. Other agencies may propose delivering a specific report on a monthly, quarterly or semi-annual basis to the oversight agency. Still other rail transit agencies may provide oversight agencies with access to existing hazard management databases and reports, or may conduct monthly teleconferences. FTA encourages the rail transit agencies and the oversight agencies, whenever possible, to take advantage of existing hazard management tools and processes to document and share information.

This process would ensure a continuous dialogue regarding hazard management between the oversight agency and the rail transit agency. Further, the hazard management process would define the sources from which rail transit agencies will identify and evaluate potential hazards as well as the notification, investigation and corrective action requirements implemented by the rail transit agency and reviewed and approved by the oversight agency.

FTA believes that this approach will provide oversight agencies with an improved understanding of this process, as applied in the rail transit industry, and a greater context from which to assess rail transit agency hazard evaluation processes and corrective action plans.

Notification (§ 659.27)

The current rule stipulates that the oversight agency must require the rail transit agency to report accidents and unacceptable hazardous conditions within a specified period of time determined by the oversight agency. Upon notification of these events, oversight agencies must investigate and require, review and approve corrective action plans, as appropriate, to address investigation findings. In the current rule, "accidents" include any events, if as a result: an individual dies; an individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or a collision, derailment, or fire causes property damage in excess of \$100,000.

"Unacceptable hazardous conditions" include those hazardous conditions determined to be unacceptable using the APTA Manual, Hazard Resolution Matrix (Checklist Number 7). As explained in the section above, the proposed rule replaces the requirements for "unacceptable hazardous conditions" notification and investigation with a hazard management process (§ 659.25).

For accident notification and investigation, results from FTA's audit program and outreach with both oversight agencies and rail transit agencies indicate that the current rule's

thresholds for accident notification are not consistent with other notification and investigation thresholds. For example, the current rule's definition of accident does not correspond with thresholds established by the NTSB, FTA's Drug and Alcohol Program, the NTD, the FRA for shared track systems, or State or local occupational safety and environmental protection programs.

In working sessions with oversight agencies and rail transit agencies, FTA identified a range of thresholds, currently used for major incident reporting in the NTD, that FTA believes are significant to the state safety oversight program. Using these thresholds, the proposed rule would require oversight agency notification within two (2) hours for any of the following events: (1) A fatality, where an individual is confirmed dead within 30 days of a transit-related incident, excluding suicides and deaths from illness; (2) injuries requiring immediate medical attention away from the scene for two or more individuals; (3) property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities that equals or exceeds \$25,000; (4) an evacuation due to life safety reasons; or (5) a main-line derailment. These events could take place on a rail transit vehicle or on rail transit-controlled property, and could involve rail transit passengers, employees, contractors, rail transit facility occupants, other workers, or trespassers.

By using consistent thresholds in the revised rule, oversight agencies would be able to track rail transit agency reports to the NTD using a module to be developed by FTA for this purpose. The ability to access information within the NTD would enable oversight agencies to consistently monitor rail transit agency performance of investigations, identify causal factors, and assign corrective actions using an existing federal resource. Consistent definitions allow FTA to remove elements of oversight agency annual reporting requirements, namely accident data and causal factors. FTA would get this information directly from the NTD to support its analysis of causal factors and drive safety and security initiatives and activities.

For rail transit agencies that share track with the general railroad system and are subject to FRA notification requirements, FTA's revised rule proposes that the oversight agency would also be notified within two (2) hours of an incident for which the rail transit agency must notify the FRA. FTA believes this is necessary to address the role of the state safety oversight program in FRA's waiver process.

FTA's proposed rule would also require that the oversight agency identify in its program standard the information to be given by the rail transit agency during notification. The oversight agency would be notified using any means, system, or format specified by the oversight agency in its program standard.

Investigations (§ 659.29)

In the current rule, the oversight agency must (1) establish procedures to investigate accidents and unacceptable hazardous conditions and (2) unless the NTSB has investigated or will investigate an accident, the oversight agency must investigate accidents and unacceptable hazardous conditions occurring at a transit agency under its jurisdiction. In the current rule, investigation "may involve no more than a review and approval of the transit agency's determination of the probable cause of an accident or unacceptable hazardous condition."

FTA is now proposing that the oversight agency must, at a minimum investigate, or cause to be investigated, accidents meeting one of three thresholds for which it receives notification: (1) A fatality; (2) injuries requiring immediate medical attention away from the scene for two or more persons; (3) property damage equal to or exceeding \$25,000. This definition would correspond closely to the thresholds required by the NTSB for rail transit agency notification of events that may be subsequently investigated by the NTSB.

