December 2, 2011

SUBMITTED TO ELECTRONIC DOCKET
Administrator Peter Rogoff
U.S. Department of Transportation
1200 New Jersey Avenue, SE
West Building, Ground Floor
Room W12-140
Washington, DC 20590-0001

Re: Comments on Docket Nos. FTA-2011-0054 and FTA-2011-0055

Dear Administrator Rogoff:

The undersigned are national, statewide, and local organizations, and scholars who specialize in social justice issues in transportation. All of us are keenly aware of the importance of civil rights and Environmental Justice in transportation. We appreciate the extensive work that the Federal Transit Administration has undertaken in its effort to create proposed new Circulars on Title VI and Environmental Justice (EJ), and thank you for the opportunity to comment on the proposed guidance.[1]

Our organizations have a unique vantage point on the impacts of unjust transportation plans, policies, and practices on real families and communities. Our members and constituents include transit riders who are transit-dependent in metropolitan regions and rural areas across the United States, including students, late shift workers, people with disabilities, and seniors. They feel the effects of inequality in the planning and expenditure of state and metropolitan funding and in the uneven manner in which transit service is often expanded for some populations at the same time that it is cut for those who most depend on it. They shoulder the ill effects over the long term when metropolitan planning organizations (MPOs) and state departments of transportation, in the development of their long- and short-range plans, and transit providers in their planning and service deployment, fail to address, much less prioritize, the needs of low-income and minority populations or to demonstrate explicit consideration and response to their input. In addition, the adverse impacts they suffer are left unaddressed when FTA recipients fail adequately to monitor and enforce the Title VI and Environmental Justice compliance of their subrecipients.

As the proposed new EJ Circular notes, public transportation is critical for members of low-income populations and minority populations, "many of whom have no other reliable transportation to get them to jobs, health care, school, or childcare services." (EJ Circular, p. 2.) Ensuring that public transit providers, MPOs, and state departments of

[1] Because our comments address both the Title VI Circular and the EJ Circular, we are submitting them to both dockets. The detailed comments in Attachment A specify which Circular is affected by each specific comment.

transportation comply with the requirements of Title VI and the Executive Order on Environmental Justice is essential to ensuring fairness, and is also crucial to promoting economic vitality and environmental sustainability across our metropolitan regions. We hope our comments will assist FTA in strengthening the proposed Circulars by providing greater clarity to transit providers and other recipients of FTA financial assistance, as well as to transit riders themselves.

These proposed Circulars confirm FTA's recognized status as a leader among federal executive agencies in overseeing the civil rights and Environmental Justice compliance of regional and local transportation agencies. FTA's existing Title VI and EJ guidance to its 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 and burdens of transportation plans, projects, and services. To that end, FTA's current Circular requires an up-front "equity analysis" so that potential adverse impacts on minority and low-income populations can be identified and addressed. We support the continued use of this equity analysis, which — when applied thoroughly and consistently — provides a comprehensive, efficient framework to better ensure compliance with existing laws and obligations. This analysis helps channel resources equitably to all communities, and can also benefit providers by avoiding costly, uncoordinated attempts at complying with antidiscrimination mandates after projects are commenced.

We find much else to applaud in the proposed new Circulars. Consistent with U.S. DOT's Title VI regulations, they prohibit discriminatory effects, or "disparate impact," regardless of intent. They delineate a number of important disparate impact analyses that recipients must conduct at critical decision points to ensure against disparate impacts that might fall on both minority *and* low-income populations. And they generally require those analyses to be conducted *early in the development* of the project, plan or activity – well before NEPA would require an Environmental Impact Statement, and early enough to allow minority and low-income residents a meaningful voice in decision making. The requirements for active public engagement as part of this analysis will also help transit providers to identify and address potential violations of Title VI and the EJ Executive Order promptly and consistently.

The proposed Circulars attempt to distinguish the requirements of Title VI from the overlapping requirements of the EJ Executive Order. While Executive Order 12898 binds federal executive agencies, the DOT EJ Order makes it clear that DOT's obligations under the Executive Order extend to ensuring that projects, programs, policies and activities that "are undertaken or approved by DOT" are in compliance, including "permits, licenses, and financial assistance provided by DOT." Consistent with this, FTA's proposed EJ Circular notes that, "[i]n our grant agreements, we require you, as a recipient of FTA funds, to facilitate our compliance with Executive Order 12898 and DOT's implementing Order 5610.2…." (EJ Circular, p. 1.) At the same time, the proposed Circulars help to clarify that compliance with Title VI does not necessarily

guarantee compliance with the EJ Order, and vice versa. For example, a project that would have a disparate impact on a minority population may not simply be mitigated (an EJ requirement) if a less discriminatory alternative (a Title VI requirement) is available.

Additionally, the proposed Circulars ensure that passenger demographic surveys and other important data needed to identify and address disproportionate adverse impacts on protected populations will be gathered and utilized. And they assist recipients of FTA funding in better meeting their obligations under federal statutes and regulations, including requirements to meaningfully engage disadvantaged populations in decision making and to ensure and certify their compliance with Title VI.

In some details, too, the proposed Circulars are exemplary. For instance, the requirement to set and monitor objective service standards will assist transit providers in improving their service and doing so in a manner that benefits all rider populations fairly.

We especially appreciate FTA's efforts to model for the nation's transportation agencies some best practices in public participation. FTA's listening sessions successfully brought together community members and industry representatives to engage directly in discussions about their respective concerns and comments on the proposed Circulars. Community participants in some of these forums raised important issues (for instance, the need to include compliance mechanisms in the EJ Circular; the need to look at riders as EJ populations, rather than just at geographic neighborhoods; the need to consider the equity impacts of flat fare increases; and the importance of identifying cumulative impacts, such as incremental service cuts). We look forward to seeing revisions to the proposed Circulars that reflect these and other important community comments.

We believe that the attached comments will assist FTA in making changes that will bring more consistent and reliable protection to EJ populations. Our comments emphasize the need for FTA to:

- Explicitly and consistently acknowledge, in the definitions of minority and low-income populations, that low-income people and people of color experience adverse impacts as a group not only when they live in the same neighborhood, but also when they ride the same transit system, mode or route. (See Comment #3.)
- Set uniform standards for disproportionality, such as a benchmark that can be used in determining when disparities are significant, rather than requiring each recipient to establish its own. (See Comment #4.)
- Provide more specific guidance on how to "consider the needs" and concerns of low-income and minority populations, how to do so "at the earliest stages of planning," and how to incorporate those needs and concerns into the plan; and require a public "scoping" of potential impacts for study in equity analyses. (See Comment ##5, 7.)

- Require fare equity analyses to account for severe impacts (including incremental cumulative impacts) on socially-vulnerable, transit-dependent populations. (See Comment #15.)
- Ensure that transit providers do not treat users of different modes of transit differently without a valid justification. (See Comment ##13, 16.)
- Ensure that MPOs monitor Title VI and EJ compliance at all levels of the metropolitan transportation planning process, at both the project and the system level. (See Comment #10.)
- Promote cross-agency cooperation with HUD, and clarify that use of its funds may not result in housing discrimination, and must promote fair housing and integration, as requiring by Title VI and Title VII (the Fair Housing Act, 42 U.S.C. § 3608 (d)). (See Comment #11.)
- Provide EJ communities the opportunity to seek redress from FTA, where necessary, when violations of Title VI *and* EJ obligations occur. (See Comment ##18-20.)

Thank you for the opportunity to comment on these important guidance documents.

