December 20, 2010

VIA ELECTRONIC MAIL (Peter.Rogoff@dot.gov)
Peter Rogoff, Administrator
Federal Transit Administration
1200 New Jersey Ave., S.E.
Washington, DC 20590

Re: FTA Title VI and Environmental Justice Circular Revisions

Dear Mr. Rogoff:

Under your leadership, the Federal Transit Administration has become recognized as a leader in ensuring that civil rights and Environmental Justice protections are taken seriously by regional and local transportation agencies across the country. FTA's existing civil rights and EJ guidance, found in Circular 4702.1A, as carried out by your staff under your leadership, has proven a successful tool for ensuring compliance by federal fund recipients.

In particular, FTA's existing guidance has demonstrated that conducting an analysis of potential discriminatory impacts – an "equity analysis" – at the early stages of a planning or funding decision is necessary, and can be an effective tool for identifying and addressing potential discriminatory impacts, as the Executive Order requires.

In the attached white paper, we suggest several respects in which FTA's Circular can be improved so that it is even more effective in ensuring that Title VI of the Civil Rights Act of 1964, U.S. DOT's Title VI regulations, and the EJ Executive Order are fully and meaningfully implemented by FTA fund recipients. These proposals include:

- Requiring a public "scoping" of the issues and impacts to be analyzed, at the outset of an equity analysis;
- Clarifying the basic methodology for conducting an analysis of disproportionate impacts;
- Ensuring that fare equity analyses account for the greater adverse impacts on socially-vulnerable transit riders; and
- Identifying and addressing the potential impacts of system expansion on riders dependent on existing service, whether those

impacts fall on riders of the same transit system or on riders of another transit provider under the same MPO.

We will follow up with specific language that we propose in order to meet the objectives described in the attached paper. In the meantime, we would welcome the opportunity to discuss our proposals with you or your staff.

Thank you for considering these recommendations.

Very truly yours,

Marc Brenman

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Civil Rights and Environmental Justice in Public Transportation: Proposed FTA Actions to Build on its Strong Record of Enforcement

Crucial issues of equality for minority and low-income communities arise in the provision of transit services and in the spending of hundreds of billions of transportation dollars across the United States. Both local transit providers and the regional agencies known as "metropolitan planning organizations" or MPOs are required to ensure fairness and equality in their planning, their provision of services and their spending decisions.

These protections, embedded in Title VI of the Civil Rights Act of 1964 and in the Presidential Executive Order on Environmental Justice, are only as strong as the compliance and enforcement measures that the federal government puts in place. Within the Obama Administration, the Federal Transit Administration (FTA) has become recognized as a leader in overseeing the civil rights and Environmental Justice compliance of regional and local transportation agencies.

FTA's existing civil rights and EJ guidance for compliance by federal fund recipients, found in Circular 4702.1A, not only prohibits discrimination based on race, color or national origin by these recipients, but also prohibits actions that deny minority or low-income populations a fair share of the benefits of transportation spending. To help ensure that benefits will be fairly shared, FTA's Circular requires an up-front "equity analysis" to identify potential adverse impacts on minority and low-income populations. If adverse impacts fall disproportionately on minority or low-income populations, those impacts must be avoided or mitigated.

An important strength of FTA's current Circular is its integration of civil rights requirements with those of the Executive Order on Environmental Justice. Integrating these overlapping requirements streamlines compliance for recipients. More importantly, it serves two major substantive goals. First, it helps protect low-income populations from actions that deny them a fair share of the benefits of transportation funding. Second, as required by the Executive Order, it supplements civil rights protections for minority populations under Title VI with the added protection that an equity analysis can bring by identifying and addressing the risk of unfairness before it occurs.

In these respects, FTA's civil rights and EJ guidance is strong. Rather than resting on its laurels, however, FTA appears to be considering how it can achieve its goals of fairness

and equality even more effectively. We hope that this paper will help the agency to build on its strong record. In that spirit, we offer the recommendations that follow.