In meeting this requirement, the oversight agency would be required to ensure that the investigation is conducted according to procedures reviewed and approved by the oversight agency and submitted to FTA. In the event the oversight agency designates the rail transit agency to conduct the investigation on its behalf, it would do so formally and would require the rail transit agency to use investigation procedures that have been formally approved by the oversight agency and submitted to FTA to fulfill the oversight agency's Initial or Annual Submission requirements.

FTA's proposed rule specifies that each investigation must be documented in a final report that includes a description of investigation activities, identified causal factors, and a corrective action plan. The revised rule would provide the oversight agency with the flexibility to determine, in its program standard, when the final investigation report must be submitted to the oversight agency; the format of the final report; and whether status

updates or preliminary findings should also be submitted according to a timeframe specified by the oversight agency. FTA encourages oversight agencies and rail transit agencies to take advantage of existing reports and templates, to eliminate the need for additional rail transit agency reporting requirements. FTA's proposed rule also specifies that the oversight agency must review and formally approve each final investigation report.

Corrective Action Plans (§ 659.31)

Based on the results of FTA's audit program and working sessions with oversight agencies and rail transit agencies, FTA's proposed rule would consolidate all requirements for corrective action plans into a single section. In this section, FTA proposes that the oversight agency would, at a minimum, require the rail transit agency to develop a corrective action plan for the following occurrences: (1) Results from investigations in which identified causal factors are determined by the rail transit agency or oversight agency as requiring corrective actions; and (2) findings from safety and security reviews performed by the oversight agency. Requirements for corrective action plan development for identified hazardous conditions would be specified by the rail transit agency in the hazard management process.

The proposed rule specifies that each corrective action plan must identify the action to be taken by the rail transit agency and the schedule for its implementation. The corrective action plan would be reviewed and formally approved by the oversight agency. The oversight agency would be required to monitor the implementation of each approved corrective action plan.

FTA is aware of current program challenges, described by both oversight agencies and rail transit agencies, regarding the means available to assess whether the corrective action has been implemented and whether it is successfully meeting its intended objective. To address these concerns, FTA's proposed rule specifies that the oversight agency must require the rail transit agency to provide (1) verification that the corrective action(s) has been implemented as detailed in the corrective action plan or a proposed alternate action(s) subject to oversight agency review and approval; and (2) periodic reports as requested by the oversight agency detailing the status of each corrective action(s) not completely implemented as detailed in the corrective action plan.

FTA believes that this approach would provide the rail transit agency

with sufficient flexibility to address the implementation of corrective action plans, while, at the same time, ensure the implementation of a process which can be effectively monitored by the oversight agency.

Oversight Agency Report to the Federal Transit Administration (§ 659.33)

Based on its experience with monitoring and evaluating implementation of the state safety oversight program, FTA is proposing minor modifications to the current oversight agency submissions to FTA, namely its initial submissions, annual submissions, and periodic submissions. The proposed regulation would require that all submissions to FTA are made electronically using an electronic reporting system. At the current time, FTA anticipates that this reporting would occur in an internet-based format, as a secure page on FTA's existing safety and security website. State oversight agencies will be assigned a secure login where they may upload their annual reports and electronic copies of supporting documents and procedures. FTA believes that automating this process would simplify the reporting function and data warehousing requirements associated with the rule.

For initial submissions, the proposed rule would specify that the each designated oversight agency must submit to FTA: (1) Oversight agency program standard and supporting procedures; and (2) a certification that the system safety program plan and the system security plan have been developed, reviewed, and approved. In States with rail fixed guideway systems in passenger operations as of the publication date of this rule, the designated oversight agency must make its initial submissions to FTA no later one year after the publication of the final rule. In States with rail fixed guideway systems entering passenger operations after the publication date of this rule, the designated oversight agency must make its initial submission within a time frame proposed by the State in its designation submission and approved by FTA.

For commenters addressing this section, FTA requests their opinions regarding the specified time frames for the initiation submissions. Is one year from the publication date of the final rule sufficient?

FTA's revised rule proposes that annual submissions from oversight agencies be made prior to March 15 of each year, and comply with the annual report template developed by FTA and submitted to the oversight agencies

prior to March 15 of each year. The annual submission would require the following: (1) A publicly available annual report summarizing its oversight activities for the preceding twelve months; (2) a report documenting findings from three-year safety review activities, if a three-year safety review has been completed since the last annual report was submitted; and (3) program standard and supporting procedures that have been changed during the preceding year.

Finally, in its revised rule, FTA would have the authority to request periodic submissions from oversight agencies, which may include status reports for accident investigations, hazards, and corrective action plans.

Use of Contractors (§ 659.35)

FTA's revised rule would remove the list of activities for which state safety oversight agencies may allow the use contractors to address state safety oversight requirements. Instead, this revised section would simply require the oversight agency to prohibit an individual or entity from providing state safety oversight services when there may exist a conflict of interest. FTA would leave this determination to the oversight agency.