Sincerely,

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Enclosures: Attachment A: Summary of Comments
Attachment B: Detailed Comments
Attachment C: Illustrative legislative strikeout and underscore

Cc: Assistant Attorney General Tom Pérez

ATTACHMENT A: SUMMARY OF COMMENTS

FTA should explicitly acknowledge, in the definition of "minority population" and "low-income population," and elsewhere in the proposed Circulars, that riders of minority/low-income transit systems, modes and routes are protected by Title VI. The definition of "minority population" for Title VI purposes should be modified to read: "any readily identifiable group of minority persons who will be similarly affected by a proposed program, policy, or activity of an FTA recipient, whether they live in geographic proximity or not. The riders of a transit system, mode or route constitute a minority population under Title VI if they meet this definition." The definitions of "low-income population" and "minority transit route" should similarly be modified. (Comment 3)

FTA should provide in both Circulars consistent guidance on what it means to "consider" and "respond to" the needs of low-income and minority populations. At a minimum, this guidance should explain that (a) planning should begin with a needs assessment, and the generation of a range of alternatives to meet those needs, with full public participation of the affected populations, and (b) an analysis of the equity impacts of the plan alternatives should be conducted before the selection of a preferred alternative. In the EJ Circular, FTA should provide more specific guidance on how to "consider the needs" and concerns of low-income and minority populations, how to do so "at the earliest stages of planning" (p. 23), and how to incorporate those needs and concerns into the plan. (Comment 7)

FTA should require agencies to build into their public participation an up-front "scoping" process to identify the issues and impacts of concern to the affected minority populations, and then to design the methodology and metrics of their Title VI and EJ analyses in a manner specifically calculated to focus on the identified issues and impacts. (Comment 5)

FTA should provide more robust discussion in the EJ Circular about the importance of public participation in identifying the potential impacts, not only as part of NEPA, but "well in advance of NEPA," in the course of an EJ Analysis. (Comment 5)

FTA should provide a comprehensive definition of "the metropolitan transportation planning process," and specific guidance to ensure that MPOs are meeting their obligation to supervise the Title VI compliance of the planning process at <u>all</u> levels throughout the region. This should include both monitoring the Title VI compliance of other agencies that play a role in the metropolitan planning process and ensuring overall compliance of the system and planning process as a whole. (Comment 10)

FTA should explicitly link the requirement to consider the needs of EJ populations, and alternatives for meeting those needs, to the requirements for planning certification. (Comment 10)

FTA should require that modeling or other speculative measures of equity in State and MPO plans must be accompanied by some measure of how well (and how soon) the plan meets the needs and priorities that EJ populations have identified relative to those of other populations. (Comment 10)

FTA should require that if the New Starts building entity is also a transit provider, the service and fare equity analysis proposed by the Title VI Circular will determine the impact on the minority populations that use both providers' systems. (Comment 16)

FTA should ensure, in consultation with HUD, that it is providing appropriate guidance to its recipients in meeting this obligation, and doing so in a manner consistent with HUD guidance and practice. (Comment 11)

FTA should explain, and give concrete examples of, each of the phases of a disparate impact and EJ analysis. (Comment 2)

FTA should concretely describe how to determine whether a less discriminatory alternative must be adopted, and should specify the requirement of engaging the participation of the impacted population in identifying a range of such alternatives. (Comment 2)

FTA should consistently emphasize that EJ addresses whether protected populations receive a fair share of both the burdens and the benefits of decisions and other activities. (Comment 2)

FTA should consistently define the scope of the "decisions" or "activities" subject to an EJ analysis. (Comment 2)

FTA should spell out the framework for an EJ Analysis consistently. FTA should break out each of the 6 steps separately. (Comment 2)

FTA should provide guidance on how to weigh the totality of mitigations, enhancements and off-setting benefits against identified disproportionate adverse impacts. (Comment 2)

FTA should incorporate into the EJ Circular the Council on Environmental Quality's definition of cumulative impacts, and should provide guidance on how to assess cumulative disproportionate impacts on EJ populations. Like CEQ, FTA should place emphasis on the fact that the individually minor actions need not be those of the agency conducting the EJ analysis. (Comment 17)

FTA should require that major service change policies account for the cumulative impacts of service changes. Smaller changes in service may not reach the threshold, but over time can have a significant cumulative impact, and should trigger a service equity analysis. (Comment 14)

FTA should provide guidance on how agencies determine whether a population is identifiably minority, and whether an adverse impact falls disproportionately on members of a protected class, using the "four-fifths rule" of the Equal Employment Opportunity Commission. (Comment 4)

FTA should consistently define the time at which Title VI and EJ analyses must be undertaken, and should require that in general these analyses precede the selection of a preferred alternative. (Comment 6)

FTA should spell out meaningful, active steps that recipients will take to ensure Title VI and EJ compliance by their subrecipients with the requirements of both Circulars, and should require designated recipients to monitor the Title VI and EJ compliance of their direct recipients. (Comment 8)

FTA should consistently emphasize that a recipient may not discriminate in any of its programs or activities. (Comment 9)

FTA should clearly explain that whenever a proposed action could have an adverse disproportionate impact on a minority population, the recipient must conduct both a Title VI analysis and an EJ analysis, and should clarify how recipients must proceed in that situation. (Comment 12)

FTA should require that, when ridership of a transit mode of a multi-modal transit provider constitutes a "minority population," that provider will adopt comparable service standards between its different modes. (Comment 13)

FTA should require fare equity analyses to take into account the greater adverse impacts on socially-vulnerable populations, and specify steps that would be required to avoid or mitigate those impacts. (Comment 15)

FTA should clearly state the consequences for failing to remedy a finding of deficiency in the Title VI Circular, and should incorporate accountability requirements in the EJ Circular. (Comment 18)

FTA should expressly commit to investigate complaints alleging a recipient's failure to comply with a provision of the Circular, regardless of whether it also constitutes a violation of the regulations, and should put in place a complaint process to investigate complaints of non-compliance with the EJ Circular. (Comment 19)

FTA should specify an appeal process, particularly where it decides to administratively close a complaint. (Comment 20)

FTA should avoid the phrase "without regard to race, color or national origin" in order to clarify that discrimination is prohibited, whether or not it is intentional. (Comment 1)

Attachment B: Detailed Comments

1. Ensure that the Title VI Circular consistently addresses both disparate impact and disparate treatment discrimination.

The proposed Circular in some places prohibits acting "in a discriminatory manner," which appropriately encompasses both discriminatory effect and discriminatory purpose. However, in other places, it uses the apparently more limited phrase "without regard to race, color or national origin." This phrase could easily be misunderstood by some agencies as allowing actions with a discriminatory impact, as long as they are not racially motivated. The Title VI regulations prohibit disparate impact discrimination (e.g., 49 C.F.R. § 21.5 (b)(2), prohibiting the use of "criteria or methods of administration which have the ***effect*** of subjecting persons to discrimination").

FTA should avoid the phrase "without regard to race, color or national origin" in order to clarify that discrimination is prohibited, whether or not it is intentional.

2. Explicitly define the framework for conducting a Title VI Disparate Impact Analysis and an EJ Analysis.

Title VI Circular: The proposed Circular provides for a number of Title VI analyses to ensure against disparate impacts in the planning, funding and operation of public transportation, but does not concretely spell out for recipients the framework for conducting a disparate impact analysis. For example, the Circular requires analyses of the disparate impacts of (1) service and fare changes, including with respect to New Starts projects (Ch. IV, §6), (2) project siting decisions (Ch. III, §13), (3) discrepancies in meeting transit performance standards (Ch. IV, §§4-5), (4) fund allocation by designated recipients (Ch. VI, §2, 4), and (5) State and MPO planning and transportation system investments (Ch. V, §3; Ch. VI, §3). Finally, the proposed Circular generally requires (6) an analysis of the extent to which members of minority groups are beneficiaries of programs receiving Federal financial assistance from FTA. (Ch. V, §2; Ch. VI, §2.)

Each of these analyses is important to ensuring non-discrimination in the programs and activities of FTA recipients, and each is governed by the underlying framework of a Title VI disparate impact analysis. Unlike FTA's proposed new Environmental Justice Circular, however, which helpfully includes a step-by-step framework for how to conduct an EJ analysis (EJ Circular, pp. 5-7), the proposed Title VI Circular fails to provide the analogous framework for conducting a Title VI disparate impact analysis. This is important, as many MPOs and transit providers may be unfamiliar with the steps involved in carrying out such an analysis. FTA should spell out the steps for conducting the analysis in more detail.

The proposed Circular makes a start by defining "disparate impact" as "facially neutral policies or practices that have the effect of disproportionately excluding or adversely affecting members of a group protected under Title VI, where the recipient's policy or practice is not necessary to meet a legitimate, important goal that is integral to the [recipient's] mission and where there exists one or more alternative(s) that have a less adverse impact on members of a group protected under Title VI." (p. I-2; see also Sec.