Background

Transportation has long been at the heart of civil rights struggles in the United States. Fifty years before Rosa Parks boarded a bus in Montgomery and triggered the modern civil rights movement, Homer Plessy had brought his unsuccessful challenge to "separate but equal" rail accommodations. Today, however, civil rights concerns in transportation have shifted from where people of color can sit on public transit to whether their communities are receiving a fair share of the benefits and burdens of hundreds of billions of dollars of federal, state and local transportation investment.

Transportation connects communities to opportunity across metropolitan regions. If low-income communities and communities of color share fairly in the benefits of regional transportation spending, they can begin to overcome the cumulative impacts of years of exclusion from jobs, education, health care and other crucial opportunities. The lifeblood of these communities is local transit service. Across our country, however, local service has suffered repeated cuts even as other transportation mega-projects, that often do not meet the needs of these communities, are built and expanded. The fundamental civil rights issue in transportation today is whether costly expansion projects in our regions are coming at the expense of basic transit service in low-income minority communities.

Federal civil rights law provides strong protections to minority populations. Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating in any of their programs or activities on the basis of race, color or national origin. Prohibited discrimination under Title VI includes a denial or delay in receipt of the benefits of public investment.

In addition, Executive Order 12898 on Environmental Justice provides important protections to both minority and low-income populations. The Executive Order requires each agency to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations." As implemented by the Secretary of Transportation, this obligation extends to recipients of U.S. DOT funding.[1]

Taken together, these are strong protections. In particular, the requirement to "identify and address" inequities – to conduct an "equity analysis" and then take the steps

[1] U.S. DOT's Order To Address Environmental Justice in Minority Populations and Low-Income Populations (hereafter, "the U.S. DOT EJ Order") defines the "Programs, policies, and/or activities" to which the Executive Order requirements extend to include "permits, licenses, and financial assistance provided by DOT." 62 Fed. Reg. 18377, 18381 (Apr. 15, 1997), Appendix 1 (h). In other words, DOT must ensure that recipients of its financial assistance comply with the Executive Order.

necessary to avoid or mitigate identified inequities – provides a strong tool for ensuring Title VI and EJ compliance. The purpose of the equity analysis is to determine whether low-income and minority populations are receiving a fair share of the benefits and the burdens of transportation projects and programs. If MPOs and local transit agencies consistently carried out this requirement in a meaningful, open and transparent way, substantive fairness in the outcomes for under-served communities would be far more likely. Unfortunately, the "equity analysis" requirement is often treated as little more than a formality, or is not conducted at all.

FTA's Title VI and EJ Circular provides guidance to transit operators and to MPOs on complying with their obligations under Title VI and the Executive Order. Among other things, the Circular provides that transit providers and MPOs must conduct an "equity analysis" of specified actions and decisions, and must then take appropriate steps to avoid or mitigate the disparities uncovered in that analysis. Specifically, the Circular requires:

- **Transit providers** to "evaluate significant system-wide service and fare changes and proposed improvements at the planning and programming stages to determine whether those changes have a discriminatory impact";[2] and
- **MPOs** to "have an analytic basis in place for certifying their compliance with Title VI" such as one that "identifies the benefits and burdens of metropolitan transportation system investments for different socioeconomic groups," and to then "identif[y] imbalances and respon[d] to the analyses produced."[3]

This guidance is appropriate, but falls short in a number of important respects of the full protections promised by Title VI and the Executive Order. We propose that FTA update the Circular to address these issues.

Summary of Proposed Changes and Rationale

Loopholes in the current Circular are being exploited by some MPOs and transit providers, resulting in the unfair treatment of minority and low-income communities. To address these problems, we propose the following solutions:

1. "Scoping" of Equity Analyses

Problem: An equity analysis is only useful if it measures the issues and impacts that actually affect protected populations. Unfortunately, the analyses designed by MPOs and transit providers often fail to measure those impacts, or purport to measure them using inapt methodologies and metrics. Experience has shown that when the methodology and metrics are not tailored to address the specific issues and impacts that protected populations have raised, <u>any</u> action can be made to appear equitable. Put differently, an

[2] FTA Circular 4702.1A, "TITLE VI AND TITLE VI-DEPENDENT GUIDELINES FOR FEDERAL TRANSIT ADMINISTRATION RECIPIENTS" (2007), ch. V, sec. 4.