Certification of Compliance (§ 659.37)

As in the existing rule, FTA's revised rule would require that each oversight agency certify annually to the FTA that it has complied with the requirements of the state safety oversight program. FTA is proposing that each certification would be made electronically to FTA using an electronic reporting system specified by FTA. The oversight agency would be required to maintain a signed copy of each annual certification to FTA, subject to audit by FTA.

VI. Regulatory Process Matters

a. Executive Order 12866

FTA has determined that this proposed action is a significant regulatory action within the meaning of Executive Order 12866. While it is anticipated that the economic impact of this rulemaking will be minimal because the changes here are incremental in nature and any incremental costs are negligible, FTA recognizes that the proposed rule affects State governments and may be of congressional interest. After consultation between DOT and the Office of Management and Budget (OMB) concerning this NPRM, it has been determined that further OMB review of the NPRM is not needed.

In 1995, FTA evaluated the industry-wide costs and benefits of the current

rule. The economic analysis is available from FTA. In its analysis, FTA estimated the total costs for the first ten years to be approximately \$9.1 million. However, when factoring in projections for program growth and new starts, the estimated annual burden between years five (5) and ten (10) increased approximately 15 percent. The present annual cost of 49 CFR Part 659 is \$1,337,688. FTA estimates the annual cost of the proposed rule (*i.e.*, the annual cost of the entire rule as amended, as distinct from incremental costs of the proposed changes) to be approximately \$2.1 million. The \$800,000 difference between the current cost of implementing the rule and the annual cost of implementing the rule over the next 10 years is caused by mostly continued program growth (*i.e.*, addition of seven (7) rail transit agencies and new states by the year 2013). Further, in its estimate for this proposed rule, FTA increased the assumed hourly rate for personnel responsible for implementing rule requirements from \$25 per hour to \$35 per hour. This increase reflects FTA experience with the implementation of the current rule's requirements and outreach with state and rail transit agency representatives. FTA believes that while the estimate for annual cost burden has increased, the proposed changes will not cause the regulated parties to drastically change their behavior or substantially increase the number of resources needed to meet the proposed requirements.

b. Departmental Significance

This proposed rule is a significant regulation under the Department's Regulatory Policies and Procedures, because it makes changes to an important Departmental policy. Changes include the replacement of a referenced industry manual as the guideline for program compliance with proposed minimum requirements, a change in the definition of accident notification and investigation thresholds, clarification of critical processes such as the management of hazardous conditions and the performance of threat and vulnerability assessments, and many definitional additions.

c. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), FTA has evaluated the effects of this proposed action on small entities and has determined that this proposed rule will not have a significant impact on a substantial number of small entities because these proposed changes will effect only larger transit agencies and oversight agencies (such as State

departments of transportation and public utility commissions). Further, the original analysis done for the 1995 final rule, currently being implemented, led to the determination that there would be no significant impact on small entities. This rule merely proposes modest administrative changes to the original rule. For these reasons, FTA certifies that this action will not have a significant economic impact on a substantial number of small entities.

d. Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532). As noted above, the estimated \$2.1 million annual cost of implementing the rule is well below this threshold.

e. Executive Order 13132 (Federalism Assessment)

Prior to the publication of the original State Safety Oversight rule, FTA conducted a Federalism Assessment according to requirements of Executive Order 12612, which has since been revoked and replaced by the above-referenced order. That analysis can be found at 60 Fed. Reg. 67041 (Dec. 27, 1995). Because the State Safety Oversight requirements are already in place, and this proposed rule only provides more detailed requirements for greater clarification and performance-based evaluation to the existing rule, FTA has determined that Federalism impacts are minimal.

FTA has also determined that this action does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions. As was noted in the original analysis, there may be instances in which a State or local agency faces a conflict between compliance with this rule and State and local requirements. Because compliance with this rule is a condition of Federal financial assistance, State and local governments have the option of not seeking the Federal funds if they choose not to comply with this rule.

f. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, *et seq.*), Federal agencies must obtain approval from the Office of Budget and Management (OMB) for each collection of information they conduct, sponsor, or

require through regulations. This proposed rule includes information collection requirements subject to PRA. OMB approved FTA's collection requirements in the original rule and reviewed and approved an updated submission in September 1999. That approval can be found under OMB #2132–0558.

