



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Transit Administration**

#### **49 CFR Part 639**

**[Docket No. FTA–2018–0006]**

**RIN 2132-AB34**

#### **Capital Leases**

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

**ACTION:** Final rule.

**SUMMARY:** This rulemaking rescinds the regulation implementing the requirement for recipients to conduct a cost-effectiveness analysis before leasing public transportation equipment or facilities with Federal transit funds. The requirement to conduct a cost-effectiveness analysis was rescinded by statute in 2015.

**DATES:** This final rule is effective on [INSERT DATE OF PUBLICATION IN FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Mark Montgomery, Office of Chief Counsel, (202) 366-1017 or [mark.montgomery@dot.gov](mailto:mark.montgomery@dot.gov). Office hours are from 9 a.m. to 5:30 p.m., ET, Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

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<http://www.gpo.gov>.

## **Background**

49 CFR part 639 limits capital leasing arrangements for use in public transportation to those that are more cost-effective than purchase or construction. This part implements section 3003 of the Transportation Equity Act for the 21st Century (Pub. L. 105–178) (TEA-21), which amended section 5302 of title 49, United States Code (Section 5302), to allow a recipient to use capital funds to finance the leasing of facilities and equipment on the condition that the leasing arrangements are more cost-effective than purchase or construction. This section also required the Secretary to promulgate regulations to implement the cost-effectiveness limitation. Recently, section 3002 of the Fixing America's Surface Transportation Act (Pub. L. 114-357) (FAST Act) amended the definition of “capital project” under section 5302 to remove this requirement and the mandate to promulgate regulations to carry out this requirement. For this reason, FTA is issuing this final rule to rescind 49 CFR part 639.

FTA will continue to evaluate its regulations and guidance to promote improvements to the capital leasing process in the least burdensome manner.

## **Discussion of the Changes**

Under the amended statutory definition of “capital project,” capital leases are no longer subject to the requirement or regulation limiting leasing arrangements to those that are more cost-effective than purchase or construction. Accordingly, this rulemaking rescinds 49 CFR part 639, which outlines the procedures for conducting the cost-effectiveness analysis. This rule does not affect the general procurement standards in 2

CFR part 200, nor does it alter the award management requirements in FTA's Circular 5010.1E.

Under the Administrative Procedure Act (APA) (5 U.S.C. 553(b)), an agency may waive the normal notice and comment procedure if it finds, for good cause, that it is impracticable, unnecessary, or contrary to the public interest. Additionally, 5 U.S.C. 553(d) provides that an agency may waive the 30-day delayed effective date upon finding of good cause.

Section 3003 of TEA-21 amended section 5302 to allow a recipient to use capital funds to finance the leasing of facilities and equipment, "subject to regulations that the Secretary prescribes limiting the leasing arrangements to those that are more cost-effective than purchase or construction." By removing this language, section 3002 of the FAST Act eliminated the requirement limiting capital leases to those that are more cost-effective than purchase or construction. FTA finds good cause that notice and comment for this rule is unnecessary due to the nature of the revisions (i.e., the rule simply carries out the statutory language found in the FAST Act). The statutory language does not require regulatory interpretation to carry out its intent, and comments cannot alter the regulation given that the statute abrogated its purpose. Further, the delayed effective date is unnecessary because the removal of the cost-effectiveness analysis requirement was already made effective by the FAST Act. Accordingly, FTA finds good cause under 5 U.S.C. 553(b)(3)(B) and (d)(3) to waive notice and opportunity for comment and the delayed effective date.

## **RULEMAKING ANALYSES AND NOTICES**

### **Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and Department of Transportation (DOT) Regulatory Policies and Procedures**

FTA has determined that this rulemaking is not a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of DOT regulatory policies and procedures. This action complies with Executive Orders 12866, 13563 and 13771 to improve regulation.

FTA classifies this rule as a deregulatory action under Executive Order 13771, because it removes the mandatory cost-effectiveness analysis. FTA finds that the cost savings are minor. On average, there are twelve leases per year subject to the requirement, and the analysis takes approximately a week for transit agencies to compile and prepare and approximately eight hours for FTA to review and approve the certification. Thus, removing these requirements would provide a maximum average annual cost savings of \$32,373 and impose no additional costs on recipients.