[3] FTA Circular 4702.1A, ch. VII, sec. 1.

action that appears equitable in one aspect may prove inequitable in other aspects; if only the former is measured, a complete equity analysis has not been conducted. Therefore, it is critical that the public participation process required by federal law extend to the scope of the issues and impacts to be addressed by the equity analysis so that appropriate metrics and methodologies can be developed to measure each impact of concern to the protected population.

When this "scoping" does not occur, equity analyses can become mere paper exercises that are incapable of identifying significant equity impacts. In the San Francisco Bay Area region, for instance, low-income and minority communities for many years have been asking their MPO, the Metropolitan Transportation Commission, to protect them against local bus service cuts that they believe are linked to prioritizing rail expansion. In 2001, for instance, a large group of African American ministers in Richmond, California, urged MTC to ensure that rail expansion did not come at the expense of critical bus service to minority and low-income communities. Bus systems in the region have minority riderships as high as 80%, compared to less than 55% for rail systems.

MTC has never conducted an equity analysis of this trade off of existing bus service against rail expansion. Instead, in equity analyses of its long-range transportation plan dating back to 1998, it has predicted future changes in "accessibility" as the primary or sole indicator of equity. The analysis, however, did not define "accessibility" in relation to the bus service that protected communities actually use. Instead, MTC used its travel demand model to forecast how many jobs will be within a 30 minute transit ride of low-income and minority neighborhoods, as compared to other neighborhoods – regardless of whether the "jobs accessed" could be reached by the mode of transit (local bus service) that the community at issue actually used and could afford.

In a review of MTC's equity analysis methodology in 2008, national transportation equity expert Professor Thomas W. Sanchez concluded that "[b]y its very design, [it] is incapable of showing inequities as they affect bus riders compared to rail riders." In particular, he found that it "[i]s designed in such a way that it is likely to conclude that 'accessibility' for minority and low-income communities improves based on expanded rail service, even if bus service does not expand, or is cut."

By failing to measure the impacts that actually mattered to the community, namely the impacts on bus service, MTC's equity analysis concluded that its long-range plan was equitable.

Solution: Require each MPO and transit provider to build into its public participation an up-front "scoping" process to identify the issues and impacts of concern to the protected populations, and then to design the methodology of its equity analysis in a manner specifically calculated to focus on the identified issues and impacts.

Scoping is an important concept in environmental law. Under the National Environmental Policy Act (NEPA), the preparation of an Environmental Impact Statement (EIS) begins with "an early and open process for determining the scope of

issues to be addressed and for identifying the significant issues related to a proposed action."[4] Based on the nature of the significant issues that are identified in the "scoping" process, the methodology and metrics for the analyses are then determined.

"Scoping" is equally important as MPOs and transit providers determine the potential equity impacts to be analyzed and how to analyze them. In an equity scoping process, the MPO or transit agency would hear from the affected community members any serious concerns they have about inequity and discrimination, including what benefits or burdens they believe might be shared unfairly. The MPO or transit provider would then be required to design a methodology and metrics specifically tailored to determine the existence and significance of each serious equity impact raised in that public process. In short, these agencies would not be permitted to treat an equity analysis as a mere ritual, but instead to make a good faith effort to investigate the concerns that are actually being raised in an open public process by members of protected populations.