Since this action contains a proposal to institute additional or altered paperwork collection burdens, FTA is required to submit this collection of information to OMB for review and approval. Accordingly, FTA seeks public comments on this proposed information collection requirement. Interested parties are invited to send comments regarding any aspect of this information collection, including but not limited to: (1) The necessity and utility of the information collection for the proper performance of the functions of FTA; (2) the accuracy of the estimated burden; (3) ways to enhance the quality, utility, and clarity of the collected information; and (4) ways to minimize the collection burden without reducing the quality of the collected information. Comments submitted in response to this NPRM will be summarized and/or included in the request for OMB approval of this information collection.

The estimated burden for information collection requirements is an annualized amount of 26,502 hours and \$927,600 for oversight agencies and 33,244 hours and \$1,163,540 for rail transit agencies. These numbers concern the burdens of the entire as amended, as distinct from incremental burdens of the proposed changes.

List of Subjects in 49 CFR Part 659

Grant Programs—Transportation, Mass transportation, Reporting and record keeping requirements, Safety, Security, and Transportation.

For the reasons described in the preamble, FTA proposes to amend title 49, Code of Federal Regulations, Part 659, as set forth below:

PART 659—STATE SAFETY OVERSIGHT

1. The authority citation for 49 CFR part 659 continues to read as follows:

Authority: 49 U.S.C. 5330.

2. Revise part 659 to read as follows:

PART 659—RAIL FIXED GUIDEWAY SYSTEMS; STATE SAFETY OVERSIGHT

Sec.

659.1 Purpose.

659.3 Scope.

659.5 Definitions.

- 659.7 Withholding of funds for noncompliance.
- 659.9 Designation of oversight agency.
- 659.11 Confidentiality of investigation reports.
- 659.13 System safety program standard.
- 659.15 System safety program plan.
- 659.17 System security plan.
- 659.19 Rail transit agency annual review of its system safety program plan and system security plan.
- 659.21 Rail transit agency internal safety and security reviews.
- 659.23 Oversight agency safety and security reviews.
- 659.25 Hazard management process.
- 659.27 Notification.
- 659.29 Investigations.
- 659.31 Corrective action plans.
- 659.33 Oversight agency reporting to the Federal Transit Administration.
- 659.35 Conflict of interest.
- 659.37 Certification of compliance.

§ 659.1 Purpose.

This part implements 49 U.S.C. 5330 by requiring a State to oversee the safety and security of rail fixed guideway systems through a designated oversight agency.

§ 659.3 Scope.

This part applies to a State that has within its boundaries a rail fixed guideway system as defined in this part.

§ 659.5 Definitions.

Contractor means an entity that performs tasks required by this part on behalf of the oversight or rail transit agency. The rail transit agency may not be a contractor for the oversight agency.

Corrective action plan means a plan developed by the rail transit agency that sets forth the actions the rail transit agency will take to minimize, control, correct, or eliminate hazardous conditions and the schedule for implementation for those actions.

FTA means the Federal Transit Administration, an agency within the U.S. Department of Transportation.

Hazard means any real or potential condition (as defined in the rail transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.

Individual means a passenger; employee; contractor; rail transit facility occupant; other transit facility worker; or trespasser.

Investigation means the process used to determine the causal factors of an accident or hazard such that actions can be identified to prevent recurrence.

Oversight agency means the entity, other than the rail transit agency, designated by the State or several States to implement this part.

Passenger means a person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.

Passenger operations means the period of time commencing when any aspect of rail transit agency operation is initiated with the intent to carry passengers.

Program standard means a written document developed and adopted by the oversight agency that describes the policies, objectives, responsibilities, and procedures used to provide rail transit agency safety and security oversight.

Rail fixed guideway system means, as determined by FTA, any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or automated guideway that:

- (1) Is not regulated by the Federal Railroad Administration; and
- (2) Is included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336); or
- (3) Has submitted documentation to FTA indicating its intent to be included in FTA's calculation of fixed guideway route miles to receive funding under FTA's formula program for urbanized areas (49 U.S.C. 5336).

Rail transit agency means an entity that operates a rail fixed guideway system.

Rail transit-controlled property means property that is utilized by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.

Rail transit vehicle means the rail transit agency's rolling stock.

Safety means freedom from harm resulting from unintentional acts or circumstances.

Security means freedom from harm resulting from intentional acts or circumstances.

System safety program plan means a document developed and adopted by the rail transit agency detailing its safety policies, objectives, responsibilities, and procedures.

System security plan means a document developed and adopted by the rail transit agency detailing its security policies, objectives, responsibilities, and procedures.

§ 659.7 Withholding of funds for noncompliance.

The Administrator of the FTA may withhold up to five percent of the amount required to be apportioned for use in any State or affected urbanized area in such State under FTA's formula program for urbanized areas if the State in the previous fiscal year has not met the requirements of this part and the Administrator determines that the State

is not making adequate efforts to comply with this part.

§ 659.9 Designation of oversight agency.