6(c)(3), p. IV-12.) It should go on to detail the steps involved in analyzing whether a proposed decision will result in any disparate impacts.

FTA should explain, and give concrete examples of, each of the phases of this analysis. It should begin with the "prima facie" question of whether (a) a facially neutral practice (b) causes an adverse impact (c) 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). In particular, FTA should clarify that a Title VI disparate impact analysis must begin by: (1) identifying the plan, project, or activity; (2) identifying the relevant potential adverse impacts (as determined in the public "scoping" process described in Comment 5, below); (3) identifying the relevant protected and non-protected populations subject to the potential impact, using robust ridership or other demographic data (as discussed in Comment 3, below); and (4) comparing the impacts of the action on the protected population with the impacts on the non-protected population, utilizing metrics that are appropriately-tailored to measuring the relevant impacts.

Next, FTA should explain that, where a prima facie disparate impact exists, the recipient may not proceed absent a business necessity (*Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ["business necessity"]; *see also Larry P. v. Riles*, 793 F.2d 969, 982 (9th Cir. 1986) ["educational necessity"]), and should explain concretely what kinds of necessity are sufficient to justify a discriminatory impact. The proposed Circular should consistently use the definition it provides on p. IV-12, where it states that the proposed action must be "necessary to meet a legitimate, important goal that is integral to the [recipient's] mission."

Finally***, FTA should concretely describe how to determine whether a less discriminatory alternative must be adopted, and should specify the requirement of engaging the participation of the impacted population in identifying a range of such alternatives.*** This is expressly required for State DOTs and MPOs in the FHWA/FTA joint planning regulations. See EJ Circular, p. 9 (citing 23 CFR 450.210(a)(1)(viii).)

EJ Circular: The Circular frames EJ by listing three of its "fundamental principles" (p. 2), but omits a fourth that the Circular acknowledges elsewhere: "effectively integrating EJ principles into public transportation decisionmaking processes." (quoted from p. 4.)

In terms of laying out the framework for an EJ Analysis, it makes a good start, but is internally inconsistent in several important respects.

First, ***FTA should consistently emphasize that EJ addresses whether protected populations receive a fair share of both the burdens and the benefits of decisions and other activities.*** Executive Order 12898 expressly prohibits "denying persons (including populations) the benefits of … programs, policies, and activities" (Sec. 2-2), and the DOT implementing Order defines "adverse effects" to include any "reduction in, or significant delay in the receipt of, benefits." The Circular correctly emphasizes this point in some places (e.g., p. 29, noting that "Most transit projects are undertaken because they

will provide a number of benefits to the community," p. 31), but frequently fails to mention it. For instance, the Circular states that "when you are developing a project such as a bus rapid transit or rail project that will travel through predominantly minority or low-income areas and also through nonminority and non-low-income areas, you should compare the planned mitigation and environmental enhancement actions that affect the predominantly low-income or minority areas with the planned mitigation and enhancement actions in the predominantly non-minority or non-low-income areas" (pp. 10-11); there is no mention of the crucial importance of also determining whether EJ populations will share fairly in the benefits of that project. See also p. 35 (referring to "a fair distribution of the adverse impacts of, or burdens associated with, Federal programs, policies, and activities," but omitting mention of a fair distribution of benefits).

Next, ***FTA should consistently define the scope of the "decisions" or "activities" subject to an EJ analysis.*** The Circular correctly emphasizes in some places that a broad range of actions and decisions are subject to EJ, including "long range plan[s], Transportation Improvement Program[s]/Statewide Transportation Improvement Program[s], or transit project[s]." (p. 1.) In various places, however, the Circular refers to "project, policy or activity" (p. 1), "activity" (p. 2-3), "your plan or project (activity)" (p. 5), and "your plans, programs, projects and activities." (p. 5.)

A single comprehensive definition of "decision" or "activity" would encompass long- and short-range plans, fund programming and allocation, projects, and programs, as well as service and fare changes by transit providers. The most appropriate definition is the one that Title VI provides: "The term 'program or activity' means all of the operations of a department, agency, special purpose district, or government." (Title VI Circular, p. II-1.)

Third, ***FTA should spell out the framework for an EJ Analysis consistently.*** In three places (in Chapters I, II and VI), the Circular spells out the "three steps" that should be taken to conduct an EJ Analysis, providing two different versions of what those steps are. Chapter I gives an overview of three steps as follows:

> An EJ analysis starts with determining whether there are any minority populations or low-income populations potentially impacted by the activity. . . . Once you determine that you have one or more minority populations and/or low-income populations in the planning or project impact area, you will need to analyze whether the activity will result in a "disproportionately high and adverse effect on human health or the environment." . . . Once you have identified your EJ populations and the adverse effects, you should assess the proportionality of impacts of the activity. (pp. 2-3)

Chapter II, however, breaks the "three fundamental steps" differently. Like Chapter I, it begins with "determin[ing] whether there are any EJ populations potentially impacted by the activity." (p. 5.) In step 2, however, it merges two steps, the identification of potential adverse impacts, and the analysis of whether they fall disproportionately on protected populations. (p. 6.) It then adds the steps of "[d]etermin[ing] whether you can avoid,

minimize or mitigate any disproportionately high and adverse" effects and the question of "off-setting benefits." (p. 6.) Chapter V repeats these steps (p. 29), but goes on to break out additional crucial steps, including "Defin[ing] the Project Impact Area" "Identify[ing] Alternatives" and "Identify[ing] Project Benefits." (pp. 30-32.)

To provide the consistent and clear guidance, ***FTA should break out each of the steps separately***, as follows:

> Step 1: Define the project, plan or activity, including the purposes it is intended to serve, its geographic scope, and a range of possible alternatives. This should include spelling out a range of potential alternatives, derived from a robust public process. It should also include identifying the potential impacts of the project, plan or activity, including both its "burdens" and its "benefits."
>
> Step 2: Identify all minority populations or low-income populations that will potentially be impacted by the project, plan or activity, including any geographically-dispersed populations, such as transit riderships.
>
> Step 3: Identify (through the public scoping process described in Comment #5, below) which of the impacts of the project, plan or activity have the potential to affect protected populations adversely, whether by imposing burdens, or providing fewer or delayed benefits.
>
> Step 4: Determine whether the potential adverse impacts (including the delay or denial of benefits) fall disproportionately on protected populations.
>
> Step 5: If any disproportionate adverse impacts on a protected population are found in connection with any alternative, determine the extent to which those impacts can be avoided, off-set and/or mitigated.

Finally, with respect to the last step, the Circular gives the misimpression that any "off-setting benefits" will be sufficient to justify a disproportionate adverse impact. In fact, as the DOT Order explains, those off-setting benefits "may be taken into account," along with "mitigation and enhancement measures":

> In making determinations regarding disproportionately high and adverse effects on minority and low-income populations, mitigation and enhancements measures that will be taken and all offsetting benefits to the affected minority and low-income populations ***may be taken into account***, as well as the design, comparative impacts, and the relevant number of similar existing system elements in non-minority and non-low-income areas. (DOT EJ Order, section 8(b).)

The question on which guidance would be helpful is how to take them into account. In and of themselves, "off-setting benefits" may or may not be sufficient. That will depend, for instance, on whether they provide a fair share of the same kind of benefits that the project provides, to the EJ population in question. ***FTA should make this clear, and***

should provide guidance on how to weigh the totality of mitigations, enhancements and off-setting benefits against identified disproportionate adverse impacts.[1]

3. Ensure that "Minority Populations" and "Low-Income Populations" are defined to explicitly include minority and low-income transit riderships.

FTA should explicitly acknowledge, in the definition of "minority population" and "low-income population," and elsewhere in the proposed Circulars, that riders of minority/low-income transit systems, modes and routes are protected by Title VI. The definition of "minority population" for Title VI purposes should be modified to read: "any readily identifiable group of minority persons who will be similarly affected by a proposed program, policy, or activity of an FTA recipient, whether they live in geographic proximity or not. The riders of a transit system, mode or route constitute a minority population under Title VI if they meet this definition." The definitions of "low-income population" and "minority transit route" should similarly be modified.