2. Equity Analysis Methodology

Problem: The steps in analyzing a "disparate impact" are simple and clear from years of legal precedent,[5] yet many MPOs and transit providers do not follow those steps and therefore make improper comparisons in their equity analyses. Specifically, they fail to make the comparison of the impact of an action on a "protected population" with the impact of that same action on other populations to determine if that impact is disproportionate. Title VI protects groups on the basis of race, color or national origin; the Executive Order protects groups on the basis of their minority or low-income status.[6]

For instance, Bay Area Rapid Transit (BART) recently conducted an equity analysis of a system-wide fare increase. The most severe impact of that fare increase was a 16.67% increase in the minimum fare for short trips compared to the 6.1% fare increase for longer trips. The appropriate question for analysis was whether the adverse impacts of this greater increase disproportionately fell upon low-income riders. BART's analysis acknowledged that "low-income riders take 20 percent of the $1.75 [minimum fare] trips and 11 percent of all other trips," yet failed to compare the rate at which low-income riders paid the higher fare increase with the comparable rate for non-low-income riders. In other words, instead of comparing the impact on low-income riders with the impact on other riders, BART compared two subsets of low-income riders, and improperly concluded that no inequities were present.

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[4] 40 C.F.R. § 1501.7.

[5] See footnote 7, below.

[6] See U.S. DOT EJ Order, 62 Fed. Reg. 18377, 18380 (defining minority and low-income populations).

Solution: Clarify the legal framework for a proper analysis of disproportionate impacts as the basis for an equity analysis.[7] For instance, clarify that the analysis must: (1) identify the relevant potential adverse impacts (as determined in the public "scoping" process described above); (2) identify the relevant protected and non-protected populations subject to the potential impact, using robust ridership demographic data; and (3) compare the impacts of the action on the protected population with the impacts on the non-protected population. If this analysis indicates that a potentially significant adverse impact would fall disproportionately on a protected population, that impact must be avoided, or mitigated by means of a less-discriminatory alternative.

Problem: In addition, MPOs and transit providers often utilize improper standards in determining the significance of racial disparities and disproportionate impacts. For instance, MTC has contended that service cuts falling on riders of AC Transit, an 80% minority bus system, are not racially disparate compared to service increases on BART, with only 53% minorities, because BART, due to its higher ridership, carries more <u>total</u> minorities than AC Transit. The appropriate comparison for disparate impact purposes, however, is a comparison of proportions, or "rates," not of absolute numbers. That, indeed, is the whole point of an analysis of "disproportionate impact."

Solution: Solution: The "four-fifths rule" of the Equal Employment Opportunity Commission (EEOC) establishes that "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact." In other words, "our-fifths" establishes a benchmark for when differences are legally cognizable. This suggests two things. As an initial matter, if the percentage of minority riders on one project (or transit system) is less than 4/5 (or 80 percent) the percentage of minority riders on another project (or transit system), the demographics of the two projects (or transit operators) are racially disproportionate. (For instance, if the minority ridership of one operator or line is 80%, and of another operator or line is 64%, then the racial disparity is significant at a four-fifths level, because 0.64 divided by 0.80 = 80 percent.)

Relatedly, if projects benefitting a minority or low-income population are approved or funded at a rate that is less than four-fifths the rate at which projects benefitting another population are approved, the disparity in project funding and approval is also significant.

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[7] A prima facie case of disparate impact requires demonstration (1) that a facially neutral practice (2) causes an adverse impact (3) suffered disproportionately by members of a protected class. *See Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002); *Gamble v. City of Escondido*, 104 F.3d 300, 306 (9th Cir. 1997). Where a prima facie case of disparate impact has been established, the burden shifts to the recipient to establish a "business necessity" for the challenged practice. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *see also Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1986) ("educational necessity"). Even where a necessity justifies the action, a less discriminatory alternative, such as the action with mitigations, must be adopted if feasible.

In sum, a four-fifths standard, or some other appropriate threshold, should be specified in the guidance as the basis for determining both whether the populations that are compared are racially disproportionate, and whether the impact falls disproportionately on a protected population.

3. Accounting for Fare Impacts on Socially Vulnerable Riders

Problem: With respect to fare increases, transit providers have sometimes been allowed to conduct an equity analysis that does not take into account the greater social vulnerability of low-income riders of color.[8] As a result, the methodology used by these providers is incapable of ever showing any adverse equity impacts of a flat across-the-board fare increase.