(a) States with oversight agencies designated for rail fixed guideway systems in passenger operations prior to the publication of this rule are not required to re-designate to FTA.

(b) For a rail fixed guideway system that will operate in only one State, the State must designate an agency of the State, other than the rail transit agency, as the oversight agency to implement the requirements in this part.

(c) For a rail fixed guideway system that will operate in more than one State, each affected State must designate an agency of the State, other than the rail transit agency, as the oversight agency to implement the requirements in this part. To fulfill this requirement, the affected States:

(1) May agree to designate one agency of one State, or an agency representative of all States, to implement the requirements in this part.

(2) In the event multiple States share oversight responsibility for a rail fixed guideway system, the States must ensure that the rail fixed guideway system is subject to a single program standard, adopted by all affected States.

(d) The State designation of the oversight agency must:

(1) Coincide with the execution of any grant agreement between FTA and the rail fixed guideway system within the State's jurisdiction; or

(2) Occur prior to the application for funding under FTA's formula program for urbanized areas (49 U.S.C. 5336) by an entity determined by FTA as meeting the definition of rail fixed guideway system.

(e) Within (60) days of designation of the oversight agency, the State must submit the following to FTA:

(1) The name of the oversight agency designated to implement requirements in this part;

(2) Documentation of the oversight agency's authority to provide State oversight;

(3) Contact information for the representative identified by the designated oversight agency as having responsibility for oversight activities;

(4) A description of the organizational and financial relationship between the designated oversight agency and the rail transit agency;

(5) A schedule for the designated agency's development of its State safety oversight program including the projected date of its initial submission, as required in § 659.31(a); and

(f) The State's designation of its oversight agency and submission of

required information is subject to review and approval by FTA.

§ 659.11 Confidentiality of investigation reports.

The State may prohibit an investigation report that may be prepared by the oversight agency from being admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.

§ 659.13 System safety program standard.

(a) The oversight agency must develop a written program standard that meets the requirements as specified in this part and includes, at a minimum, the following sections:

(1) *Oversight agency program management*—In this section, the oversight agency must explain its authority, policies, and roles and responsibilities for the provision of safety and security oversight of the rail transit agencies within its jurisdiction. This section must provide an overview of planned activities to ensure on-going communication with each affected rail transit agency regarding safety and security information, as well as policies for communication with FTA, including initial, annual and periodic submissions.

(2) *Oversight agency program standard development*—In this section, the oversight agency must describe its process for the development and review and adoption of the program standard, the modification and/or update of the program standard, and the process through which the program standard and any subsequent revisions are distributed to each affected rail transit agency.

(3) *Requirements for rail transit agency system safety program plan*—In this section, the oversight agency must specify the minimum requirements to be addressed in the system safety program plan developed by each affected rail transit agency within its jurisdiction. This section must also describe the process and timeframe through which the oversight agency must receive, review, and approve the rail transit agency system safety program plan.

(4) *Requirements for rail transit agency system security plan*—In this section, the oversight agency must identify the minimum requirements to be addressed in the system security plan developed by each affected rail transit agency within its jurisdiction. This section must also describe the process through which the oversight agency will review and approve the rail transit agency system security program plan.

(5) *Rail transit agency internal safety and security reviews*—In this section,

the oversight agency must describe its role in overseeing the rail transit agency internal safety or security review process. This includes a description of the process used by the oversight agency to receive rail transit agency checklists and procedures and approve the rail transit agency's annual report on findings.

(6) *Oversight agency safety and security review*—In this section, the oversight agency must specify its process and criteria to be used every three years for conducting a complete review of each affected rail transit agency's implementation of its system safety program plan and system security plan. This section must also include the process to be used by the affected rail transit agency and the oversight agency to manage findings and recommendations from this review.

(7) *Hazard management process*—In this section, the oversight agency must specify information to be contained in the affected rail transit agency's system safety program plan regarding the hazard management process, including requirements for on-going communication and coordination regarding the identification; categorization; resolution; and reporting of hazardous conditions to the oversight agency.

(8) *Notification*—In this section, the oversight agency must identify the specific requirements for the notification of accidents by the rail transit agency to the oversight agency. This section must include required timeframes, means for notification, and the information to be submitted upon notification.

(9) *Investigations*—In this section, the oversight agency must identify the thresholds for events which require an oversight agency investigation. The roles and responsibilities for conducting investigations must include: coordination with the rail transit agency investigation process; the role of the oversight agency in supporting investigations conducted by the National Transportation Safety Board; and review and approval of investigation reports, including formats and sign-offs.

(10) *Corrective actions*—In this section, the oversight agency must specify its criteria for the development of a corrective action plan by the rail transit agency; its process for the review and approval of a corrective action plan; and its policies for the verification and tracking of corrective action plan implementation.