Title VI Circular: The proposed Circular correctly notes that a disparate impact arises any time that an adverse effect falls disproportionately on "members of a group protected under Title VI." (p. I-2.) The proposed definition of "minority population" (taken from DOT's Environmental Justice Order) acknowledges that for Title VI purposes, a minority population need not "live in geographic proximity" but may also be "geographically dispersed." (p. I-4.)[2] The Circular, however, gives only two examples of geographically-dispersed minority populations: migrant workers and Native Americans. Conspicuously absent are transit systems, modes or routes whose riders are identifiably minority.

Title VI draws no distinction based on whether the members of an affected minority group live in the same community. Rather, it protects ***any*** class of minorities who are similarly affected by a policy or practice. E.g., *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1986) (challenge to discriminatory impacts of statewide test on black students throughout California). See 49 C.F.R. § 21.9(b) (regulations broadly address "members of minority groups [who] are beneficiaries of programs receiving Federal financial assistance.").

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[1] The Circular provides a list of "factors" (p. 11) that purport to assist in determining whether disproportionately high and adverse effects exist. As discussed under Comment #4, below, those factors are inappropriate to that purpose. However, factors 4 and 5, relating to mitigations, enhancements and off-setting benefits, could provide the opportunity to provide guidance on how to weigh these project characteristics against disproportional adverse impacts.

[2] The definition of "minority population" reads "readily identifiable group of minority persons who live in geographic proximity and, if circumstances warrant, geographically dispersed/transient populations (such as migrant workers or Native Americans) who will be similarly affected by a proposed *DOT program, policy, or activity*." The Circular, however, does not include the DOT EJ Order's definition of "programs, policies, and/or activities" as "all projects, programs, policies, and activities that affect human health or the environment, and *which* are undertaken *or approved by DOT. These include, but are not limited to, permits, licenses, and financial assistance provided by DOT*." FTA should clarify that a "DOT" program, policy or activity includes the programs, policies and activities of FTA recipients.

By the very nature of the mobility that transit affords, the beneficiaries of any given transportation service, project or program are especially likely to be "geographically dispersed." Both the harms and the benefits of transportation services are primarily tied not to where the rider lives, but how she or he travels. As a result of sharing travel patterns with other transit users, a rider will often feel the impacts of an agency's decision or action in common with those other users, rather than with her or his neighbors.

The failure to explicitly define geographically-dispersed minority transit riderships as a "minority population" raises concerns throughout the proposed Circular. For instance, the proposed Circular requires MPOs to submit to the State and to FTA a Title VI program that includes "A demographic profile of the metropolitan area that includes identification of the ***locations*** of minority populations as covered by Title VI." (Sec. 2(a)(2), p. IV-1.) The only mention made of identifying minority transit ***riderships*** is in Chapter IV, which requires larger transit providers to "collect survey information every three years to identify the racial makeup of their ridership by route or line." (p. 8.) App. I helpfully illustrates that FTA expects a transit provider to give this information by mode, as well as by route. However, nowhere does the proposed Circular step outside of the silo of the individual transit provider to require an overarching look at whether some providers or modes within the metro region carry disproportionately minority riderships relative to others.

Without a definition of "minority population" that recognizes disparities by ridership as well as by place of residence, other provisions, such as the requirement to "assess the effects of proposed fare or service change[s] on minority . . . populations" (§ 6(c)(1), p. IV-10), will be inadequate. Another example is the definition of "minority transit route," which is incomplete, relying solely on the demographics of the census tracts through which the route passes, without regard to the demographics of the route's actual riders. (p. I-4.) Rail lines, for instance, may well run through communities of color, yet have disproportionately white riderships; conversely, bus lines may carry a predominantly minority ridership to jobs in predominantly white Census tracts.

EJ Circular: The same issue arises in the EJ Circular, with regard to the definition of both "minority" and "low-income" populations. In many places, the Circular appears to limit protected populations to those that live in the same community, and fails to ask about geographically-dispersed EJ populations that are similarly situated with respect to a transportation plan, project or activity. See, e.g., pp. 3 (analyze "demographic data ***for the area***"), 6 ("minority population percentage of ***the affected area***"), 7-9 & 23 (regarding the preparation of a "residential demographic profile"), and 24 ("residential locations of EJ populations"). The residents of a geographically-contiguous neighborhood may be an EJ population that is similarly situated with respect to an adverse effect, and that analysis must be undertaken. But the analysis should not overlook the possibility that adverse effects of transit-related activities will fall on EJ populations that do <u>not</u> live in the same neighborhood.

The fact that many EJ populations affected by public transportation programs and activities do not live in geographic proximity also has important implications for outreach and public participation, which should be noted in Chapter III.

4. Clarify the standards for when a population is "identifiably minority" and when an impact falls disproportionately on a protected group.

In connection with the framework for a Title VI disparate impact analysis and an EJ analysis, ***FTA should provide guidance on how agencies determine whether a population is identifiably minority, and whether an adverse impact falls disproportionately on members of a protected class, using the "four-fifths rule" of the Equal Employment Opportunity Commission.***

Title VI Circular: The courts have widely adopted the EEOC's "four-fifths rule" for purposes of determining the disproportionality of impacts on protected classes. That rule 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." (29 C.F.R. § 1607.4 (D).) In other words, "four-fifths" establishes a benchmark for when disparities are significant.

This rule easily translates to the transit context. Thus, if the percentage of minority riders on one transit system, mode or route is less than 4/5 (or 80 percent) the percentage of minority riders on another, the latter is a minority population. (For instance, if the minority ridership of one system or route is 80%, and of another system or route is 60%, then the racial disparity is significant at a four-fifths level, because 0.6 divided by 0.8 = 75 percent, and the former is identifiably minority. On the other hand, a disparity of 55% vs. 60% would <u>not</u> be significant at a four-fifths level, since 0.55 divided by 0.6 = 91.67 percent, exceeding the four-fifths threshold.)

The EEOC approach has the virtue not only of quantifying the threshold, but also of applying equally well in areas in which people of color outnumber whites (so-called "majority-minority" areas). Where impacts can be readily quantified, as in service hours or funding, this approach will also translate well to determining whether an impact falls disproportionately on a minority population. For instance, if service on non-minority transit routes is cut four-fifths or less than on minority transit routes, the impact of those cuts will fall disproportionately on a minority population.

EJ Circular: The EJ Circular includes a discussion of "thresholds," but does not quantify them, beyond saying that "a minority population may be present if the minority population percentage of the affected area is 'meaningfully greater' than the minority population percentage in the general population …" (EJ Circular, p. 6.) Here, too, the "four-fifths rule" would provide a useful rule of thumb.

In addition, the EJ Circular provides confusing and legally incoherent guidance on how to determine whether an adverse effect falls "disproportionately" on an EJ population.

Under Title VI, from which the disproportionality standard derives, the question is simply one of weighing the impact on a protected population and comparing it to the impact on a population that is not protected. The Circular, however, creates out of whole cloth a set of five "factors" that is inappropriate in this context. (p. 11.) The first and third factors – "Whether a high or substantial impact exists which adversely affects an EJ population," and a related question about cumulative or indirect effects – relate not to disproportionality, but to identifying the adverse impacts. The second is simply a restatement of the question: "Whether effects on EJ populations exceed those borne by non-EJ populations." And the fourth and fifth, as mentioned in note 4, above, relate not to whether a disproportional impact exists, but to what must be done to mitigate or off-set it. This entire set of factors should be deleted, or better yet, retooled into a set of factors to help grantees weigh the extent to which mitigations, enhancements and off-setting benefits are sufficient.

5. Require public participation in identifying, or "scoping," the potential impacts that will be studied in a Title VI analysis.

Title VI Circular: 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 do not always measure important impacts properly, and sometimes overlook them altogether. 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.

Scoping is a time-tested part of the process of environmental review. 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." (40 C.F.R. §1501.7.) 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.

When this "scoping" does not occur, equity analyses can become mere paper exercises that are incapable of identifying significant equity impacts – like a doctor who tries to diagnose an illness but does not allow the patient to say where it hurts. The proposed Circular (and the proposed new EJ Circular) incorrectly assumes that agencies can easily identify the range of ways in which their proposed actions or plans will impact minority populations, and will automatically know which ones are significant to the affected population.