For example, BART's recently-conducted equity analysis of a system-wide fare increase concludes that its 2009 minimum fare increases are not predominantly borne by low-income riders. However, its methodology would never result in a showing of discriminatory impact regardless of whether the system-wide increase was by 5.4%, 6.1% or 100%, as long as the increase occurs across the board.

In a similar fare study, the Los Angeles County Metropolitan Transportation Authority (LACMTA) also concluded that increased fares would not disproportionately burden minority or low-income riders. Its analysis was based on the fact that the fare increase is spread evenly. LACMTA, however, failed to analyze the effect of the rate increase relative to the proportion of the riders' income for mobility. A fare increase that is not burdensome to a more affluent rider may result in the exclusion of a low-income rider from the ability to use the service. Yet LACMTA's methodology is incapable of showing any disproportionate impact on the 73% of its riders with low household incomes.[9]

An evaluative methodology that, by design, will fail to capture the severe adverse impacts of flat fare increases on vulnerable populations allows transit providers to further entrench the very social vulnerabilities that they should be mitigating. As a screening tool, any equity analysis of fare increases should enable the FTA and operators to "identify areas . . . where vulnerable populations live and where environmental burdens

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[8] *See* Susan L. Cutter et al., *Social Vulnerability to Environmental Hazards*, 84 Social Science Quarterly 242, 251, 253 (June 2003) (The lack of wealth is a primary contributor to social vulnerability as the fewer available resources make the community less resilient to hazardous impacts; similarly, race contributes to social vulnerability through the lack of access to resources, cultural differences and the social, economic and political marginalization that is often associated with racial disparities.)

[9] Los Angeles County Metropolitan Transportation Authority, *Title VI Assessment of Proposed and Adopted Fare Changes* 34-35 (May/June 2007).

are concentrated"[10] in order to identify and alleviate the disproportionate adverse impacts that fall on these socially-vulnerable populations.

Solution: Require fare equity analyses to take into account the fact that a fare increase of a given amount may have far greater adverse impacts on socially-vulnerable populations than on others, and specify steps that would be required to avoid or mitigate those impacts. An effective methodology to evaluate the environmental justice impacts of any fare increase must accurately identify potential areas of concern, with assurance that communities of color and low income communities potentially adversely affected will be identified and protected.[11]

4. Reasonable Major Service Change Thresholds

Problem: The Circular permits transit providers to set their own thresholds for "major service changes" that trigger the need for an equity analysis.[12] The Circular goes on to state that "[o]ften, this is defined as a numerical standard, such as a change that affects 25 percent of service hours of a route."

While the Circular refers to 25% of a "route," some transit operators set this very high threshold for system-wide service cuts. That means that very significant system-wide reductions of, say, 5%, which include the elimination of entire routes, are not analyzed for their equity impacts.

Research suggests that service cuts far below 25% can have significant equity impacts. A 1998 study conducted by the National Academy of Sciences found that AC Transit's 12% service reduction in Oakland California, resulted in $48.1 million in economic losses to its low-income and minority ridership, and cut trips to employment by 35%, trips to school by 27%, trips to healthcare by 56%, and recreational trips by 67%.[13]

Operators routinely set major service change thresholds far above 12%. For instance, BART has recently adopted a Major Service Change Policy, defining major service changes as those that add or subtract more than 25% in line length (in revenue miles), service miles, or service hours either at one time, or cumulatively over a three year period. However, BART's policy also sets an unreasonably high 20% threshold for aggregate annual system-wide cuts. Data on BART service levels from the National Transit

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[10] National Environmental Justice Advisory Council, *Nationally Consistent Environmental Screening Approaches*, A Report of Advice and Recommendations of the National Environmental Justice Advisory Council 5 (May 2010).

[11] *Nationally Consistent Environmental Screening Approaches* at 2.

[12] FTA Circular 4702.1A, ch. V, sec. 4.