(b) The program standard and any referenced program procedures must be submitted to FTA as part of the initial

submission. Subsequent revisions and updates must be submitted to FTA as part of the oversight agency's annual submission.

§ 659.15 System safety program plan.

(a) The oversight agency must require the rail transit agency to develop and implement a written system safety program plan that complies with requirements in this part and the oversight agency's program standard.

(b) The system safety program plan must include, at a minimum:

(1) A policy statement signed by top management which endorses the safety program and provides a description of the authority that establishes the system safety program plan.

(2) A clear definition of the goals and objectives for the safety program and stated management responsibilities to ensure that they are achieved.

(3) An overview of the management structure of the rail transit agency, including:

- (i) An organization chart;
- (ii) A description of how the safety function is integrated into the rest of the rail transit organization; and
- (iii) Clear identification of the lines of authority used by the rail transit agency to manage safety issues.

(4) The process used to control changes to the system safety program plan, including:

- (i) Specification of an annual assessment regarding whether the system safety program plan should be updated; and
- (ii) Required coordination with the oversight agency, including timeframes for submission, revision and approval.

(5) A description of the specific activities required to implement the system safety program, including:

- (i) Tasks to be performed by the rail transit safety function, specified by position and management accountability, in matrices and/or narrative format; and
- (ii) Safety-related tasks to be performed by other rail transit departments, specified by position and management accountability, in matrices and/or narrative format.

(6) A description of the process used by the rail transit agency to implement its hazard management program, including activities for:

- (i) Hazard identification;
- (ii) Hazard investigation, evaluation and analysis;
- (iii) Hazard control and elimination;
- (iv) Hazard tracking; and
- (v) Requirements for on-going reporting to the oversight agency regarding hazard management activities and status.

(7) A description of the process used by the rail transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment which do not require formal safety certification but which may have safety impacts.

(8) A description of the safety certification process required by the rail transit agency to initiate passenger operations and for subsequent major projects undertaken to extend, rehabilitate, or modify the existing system or to replace vehicles and equipment.

(9) A description of the process used to collect, maintain, analyze, and distribute safety data to ensure that the safety function within the rail transit organization receives the information necessary to support implementation of the system safety program.

(10) A description of the process used by the rail transit agency to perform accident notification, investigation and reporting, including:

- (i) Notification thresholds for internal and external organizations;
- (ii) Accident investigation process and references to procedures;
- (iii) The process used to develop, implement and track corrective actions that address investigation findings;
- (iv) Reporting to internal and external organizations; and
- (v) Coordination with the oversight agency.

(11) A description of the process used by the rail transit agency to develop an approved, coordinated schedule for all emergency management program activities, which include:

- (i) Meetings with external agencies;
- (ii) Emergency planning responsibilities and requirements;
- (iii) Process used to evaluate emergency preparedness, such as annual emergency field exercises;
- (iv) After action reports and implementation of findings;
- (v) Revision and distribution of emergency response procedures;
- (vi) Familiarization training for public safety organizations; and
- (vii) Employee training.

(12) A description of the process used by the rail transit agency to ensure that planned and scheduled internal safety reviews are performed to evaluate compliance with the system safety program plan, including:

- (i) Identification of departments and functions subject to review;
- (ii) Responsibility for scheduling reviews;
- (iii) Process for conducting reviews, including the development of checklists and procedures and the issuing of findings;

- (iv) Review reporting requirements;
- (v) Tracking the status of implemented recommendations; and
- (vi) Coordination with the oversight agency.

(13) A description of the process used by the rail transit agency to develop, maintain, and ensure compliance with rules and procedures, identified as having a safety impact, including:

- (i) Identification of operating and maintenance rules and procedures subject to review;
- (ii) Techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing;
- (iii) Techniques used to assess the effectiveness of supervision provided regarding the implementation of operating and maintenance rules; and
- (iv) Process for documenting results and incorporating them into the hazard management program.

(14) A description of the process used for facilities and equipment safety inspections, including:

- (i) Identification of the facilities and equipment subject to regular safety related-inspection and testing;
- (ii) Techniques used to conduct inspections and testing;
- (iii) Inspection schedules and procedures; and
- (iv) Description of how results are entered into the hazard management process.

(15) A description of the maintenance audits and inspections program including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.

(16) A description of the training and certification program for employees and contractors, including:

- (i) Categories of safety-related work requiring training and certification;
- (ii) A description of the training and certification program for employees and contractors in safety-related positions;
- (iii) Process used to maintain and access employee and contractor training records; and
- (iv) Process utilized to assess compliance with training and certification requirements.