FTA should require agencies to build into their public participation an up-front "scoping" process to identify the issues and impacts of concern to the affected minority populations, and then to design the methodology and metrics of their Title VI and EJ analyses in a manner specifically calculated to focus on the identified issues and impacts.

EJ Circular: The EJ Circular helpfully notes that the joint FTA/FHWA Statewide and metropolitan planning regulations

> require you to consider impacts on minority households and low-income households ***during the planning process***. *See, e.g.*, 23 CFR 450.210(a)(1)(viii). These provisions provide for identification, consideration, and possible elimination or mitigation of potential impacts at the very earliest stages of decisionmaking, ***well in advance of NEPA***. (p. 9.)

With the addition of the requirement for public participation (e.g., 23 C.F.R. §§ 450.210 (a), 450.316 (a)), this reference to "identif[ying] . . . potential impacts at the very earliest stages of decisionmaking" comes very close to the "scoping" process we recommend.

Scoping is important to ensure both that the relevant impacts are identified for analysis, and that the right metrics are used in the analysis. The Circular states that "An example metric might include the number of jobs accessible within 30, 45, or 60+ minute travel times from individual communities throughout the metropolitan area or average work trip travel time for EJ populations and non-EJ populations." (p. 10.) But the arbitrary selection of this or any other metric does not assure that the relevant equity impacts (including cumulative impacts) will be studied. Instead, the metric should be tailored to the impact, and EJ populations must have an opportunity to be heard on the scope of impacts to be studied.

The Circular only mentions scoping in a few places in the discussion of NEPA in Chapter V, without elaboration. ***FTA should provide more robust discussion in the EJ Circular about the importance of public participation in identifying the potential impacts, not only as part of NEPA, but "well in advance of NEPA," in the course of an EJ Analysis.***

6. Clarify *when* Title VI and EJ analyses must be conducted.

FTA should consistently define the time at which Title VI and EJ analyses must be undertaken, and should require that in general these analyses <u>precede</u> the selection of a preferred alternative.

Title VI Circular: If a Title VI disparate impact analysis is undertaken too late, it risks becoming a meaningless post hoc justification for a decision that has already been made. The proposed Circular appropriately requires an analysis to be undertaken "during project development with regard to where a project is located or sited to ensure the location is selected [in a non-discriminatory manner]." (Sec. 13 (a), p. III-9). It should clarify that this analysis should compare the equity impacts of various siting alternatives, and occur before a selection is made of a preferred alternative.[3]

[3] The nature of the analysis required by this provision should be spelled out in greater detail. See Comment #2, above.

In other respects than project siting, however, the proposed Circular is silent on timing. It does not tell transit providers when in the decision process they must conduct the service and fare equity analysis (Sec. 6, pp. IV-9 to 13) or the disparate impact analysis relating to the monitoring of performance standards (Sec. 5, pp. IV-8 to 9). Service and fare equity analyses should occur early enough to ensure that decision-makers and the public are informed about the equity impacts of a variety of alternatives, while a continuous analysis should be made in the monitoring of the disparate impacts with respect to service standards.

Similarly, the proposed Circular does not tell MPOs when they must employ the "analytical process(es)" for identifying the disparate impacts of the metropolitan transportation planning process. This obligation implements the requirement in the statute and regulations that MPOs regularly certify that the planning process complies with Title VI. (49 U.S.C. § 5303 (k) (5); 23 C.F.R. § 450.334 (a) (3).) (See Comment 10, below.) That requires an ongoing monitoring of equity impacts, with a particular emphasis on conducting an analysis of alternatives "well in advance of NEPA" (EJ Circular, p. 9), and specifically, before a preferred alternative has been selected.

EJ Circular: Like the Title VI Circular, the EJ Circular should provide better guidance on the timing of the EJ Analysis. In particular, the Circular should distinguish more clearly between the timing and purpose of an early EJ Analysis that helps the agency decide among a range of alternatives, and of an EIS under NEPA, when a preferred alternative has already been selected.

As the Circular appropriately notes, the FTA/FHWA joint planning regulations "provide for identification, consideration, and possible elimination or mitigation of potential impacts at the very earliest stages of decisionmaking, ***well in advance of NEPA***." (p. 9.) These regulations also "contain the requirements for public participation during the planning process." (App., p. vi.)

The requirement to "identify, consider and eliminate or mitigate" impacts "at the very earliest stages of decisionmaking" should be stated more specifically. In particular, FTA should specify that the EJ analysis must be conducted after alternatives have been identified, and <u>before a preferred alternative has been selected</u>. That analysis, moreover, must be accompanied by full public participation: it "should involve EJ populations throughout the process [and] should invite members of EJ communities to become involved during the planning phase." (p. 34.) As drafted, the Circular puts the cart before the horse; it states, for instance, that "when disproportionate effects appear likely, you should work with affected populations, including EJ populations, to consider possible alternatives. . ." (p. 10.) To the contrary, the consideration of alternatives should occur from the beginning, and a selection among alternatives should only be made after an EJ Analysis has evaluated the equity impacts of each of them.

By contrast, the NEPA analysis only occurs <u>after</u> a preferred alternative has been selected. The discussion of NEPA should make it clear that the EIS, which comes at a late stage in the decisionmaking process, is not a substitute for an early EJ Analysis that

identifies the equity impacts of a range of alternatives early enough to influence the selection among them. The Circular acknowledges that "This EJ analysis should include consideration of the affected community's views on the project and the potential benefits and burdens of the project, and alternatives that have less impact on EJ populations" (p. 31), but creates some confusion by not making it consistently clear that this analysis should take place not only at the NEPA stage, but "at the very earliest stages" of planning.

7. Clarify the need for, and role of, public participation in the full range of activities and decisions.

FTA should provide in both Circulars consistent guidance on what it means to "consider" and "respond to" the needs of low-income and minority populations. At a minimum, this guidance should explain that (a) planning should begin with a needs assessment,[4] and the generation of a range of alternatives to meet those needs, with full public participation of the affected populations, and (b) an analysis of the equity impacts of the plan alternatives should be conducted before the selection of a preferred alternative. In the EJ Circular, FTA should provide more specific guidance on how to "consider the needs" and concerns of low-income and minority populations, how to do so "at the earliest stages of planning" (p. 23), and how to incorporate those needs and concerns into the plan.

Title VI Circular: By regulation, MPOs and State DOTs are required to ensure robust public engagement. State DOTs must "Establish early and *continuous* public involvement opportunities that provide timely information about transportation issues and decisionmaking processes…" (23 C.F.R. § 450.210 (a) (1) (i).) MPOs must adopt public participation plans that, "at a minimum, describe explicit procedures, strategies, and desired outcomes for: . . . [s]eeking out and *considering the needs* of those traditionally under-served by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services. . ." (23 C.F.R. § 450.316 (a) (1).) Both must "Demonstrate explicit consideration and response to public input during the development" of their long- and short-range plans. (23 C.F.R. § 450.210 (a) (1) (vii) [DOTs]; § 450.316 (a) (1) (vi) [MPOs].)

The proposed Circular does not provide adequate guidance on compliance with these important requirements.

In addition, the proposed Circular fails to mention public participation in a range of other contexts in which it is important. For instance, while it requires that agency staff bring their Title VI Programs before their governing boards for approval, it does not require public participation in the development of those programs. Nor does it require public

[4] See EJ Circular, p. 25 ("For planning purposes, it is important to engage EJ populations in a dialogue focused on their accessibility and mobility needs, with a focus on both immediate and long term issues; and to establish both a policy framework and a priority list of needs for consideration in metropolitan and statewide transportation planning.").

participation in other important decisions, such as the development of a "policy for measuring disparate impact" (Sec. 6(b), p. IV-10), of a corrective action plan (Sec. 2, p. VII-1), or of an MPOs analysis to ensure that the metropolitan transportation planning process complies with Title VI (Sec. 2(a)(5), p. VI-2).

Finally, provisions that limit public participation efforts to those that can be conducted with "the resources available" (Sec. 8, p. III-5; see also Sec. 9(a)(4), p. III-6) are troubling, since they would allow agencies in their discretion to budget inadequate resources for engaging minority populations while shifting available funds to other priorities. Recipients should be required to devote the resources that are reasonably necessary to the task.