[13] Transit Cooperative Research Program, National Research Council, *TCRP Web Document 7: Using Public Transportation to Reduce the Economic, Social and Human Costs of Personal Immobility.* (1998) p 132. Accessed at: http://www.nap.edu/openbook.php?record_id=9438&page=131

Database[14] indicate that a service change of this magnitude has never occured during the entire period for which data is available (1991 to 2009).

To give another example, Los Angeles County MTA's "Title VI Review Process for Major Service Changes" defines "Major service adjustments" as "generally those that constitute an aggregate change of 25 percent or more in route miles or hours when compared on a daily basis. This includes system - wide route restructuring, or adding and deleting service." Yet Los Angeles has never seen anything close to a 25% aggregate service change in a single year. In FY 2010-11, LACMTA saw its largest bus service reduction in two decades, amounting to 5% system-wide. Even the massive increase in bus service ordered by the federal courts and implemented over a decade totaled less than 25%.

Likewise in Cleveland, unprecedented budget deficits have forced Greater Cleveland Regional Transit Authority to reduce service repeatedly in the last decade. But between 2001 and 2008, cumulative service reductions amounted to 17% and 2009's reductions – one of the largest single service reductions in recent memory – totaled 6%. None of these cuts pass the 25% threshold. The City of Detroit has experienced service cuts every year since 2004, yet the largest of these service cuts (2005) was a 22% total reduction and did not pass the 25% threshold that would trigger an equity analysis.

Solution: Require an equity analysis for major service reductions at a threshold that is reasonable in relation to the impacts on disadvantaged and transit-dependent riders and in relation to historic service change levels. Require a comprehensive analysis of cumulative system-wide service reductions, including reductions that may occur in relatively small increments, but that are significant over the course of a longer period of time. In particular, require an analysis of equity in service cuts by a single transit provider that runs multiple modes of transit (e.g., bus and light rail).

5. Adverse Impacts of Expansion on Existing System Preservation

Problem: In many regions, costly transportation expansion projects primarily benefit populations that are neither minority nor low-income; worse still, these mega-projects may have the effect of diverting funds away from preserving the transit service on which low-income riders of color depend. This may happen where one transit provider builds the new project, such as a rail extension, and another runs the local bus service that is adversely impacted; it may also occur where the same provider runs both bus and rail service (see Problem 4, above).

Federal law requires MPOs to "emphasize the preservation of the existing transportation system."[15] Furthermore, FTA's Financial Capacity Policy circular[16] stipulates that

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[14] National Transit Database, *Historical Data Files: Service Data and Operating Expenses Time-Series by System.* (2009) Accessed at: http://www.ntdprogram.gov/ntdprogram/data.htm.

[15] 23 U.S.C. § 134 (h) (1) (H).

grantees of federal Urbanized Area Formula and Transit Capital Program funds "make capital investment plans on the basis of current and projected capability to maintain and operate current assets, and to operate and maintain the new assets on the same basis, providing at least the same level of service, for at least one replacement cycle of such assets or 20 years, as appropriate."[17] This financial capacity must be demonstrated when financial commitments are made (as in TIP approval and when selecting grants for Full Funding Grant Agreement) self-certified during grant application stages, and evaluated during triennial reviews.

A U.S. DOT regulation, moreover, requires MPOs to "certify at least every four years that the metropolitan transportation planning process is being carried out in accordance with … Title VI."[18]

These requirements not only make sound fiscal sense, they also raise important equity issues. In Seattle, Puget Sound Transit recently opened service on a light rail system from the downtown to the airport; this service expansion was followed by significant service cuts by King County Metro to parallel but non-duplicative local bus service along the light rail corridor.

Similarly, in the Bay Area, BART opened service to SFO airport in 2003. SamTrans, the operator of local and regional bus service in San Mateo County, with a ridership that is 70% minority, was required to fund the operations of the new BART extension. As a result, it cut much of its local bus service. A similar scenario is foreseeable should BART expand to San Jose, where Santa Clara Valley Transit Authority (VTA) will be required to cut local bus service (which also carries a 70% minority ridership) to fund the operation of BART in Santa Clara County.