(17) A description of the configuration management control process, including:

- (i) The authority to make configuration changes;
- (ii) Process for making changes; and
- (iii) Assurances necessary for all involved departments to be formally notified.

(18) A description of the safety program for employees and contractors

that incorporates the applicable local, state, and federal requirements, including:

- (i) Safety requirements that employees and contractors must follow when working on, or in close proximity to, rail transit agency property; and

- (ii) Processes for ensuring the employees and contractors know the requirements and follow them.

(19) A description of the hazardous materials program including the process used to ensure knowledge of and compliance with program requirements.

(20) A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements.

(21) A description of the measures, controls, and assurances in place to ensure that safety is involved in the rail transit agency's procurement process.

(c) The oversight agency must review and approve the rail transit agency system safety program plan.

(d) Upon approval of the system safety program plan, the oversight agency must issue a formal letter of approval to the rail transit agency.

§ 659.17 System security plan.

(a) The oversight agency must require the rail transit agency to implement a system security plan that complies with requirements in this part and the oversight agency's program standard. The system security plan must be developed and maintained as a separate document and may not be part of the rail transit agency's system safety program plan.

(b) The system security plan must, at a minimum:

- (1) Identify the policies, goals, and objectives for the security program endorsed by top management;
- (2) Document the rail transit agency's process for managing threats and vulnerabilities during operations and for major projects, extensions, new vehicles and equipment;
- (3) Identify controls in place that address the personal security of passengers and employees;
- (4) Document the rail transit agency's process for conducting internal security reviews to evaluate compliance and measure the effectiveness of the system security plan; and
- (5) Document the rail transit agency's process for making available its system security plan and accompanying procedures to the oversight agency for review and approval.

(c) The oversight agency may prohibit a rail transit agency from publicly disclosing the system security plan.

(d) Upon approval of the system security plan, the oversight agency must

issue a formal letter of approval to the rail transit agency.

§ 659.19 Rail transit agency annual review of its system safety program plan and system security plan.

The oversight agency must require the rail transit agency to conduct an annual review of its system safety program plan and system security plan.

(a) In the event the rail transit agency's system safety program plan is modified, the rail transit agency must submit the modified plan and any subsequently modified procedures to the oversight agency for review and approval. Upon approval of the plan the oversight agency must issue a formal letter of approval to the rail transit agency.

(b) In the event the rail transit agency's system security plan is modified, the rail transit agency must make the modified system security plan and accompanying procedures available to the oversight agency for review, subject to requirements specified in § 659.17(b)(5). Upon approval of the plan the oversight agency must issue a formal letter of approval to the rail transit agency.

§ 659.21 Rail transit agency internal safety and security reviews.

(a) The oversight agency must require the rail transit agency to develop and document in its system safety program plan, a process for the performance of on-going internal safety and security reviews.

(b) The internal safety and security review process must, at a minimum:

(1) Describe the process used by the rail transit agency to determine if all identified elements of its system safety program plan and system security plan are performing as intended.

(2) Ensure that all elements of the system safety program plan and system security plan are reviewed in an on-going manner and completed over a 3-year cycle. The 3-year cycle commences [EFFECTIVE DATE OF FINAL RULE].

(c) The rail transit agency must notify the oversight agency at least (30) days prior to the conduct of scheduled internal safety and security reviews.

(1) The rail transit agency must submit to the oversight agency any checklists or procedures it will use during the safety portion of its review.

(2) Any checklists or procedures the rail transit agency will use for the security portion of its review must be made available to the oversight agency subject to § 659.17(b)(5).

(d) The oversight agency must require the rail transit agency to submit, annually, a report documenting internal

safety and security review activities and the status of subsequent findings and recommendations. The security portion of this report must be made available for oversight agency review subject to § 659.17(b)(5).

(e) The annual report must be accompanied by a formal letter of certification signed by the rail transit agency's executive director or general manager indicating that the rail transit agency is in compliance with its system safety program plan and system security plan.

(f) The oversight agency must formally review and approve the annual report.

§ 659.23 Oversight agency safety and security reviews.

Every 3 years, or in an on-going manner, commencing with the initiation of rail transit agency passenger operations, the oversight agency must conduct an on-site review of the rail transit agency's implementation of its system safety program plan and system security plan.

§ 659.25 Hazard management process.

(a) The oversight agency must require the rail transit agency to develop and document in its system safety program plan a process to identify and resolve existing hazards conditions during its operation, as well as any hazards arising due to subsequent system extensions or modifications, operational changes, or other changes within the rail transit environment.

(b) The hazard management process must, at a minimum:

(1) Define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process;

(2) Specify the sources of, and the mechanisms to support, the on-going identification of hazards;

(3) Define the process by which identified hazards will be evaluated and prioritized for elimination or control;

(4) Identify the mechanism used to track to resolution the identified hazard(s);

(5) Define minimum thresholds for the notification and reporting to state oversight agencies of hazardous conditions; and

(6) Specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the oversight agency.