EJ Circular: The EJ Circular helpfully devotes most of Chapter III to a discussion of outreach. Public participation, however, goes deeper than outreach to EJ populations, which is only the first step. For instance, it encompasses the full range of issues addressed in the Public Participation Plan regulation. (23 C.F.R. § 450.316(a)(1).) It is only in the final sentence of Chapter III that some of these issues are touched on:

> You should, however, work diligently to engage in a meaningful public dialogue with the EJ populations impacted by your plan, project or decision by listening to what they have to say, respond to their comments and concerns, and incorporate their comments into the transportation process where practicable. (p. 22.)

Chapter IV also includes useful guidance, such as this statement:

> For planning purposes, it is important to engage EJ populations in a dialogue focused on their accessibility and mobility needs, with a focus on both immediate and long term issues; and to establish both a policy framework and *a priority list of needs for consideration in metropolitan and statewide transportation planning*. (p. 25.)

The guidance helpfully states that:

> Your public engagement strategies should be flexible and robust enough to provide meaningful input from EJ populations on transportation needs and approaches to address those key elements in the planning process. This can be accomplished through the following: . . . Discussion of the *extent and quality of current transportation options* for serving current and future *mobility needs of EJ populations*, including *articulation of specific issues, problems, and concerns* with *current facilities and services*; Identification of *recommended projects and strategies for addressing these needs*, along with the *implementation priorities* in the long-range plan; Provisions for *ongoing engagement of communities in monitoring the implementation* of recommended projects and strategies, re-evaluating their needs, and tracking emerging demographic and development shifts in order to ensure future populations are engaged. (pp. 25-26.)

The EJ Circular should expand these important hints.

8. Strengthen subrecipient monitoring requirements.

FTA should spell out meaningful, active steps that recipients will take to ensure compliance by their subrecipients with the requirements of both Circulars, and should require designated recipients to monitor the Title VI and EJ compliance of their direct recipients.

Title VI Circular: The proposed Circular notes that FTA "recipients agree to comply, and *assure the compliance of* each subrecipient, lessee, third party contractor, or other participant at any tier of the Project …" (See p. II-2, quoting FTA Master Agreement.) The proposed Circular appropriately goes on to explain that, to assure compliance, "primary recipients must *monitor* their subrecipients for compliance with the regulations." (Sec. 12, p. III-8.) The proposed Circular falls short, however, in setting forth the requirements for this monitoring.

For instance, it requires primary recipients only to passively "*collect* Title VI Programs from subrecipients" (Sec. 12 (b), p. III-8), but not to review them to ensure they are adequate on paper, or to monitor whether subrecipients are adequately implementing them.

FTA should also require designated recipients to monitor the Title VI compliance of their direct recipients. The MPO Title VI Program requirements include provisions relating to the MPO in its capacity as "direct recipient" and "primary recipient," but not "designated recipient." By statute, the designated recipient is entitled to "receive and apportion" FTA formula funds (49 U.S.C. § 5307(a)(2)), a significant source of federal transit funding. Designated recipients are responsible for ensuring equity in how they apportion those funds, and are also responsible for monitoring the Title VI compliance of the direct recipients of those funds. The proposed Circular, however, states that "Under a supplemental agreement, the direct recipient is responsible for demonstrating compliance with Federal law, including Title VI, and *the MPO is not in any manner subject to or responsible for* the direct recipient's compliance with the DOT Title VI regulations." (Sec. 4, p. VI-3.) That is incorrect as a legal matter, and poor policy as a practical matter.

In the "supplemental agreement," the MPO "assign[s] the right to receive and dispense Federal funds to the Grantee." A party with the right to receive federal funds has the legal obligation to ensure that those funds are spent in compliance with Title VI, and that obligation is not delegable. 49 C.F.R. 21.5 (b) (1); see *Armstrong v. Schwarzenegger*, 622 F.3d. 1058 (9th Cir. 2010) (construing comparable non-delegability regulation under the Americans with Disabilities Act).

As a policy matter, too, it is crucial that recipients at each level of the funding chain monitor the Title VI compliance of their subrecipients. If State DOTs, MPOs and other designated recipients are not carrying out their duty to ensure Title VI compliance by their transit providers and other regional partners, those agencies will be less likely to

comply, and FTA – which "oversees thousands of grants to hundreds of State and local transit providers" (p. I-1) – will be burdened with an unmanageable compliance role nationwide.

EJ Circular: The EJ Circular provides no mention at all of subrecipient compliance, nor of any other accountability mechanisms, such as reporting, compliance reviews or administrative complaints. See Comment #18, below. ***FTA should incorporate EJ monitoring requirements for primary, direct and designated recipients.***

9. Ensure consistency with the Civil Rights Restoration Act of 1987, which prohibits a recipient from discriminating in *any* of its programs or activities, not just those that are directly federally funded.

The proposed Title VI Circular correctly notes that "The Civil Rights Restoration Act of 1987 further expanded Title VI to include all programs and activities of Federal aid recipients, subrecipients, and contractors whether those programs and activities are Federally funded or not. The term "program or activity" means ***all*** of the operations of a department, agency, special purpose district, or government." (p. II-1, emphasis added).

In some places, however, the proposed Circular includes language that limits responsibility for Title VI compliance to federally-funded activities. See, e.g., EJ Circular, p. 37 ("Title VI applies to all Federally-funded projects and activities"); see also Title VI Circular, Sec. 3, p. VI-2 ("The State is thus responsible for monitoring the Title VI compliance of the MPO ***for those activities*** for which the MPO is a subrecipient."). ***FTA should consistently emphasize that a recipient may not discriminate in any of its programs or activities.***

10. Provide greater clarity on the responsibility of MPOs to ensure that the metropolitan transportation planning process complies *at all levels* with the requirements of Title VI and Environmental Justice.

Title VI Circular: Implementing a statutory requirement (49 U.S.C. § 5303 (k) (5)), joint FHWA/FTA regulations require MPOs to "certify at least every four years that *the metropolitan transportation planning process* is being carried out in accordance with . . . (3) Title VI of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000d–1) and 49 CFR part 21." (23 C.F.R. § 450.334 (a) (3).) The statute and regulation make it a fundamental part of the role of an MPO to ensure and certify that federal dollars are planned for and expended in a non-discriminatory manner in the region that it supervises.

Compliance with this statute and regulation requires MPOs not simply to certify, but also to monitor, their region's compliance with Title VI. This duty extends to those components of that process that an MPO conducts directly, but extends equally to the components that local agencies conduct that feed into the regional process. For instance, if county transportation agencies or local transit providers nominate lists of projects to the MPO for inclusion in its long-range plan, the MPO must monitor the local process by which those projects are selected to ensure that it complies with Title VI. If that

monitoring does not occur, the planning process is at risk of being infected by discrimination in the decisions of other agencies that the MPO incorporates into its plans.

A transportation system, moreover, consists both of the discreet projects and programs that comprise the system, and of the interaction among those component projects and programs, including any cumulative adverse impacts on a particular protected population. For this reason, MPO monitoring for Title VI compliance must ensure both that individual projects and programs comply with Title VI (by ensuring, e.g., that project sponsors have conducted appropriate equity analyses and appropriately addressed the inequities those analyses disclose) and that the system as a whole provides protected populations with a fair and equally timely share of its benefits.

Finally, just as transit providers should be required to ensure that their service standards treat riders of different modes fairly, MPOs should be required as part of their Title VI certifications to ensure that transit systems that serve EJ riderships are treated fairly relative to systems that serve non-EJ riderships.

FTA should provide a comprehensive definition of "the metropolitan transportation planning process," and specific guidance to ensure that MPOs are meeting their obligation to supervise the Title VI compliance of the planning process at all levels throughout the region. This should include both monitoring the Title VI compliance of other agencies that play a role in the metropolitan planning process and ensuring overall compliance of the system and planning process as a whole.