In Los Angeles, the bus system operated by LACMTA has suffered as a result of expansion of both the MTA's own Metro Rail system and the expansion of the rail system operated by a sister agency, Metrolink. In the 1990's, the diversion of regional transit funds to pay for massive expansion of rail service on both Metro Rail and Metrolink was directly responsible for underfunding of the bus system, resulting in severely overcrowded buses and inadequate service. It was also responsible for a proposal (in 1994) to raise the base fare and eliminate the monthly discount pass for bus riders; the result of that proposal was a federal class action Title VI lawsuit challenging a pattern of discrimination, with minority and low income populations bearing substantial burdens and wealthier, majority white communities served by rail expansion reaping the benefits. In the last three years, LACMTA has invested billions of dollars to build or expand lines on its Metro Rail system at the same time that it has raised fares twice and slashed bus service – including the largest single reduction in bus service in two decades in FY2010-2011. Metro Bus riders are 92% people of color, and 70% have an income

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16 FTA Circular 7008.1A (rev. 2002).

17 FTA Circular 7008.1A (rev. 2002).

18 23 C.F.R. § 450.334 (a) (3).

lower than $26,000. Expansions of rail service for riders who are far less likely to be minority and low-income, whether by MTA or by Metrolink, should be analyzed for their impacts on MTA bus riders.

Solution: Require MPO's, in connection with the development and adoption of their long-range plan and/or their federal Transportation Improvement Program (TIP), to conduct an equity analysis that ensures, among other things, that significant capital expansion to benefit riders of one transit provider will not come at the expense of service cuts or other adverse impacts on low-income or minority riders of other transit providers in the region. Regional planning is the job for which Congress created MPOs and insisted that they ensure Title VI compliance in the metropolitan planning process. Treating sister transit providers within a region as if they existed in their own silos is incompatible with both the role of the MPO and its obligation to ensure regional Title VI compliance.

Also require (as discussed in Solution No. 4, above) an appropriate equity analysis to ensure that a transit provider's expansion does not come at the expense of its basic transit service for low-income and minority populations.

6. Ensuring Subrecipient Compliance

Problem: The Circular requires recipients of federal funds to monitor the Title VI compliance of their subrecipients, but defines "subrecipient" narrowly as an entity that receives federal funds as a "pass through" from a recipient.[19] Some have construed this narrow definition to exclude from its coverage the "designated recipient" of Urbanized Formula Funds under Section 5307.

Such a narrow construction, however, would be inconsistent with federal law. U.S. DOT's Title VI regulations define a "recipient" broadly as "any public or private agency . . . to whom Federal financial assistance is extended, directly or through another recipient, including any successor, assignee, or transferee thereof. . . ."[20] "Primary recipient" is defined as "any recipient that is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program."[21] Both definitions plainly apply to the "designated recipient" of FTA formula funds. By statute, the designated recipient is entitled to "receive and apportion" those funds.[22]

At least one designated recipient of FTA formula funds has recently asserted that, by entering into a "Supplemental Agreement" with FTA and the direct recipient of the funds, it delegates away its obligation to ensure Title VI compliance by that direct recipient.

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[19] FTA Circular 4702.1A, ch. II, sec. 6 (aa) ("Subrecipient means any entity that receives FTA financial assistance as a pass-through from another entity.).

[20] 49 C.F.R. § 21.23(f).

[21] 49 C.F.R. § 21.23 (d).

[22] 49 U.S.C. § 5307(a)(2).

Title VI obligations, however, are not legally delegable. If State DOTs, MPOs and other designated recipients are not acknowledging and carrying out their duty to ensure Title VI compliance in the use of these funds, transit providers and other regional partners will be less likely to comply, and FTA will be burdened with an unmanageable compliance role nationwide.

Solution: Bring the Circular in line with DOT Title VI regulations by clarifying that "subrecipients" include the "direct recipient" of FTA formula funds, and that the "designated recipients" of those funds are obligated to monitor their "direct recipients" to ensure their Title VI compliance.