§ 659.27 Notification.

(a) The oversight agency must require the rail transit agency to notify the oversight agency within two (2) hours of any event involving a rail transit vehicle

or taking place on rail transit-controlled property where one or more of the following occurs:

(1) A fatality, where an individual is confirmed dead within 30 days of a transit-related incident, excluding suicides and deaths from illness;

(2) Injuries requiring immediate medical attention away from the scene for two or more individuals;

(3) Property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities that equals or exceeds \$25,000;

(4) An evacuation due to life safety reasons; or

(5) A main-line derailment.

(b) The oversight agency must require rail transit agencies that share track with the general railroad system and are subject to the Federal Railroad Administration notification requirements to notify the oversight agency within two (2) hours of an incident for which the rail transit agency must notify the Federal Railroad Administration.

(c) The oversight agency must identify in its program standard the method of notification and the information to be given by the rail transit agency.

§ 659.29 Investigations.

(a) The oversight agency must investigate, or cause to be investigated, at a minimum, any event involving a rail transit vehicle or taking place on rail transit-controlled property meeting the fatality, injury, or property damage thresholds identified in § 659.27(a).

(b) The oversight agency must use approved investigation procedures that have been submitted to FTA as required in the initial submission or annual submission.

(c) In the event the oversight agency designates the rail transit agency to conduct investigations on its behalf, it must do so formally and require the rail transit agency to use investigation procedures that have been formally approved by the oversight agency.

(d) Each investigation must be documented in a final report that includes a description of investigation activities, identified causal factors, and a corrective action plan.

(1) The final investigation report must be submitted to the oversight agency in a format and timeframe specified by the oversight agency.

(2) The oversight agency must review and formally approve each final investigation report.

(3) The oversight agency shall have the authority to require periodic status reports that document investigation activities and findings in a time frame determined by the oversight agency.

§ 659.31 Corrective action plans.

(a) The oversight agency must, at a minimum, require the development of a corrective action plan for the following:

(1) Results from investigations in which identified causal factors are determined by the rail transit agency or oversight agency as requiring corrective actions; and

(2) Findings from safety and security reviews performed by the oversight agency.

(b) Each corrective action plan should identify the action to be taken by the rail transit agency and the schedule for its implementation.

(c) The corrective action plan must be reviewed and formally approved by the oversight agency.

(d) The rail transit agency must provide the oversight agency:

(1) Verification that the corrective action(s) has been implemented as detailed in the corrective action plan or that a proposed alternate action(s) has been implemented subject to oversight agency review and approval; and

(2) Periodic reports as requested by the oversight agency detailing the status of each corrective action(s) not completely implemented as detailed in the corrective action plan.

(e) The oversight agency must monitor and track the implementation of each approved corrective action plan.

§ 659.33 Oversight agency reporting to the Federal Transit Administration.

(a) Initial submission: in States with rail fixed guideway systems in

passenger operations as of the publication date of this rule, the designated oversight agency must make its initial submission to FTA by [EFFECTIVE DATE OF FINAL RULE]. In States with rail fixed guideway systems initiating passenger operations after the publication date of this rule, the designated oversight agency must make its initial submission within the time frame specified by the State in its designation submission.

(b) The initial submission must include the following:

(1) Oversight agency program standard and referenced procedures; and

(2) Certification that the system safety program plan and the system security plan have been developed, reviewed, and approved.

(c) Annual Submission: before March 15 of each year, the oversight agency must submit the following to FTA:

(1) A publicly available annual report summarizing its oversight activities for the preceding 12 months, including a description of the causal factors of investigated accidents and status of corrective actions, updates and modifications to rail transit agency program documentation;

(2) A report documenting findings from 3-year safety review activities, if a 3-year safety review has been completed since the last annual report was submitted; and

(3) Program standard and supporting procedures that have been changed during the preceding year.

(d) Periodic submission—FTA retains the authority to periodically request program information.

(e) Electronic reporting—All submissions to FTA required in this part must be made electronically using an electronic reporting system specified by FTA.

§ 659.35 Conflict of interest.

The oversight agency must prohibit a party or entity from providing services to both the oversight agency and rail transit agency when there exists a conflict of interest.

§ 659.37 Certification of compliance.

(a) Annually, the oversight agency must certify to the FTA that it has complied with the requirements of this part.

(b) Each certification shall be made electronically to FTA using an electronic reporting system specified by FTA.

(c) The oversight agency must maintain a signed copy of each annual certification to FTA, subject to audit by FTA.

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Jennifer L. Dorn,
Administrator.

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