EJ Circular: As the Title VI Circular notes, "Planning certification reviews conducted jointly by FTA and FHWA of the metropolitan transportation planning processes of transportation management areas include a review of Title VI compliance." (p. VI-2.) Planning certification reviews, however, also encompass EJ compliance.[5] The EJ Circular should make that explicit, and provide better guidance on MPO EJ requirements in connection with those reviews.

For instance, the Circular should amplify on the joint FHWA/FTA memorandum that instructs Regional offices, in connection with planning certification reviews, to:

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[5] As FHWA notes on its website:

> *Planning Certifications:* FHWA and the Federal Transit Administration (FTA) have issued a memorandum which provides clarification for field offices on how ***to ensure EJ is considered during current and future planning certification reviews*** for Transportation Management Areas (TMAs).

http://www.fhwa.dot.gov/environment/environmental_justice/facts/ej-1-7.cfm (emphasis added). The joint FHWA/FTA memorandum, dated Oct. 7, 1999, is available at: http://www.fhwa.dot.gov/environment/environmental_justice/facts/ej-10-7.cfm.

> . . . seek to determine what, if any, processes are in place to assess the distribution of impacts on different socio-economic groups for the investments identified in the transportation plan and TIP. *If the planning process has no such capability in place, there needs to be further investigation as to how the MPO is able to annually self-certify its compliance with the provisions of Title VI* [and] . . . the planning certification report should include a corrective action directing the development of a process for accomplishing this end.[6]

The Circular provides a few hints that planning certification should hinge, at least in part, on the extent to which the needs of all communities are fairly met. It states that:

> As you identify future transportation needs in the planning process, you may want to conduct travel behavior and needs surveys and supporting studies. The Statewide, metropolitan, and local transportation planning processes should *seek to identify and respond to the unmet accessibility and mobility needs of all communities*, with general parity across EJ and non-EJ populations" (p. 27),

and that

> While the needs of all communities should be proportionately reflected by projects and strategies within the 20-year horizon of the long-range plan, you should also consider the needs of EJ populations when setting priorities of projects contained in the plan, as reflected by the projects programmed in the TIP or STIP. (p. 28.)

FTA should explicitly link the requirement to consider the needs of EJ populations, and alternatives for meeting those needs, to the requirements for planning certification, and require that modeling or other speculative measures of equity in State and MPO plans must be accompanied by some measure of how well (and how soon) the plan meets the needs and priorities that EJ populations have identified relative to those of other populations.

11. Ensure that FTA recipients Affirmatively Further Fair Housing, as required by Section 808 (d) of the Fair Housing Act.

FTA, like all of DOT's operating administrations, has a statutory obligation under the Fair Housing Act to "affirmatively further fair housing" (AFFH**). (**42 U.S.C. **§** 3608 (d) ("All executive departments and agencies shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary [of the Department of Housing and Urban Development (HUD)] to further such purposes.").) The dual purposes of the Act referred to in this statutory mandate are to prevent

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[6] Joint FHWA/FTA memorandum, issued Oct. 7, 1999, 65 Fed. Reg. 31803, 31804-5 (May 19, 2000), available at: http://www.fhwa.dot.gov/environment/environmental_justice/facts/ej-10-7.cfm.

discrimination in housing and to promote "truly integrated and balanced living patterns.'" (*Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968) (statement of Sen. Mondale).) Under the affirmative mandate of the Fair Housing Act, executive agencies must use their "grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases." (*N.A.A.C.P. v. Secretary of HUD*, 817 F.2d 149, 155 (1st Cir. 1987).)

FTA funds play a central role in both urban development and in housing patterns; in particular, the use of those funds impacts the extent to which members of protected classes have access to fair housing opportunities. As the EJ Circular notes, for instance, "preserving affordable housing may be a key focus for EJ communities, and this preservation may be challenged when major capital investments are made in transportation access and facilities." (p. 26.) To meet the Fair Housing Act mandate, FTA must ensure that its funds are used to promote open housing opportunities rather than perpetuate, or worsen, segregation. For example, agency action is needed to ensure transportation dollars are used to promote mobility to opportunity for people of color, and to protect them against adverse impacts such as displacement.

As noted, the Fair Housing Act directs all agencies to cooperate with the Secretary of HUD in meeting the AFFH obligation. HUD implements the Fair Housing mandate as well as Title VI through a number of regulatory schemes in various program areas. In the community development context, HUD grant recipients are required to conduct an Analysis of Impediments to Fair Housing Choice. Grant recipients are required to (1) analyze impediments to integrated housing patterns and access to opportunity in their jurisdiction; (2) take actions to overcome the effects of these impediments; and (3) keep records of the analysis and actions. 24 C.F.R. § 91.225. HUD also requires MPOs and other recipients of Sustainable Communities Regional Planning Grant funds to conduct a Regional Fair Housing and Equity Assessment to assess and analyze fair housing issues across the metropolitan region; this includes an analysis of segregation patterns, racially/ethnically concentrated areas of poverty, access to existing areas of high opportunity, major public investments that impact access to opportunity and demographic changes, and the strength of fair housing services and activities.

Any number of examples could be offered to illustrate the importance of integrating AFFH into FTA's Title VI guidance. For instance, in a statement that applies to transit service, HUD guidance recommends that an Analysis of Impediments address the "[c]omparative quality and array of municipal and State services across neighborhoods in local jurisdictions or among communities or regions across State jurisdictions (degree of equalization of services)." HUD Fair Housing Planning Guide, p. 5-5. Transit-oriented development projects pose another example, in which FTA investments, including New Starts funding, can lead to displacement of minority communities if affordable housing and other anti-displacement measures are not adequate. As a final example, building long-armed rail transit systems (commuter rail) tends to encourage residential segregation by income and race, as do radial freeways extending beyond the urban edge.

FTA should ensure, in consultation with HUD, that it is providing appropriate guidance to its recipients in meeting this obligation, and doing so in a manner consistent with HUD guidance and practice. This cross-agency collaboration will be especially important, given the community development impacts of transit planning and funding noted above. And it will be especially fruitful given the ability of States and MPOs to address impediments to fair housing choice that cross municipal borders or are imbedded in Statewide policy (such as the Qualified Allocation Plans states must develop for Low Income Housing Tax Credits).

12. Clarify the overlapping requirements of the Title VI and EJ Circulars.

The proposed Circular and the new EJ Circular helpfully separate out the requirements of Title VI from the related, but sometimes distinct, requirements of the Environmental Justice Executive Order. In practice, however, both Title VI and the EJ Order protect minority populations. ***FTA should clearly explain that whenever a proposed action could have an adverse disproportionate impact on a minority population, the recipient must conduct both a Title VI analysis and an EJ analysis, and should clarify how recipients must proceed in that situation.***

For instance, in the event that a disparate impact is found, Title VI does not allow the action to be "mitigated." Instead, the recipient may not proceed at all unless the action is "necessary to meet a legitimate, important goal that is integral to the [recipient's] mission" (Sec. 6(c)(3), p. IV-12), and then only if there is no less discriminatory alternative. In some cases, an action that is a mitigation for EJ purposes might constitute, or be a part of, a less discriminatory alternative for Title VI purposes, but neither Circular provides guidance on this important question.

On the other hand, even if an action with a disparate impact may proceed under Title VI, it must still be mitigated to the extent practicable under the EJ Circular. In that case, the EJ Circular should also specify a mechanism to ensure accountability for actually implementing the promised mitigation measures - for example by making clear that monitoring or audits will evaluate the outcomes of that implementation.

Finally, in connection with various transit provider equity analyses, the Title VI Circular appropriately states that, "recognizing the inherent overlap of environmental justice principles in this area, transit providers shall evaluate these proposed changes to determine whether the changes have a disproportionately high and adverse impact on minority populations and/or low-income populations." (Sec. 6, p. IV-10.) The EJ Circular, however, does not mention or cross-reference these requirements, creating the risk of confusion and non-compliance.

13. Ensure that system-wide service standards and monitoring prevent both "inter-modal" and "intra-modal" disparities that result in discrimination.