#### **Regulatory Flexibility Act**

Because FTA finds good cause under 5 U.S.C. 553(b)(3)(B) to waive notice and opportunity for comment for this rule, the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601- 612) do not apply. FTA evaluated the effects of this action on small entities and determined the action would not have a significant economic impact on a substantial number of small entities. FTA hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act of 1995**

FTA has determined that this rule does 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 rule does not include a Federal mandate that may result in expenditures of \$155.1 million or more in any 1 year (when adjusted for inflation) in 2012 dollars for either State, local, and tribal governments in the aggregate, or by the private sector. Additionally, the definition of "Federal mandate" in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. The Federal Transit Act permits this type of flexibility.

### **Executive Order 13132 (Federalism Assessment)**

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 dated August 4, 1999, and FTA determined this action will not have a substantial direct effect or sufficient federalism implications on the States. FTA also determined this action will not preempt any State law or regulation or affect the States' ability to discharge traditional State governmental functions.

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

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

### **Paperwork Reduction Act**

Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. FTA has analyzed this rule under the Paperwork Reduction Act and believes that it does not impose additional information collection requirements for the purposes of the Act above and beyond existing information collection clearances from OMB.

### **National Environmental Policy Act**

Federal agencies are required to adopt implementing procedures for the National Environmental Policy Act (NEPA) that establish specific criteria for, and identification of, three classes of actions: (1) those that normally require preparation of an Environmental Impact Statement, (2) those that normally require preparation of an Environmental Assessment, and (3) those that are categorically excluded from further NEPA review (40 CFR 1507.3(b)). This rule qualifies for categorical exclusions under 23 CFR 771.118(c)(4) (planning and administrative activities that do not involve or lead directly to construction). FTA has evaluated whether the rule will involve unusual or extraordinary circumstances and has determined that it will not.

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

FTA has analyzed this rule under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights. FTA does not believe

this rule effects a taking of private property or otherwise has taking implications under Executive Order 12630.

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

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

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

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

**Executive Order 13175 (Tribal Consultation)**

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

**Executive Order 13211 (Energy Effects)**

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

## **Executive Order 12898 (Environmental Justice)**

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) and DOT Order 5610.2(a) (77 FR 27534, May 10, 2012) (available online at [http://www.fhwa.dot.gov/environment/environmental\\_justice/ej\\_at\\_dot/order\\_56102a/index.cf](http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/order_56102a/index.cf)) require DOT agencies to achieve Environmental Justice (EJ) as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority and low-income populations. All DOT agencies must address compliance with Executive Order 12898 and the DOT Order in all rulemaking activities. On August 15, 2012, FTA's Circular 4703.1 became effective, which contains guidance for recipients of FTA financial assistance to incorporate EJ principles into plans, projects, and activities (available online at [http://www.fta.dot.gov/documents/FTA\\_EJ\\_Circular\\_7.14-12\\_FINAL.pdf](http://www.fta.dot.gov/documents/FTA_EJ_Circular_7.14-12_FINAL.pdf)).

FTA has evaluated this action under the Executive Order, the DOT Order, and the FTA Circular. The rule rescinds the requirement of conducting cost-effectiveness analysis for capital leases, and FTA has determined that this action will not cause disproportionately high and adverse human health and environmental effects on minority or low-income populations.

## **Regulation Identifier Number**

A Regulation Identifier Number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN



number contained in the heading of this document can be used to cross-reference this rule with the Unified Agenda.

**List of Subjects in 49 CFR Part 639**

Grant programs—transportation, Mass transportation.

Issued in Washington, DC, under authority delegated in 49 CFR 1.90:

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K. Jane Williams,  
Acting Administrator.

**Title 49—Transportation**

**PART 639—[Removed and Reserved]**

In consideration of the foregoing, and under the authority of 49 U.S.C. 5302 and Public Law 114-357, amend 49 CFR chapter VI by removing and reserving part 639, consisting of §§ 639.1 through 639.33.

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