The proposed Title VI Circular requires transit providers to set service standards for vehicle load, vehicle headways, on-time performance, service availability and transit

amenities; and then requires most transit providers to monitor these service factors against the standards to determine if there are any disparate impacts on minority populations. (Ch. IV, secs. 3, 5.) Transit providers that operate multiple modes of transit (e.g., bus, rail, ferry, etc.) would be permitted to set different standards for each mode. These requirements do not protect against discrimination that can occur when multi-modal transit providers systematically favor, through funding, service implementation, or other activities, one mode over another, causing "inter-modal disparities." Experience shows that in many instances minority populations rely disproportionately on local bus service, while non-minority populations disproportionately use commuter rail, light rail, or ferry service. ***When ridership of a transit mode of a multi-modal transit provider constitutes a "minority population" (see Comment 3, above), FTA should require that provider to adopt comparable service standards between its different modes.*** This will prevent disparities such as pronounced overcrowding or significantly less on-time performance for minority bus riders while other modes with lower-minority riderships enjoy higher service performance.

The "Level of Service Monitoring Program" prescribed for large providers appears to require only a comparison between the quality of service of high-minority routes and the general "standards" established by the provider. In cases where the minority route's service falls short of the standard, this program states that the provider must "take steps to reduce" this disparity. The requirements of this monitoring program should be clarified, to require providers to take concrete and timely steps to correct disparities. In addition, service monitoring information, including the demographic breakdown, should be available to the public.

14. Ensure that the Major Service Change policy is appropriate to the history of service changes by the provider, and accounts for cumulative impacts.

Like the existing Circular, the proposed Circular requires transit providers to establish a "major service change policy" that sets a threshold for the size of a service change that will trigger an equity analysis. Transit providers would continue to have broad discretion in setting that threshold. This has led some providers to set thresholds so high that they render the service equity analysis requirement a nullity. For instance, some providers set a 20 percent threshold. Yet service cuts of 5 to 15 percent of total service can have devastating consequences for minority populations disproportionately impacted by them.

FTA should require transit providers to define their major service change threshold based on the actual service changes implemented in the previous 3 to 5 years. Requiring a meaningful threshold to be defined based on the service changes that are likely to occur at given transit system will ensure that service equity analyses are triggered in appropriate circumstances.

In addition, ***FTA should require that major service change policies account for the cumulative impact of service changes***. Smaller changes in service may not reach the threshold, but over time can have a significant cumulative impact. These, too, should trigger a service equity analysis.

And again, this requirement should be cross-referenced in the EJ Circular, to avoid confusion.

15. Require a fare equity analysis of flat fare increases to account for their greater impact on socially-vulnerable populations.

With respect to fare increases, some transit providers have conducted an equity analysis that does not take into account the greater social vulnerability of low-income riders of color. 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.

FTA should require fare equity analyses to take into account the greater adverse impacts on socially-vulnerable populations, and specify steps that would be required to avoid or mitigate those impacts.

16. Require the New Starts service and fare equity analysis to be conducted in a manner that ensures that expansion does not come at the expense of cuts to existing service on which minority populations rely.

The proposed Title VI Circular requires transit providers that implement New Starts, Small Starts, or other new fixed guideway capital projects to conduct a service and fare equity analysis prior to receipt of a Full Funding Grant Agreement. "If the entity building the project is different from the transit provider that will operate the project, the transit provider shall conduct the analysis." (Sec. 6(d), pp. IV-12 to 13.) This latter provision is troubling because it overlooks adverse impacts on minority riders of the provider who builds the project.

An example of such a situation arises when one transit provider (like Valley Transit Authority, or VTA, in San Jose, California) uses its own funds to finance and build an extension of another transit system (like its proposed BART extension to San Jose). Because VTA will be responsible for financing the BART extension, there is a direct risk that VTA's own existing minority riders will see cuts to their transit service as a result of the construction and operation of the BART extension.

FTA should require that if the building entity is also a transit provider, the service and fare equity analysis conducted should determine the impact on the minority populations that use <u>both</u> providers' systems.

Once again, this requirement should be cross-referenced in the EJ Circular, to avoid confusion.

In addition, the MPO or state department of transportation should be required to ensure not only that the service changes on each of the transit provider's systems are individually equitable, but also that expanded service on the operator's system does not come at the expense of service cuts or fare hikes for riders of the builder's system.

17. Place an emphasis on avoiding adverse *cumulative* impacts.

While the EJ Circular mentions cumulative impacts in the definition of "adverse impact," and mentions the concept in passing on p. 11 (citing as a "factor" in determining disproportionality "whether cumulative or indirect effects would adversely affect an EJ population"), it nowhere defines a "cumulative impact."

The definition provided in the NEPA regulations of the Council on Environmental Quality is:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. (40 C.F.R. §1508.7.)

Moreover, the Circular should recognize that, in the context of an evolving transportation system, cumulative impacts that fall on an EJ population can occur across the system, as well as over time.

FTA should incorporate into the EJ Circular the Council on Environmental Quality's definition of cumulative impacts, and should provide guidance on how to assess cumulative disproportionate impacts on EJ populations. Like CEQ, FTA should place emphasis on the fact that the individually minor actions need not be those of the agency conducting the EJ analysis.

18. Provide explicit consequences for a failure to correct deficiencies.

The proposed Title VI Circular requires recipients to correct deficiencies identified by a compliance review (see p. VII-2), but does not provide consequences for a failure to correct those deficiencies.

Deficiencies can involve the failure of a recipient to satisfy important obligations in the Circular, such as a conducting service and fare equity analysis, developing a Title VI Program or collecting demographic information about the recipient's service area. These deficiencies may not on their own amount to a finding of noncompliance (as defined on p. VII-2), but still warrant vigorous enforcement to minimize the risk of discrimination.

Through its contractual agreements with recipients, FTA has the ability to penalize recipients if they fail or refuse to correct deficiencies after a reasonable period of time. ***FTA should clearly state the consequences for failing to remedy a finding of deficiency***, just as it does for failing to remedy a finding of noncompliance. Those consequences should include appropriate penalties to be imposed by the primary recipient in the case of a finding of deficiency against its subrecipient.

The EJ Circular lacks any accountability requirements at all, as discussed in Comment #19, below. ***FTA should incorporate accountability requirements in the EJ Circular.***

19. Open the door to complaints of violations of the Circular, not just the Title VI regulations.

Title VI Circular: The proposed Circular states that "FTA will respond to complaints filed with FTA alleging that an FTA recipient ***has violated the DOT Title VI regulations***" (p. IX-1), but that it will administratively close any complaints before a resolution is made if "the complaint does not indicate a violation of 49 CFR part 21 (IX-2)." ***FTA should instead expressly commit to investigate complaints alleging a recipient's failure to comply with a provision of the Circular, regardless of whether it also constitutes a violation of the regulations.***

EJ Circular: FTA's one-page overview of the new Title VI Circular notes that "FTA views both Title VI and Environmental Justice as equally important considerations when planning and designing FTA-funded transportation projects,"[7] yet the EJ Circular provides no complaint process at all. It also provides no accountability, whether through reporting or compliance review. This is particularly troubling in light of the requirement, for instance, to consider EJ in connection with MPO planning certification reviews.[8] ***FTA should put in place a complaint process to investigate complaints of non-compliance with the EJ Circular.***

20. Provide complainants with appeal rights

The proposed Title VI Circular does not provide complainants with appeal rights. ***FTA should specify an appeal process, particularly where it decides to administratively close a complaint.*** (See p. IX-2.)

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[7] http://www.fta.dot.gov/documents/T6_one_pager_final_9_30_2011.pdf.

[8] See note 10, above.

Page	Suggested Revised or Additional Text (Legislative Strikeout and Underscore)	Comment # and Additional Rationale
2	Minority Population means any readily identifiable group of minority persons who will be similarly affected by a proposed program, policy, or activity of an FTA recipient, whether they live in geographic proximity or not. The riders of a transit system, mode or route constitute a minority population under Title VI if they meet this definition.~~and, if circumstances warrant, geographically dispersed/transient populations (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy, or activity.~~	3
2-3	Low-Income Population means any readily identifiable group of low-income persons who will be similarly affected by a proposed program, policy, or activity of an FTA recipient, whether they live in geographic proximity or not. The riders of a transit system, mode or route constitute a low-income population if they meet this definition.~~and, if circumstances warrant, geographically dispersed/transient populations (such as migrant workers or Native Americans) who will be similarly affected by a proposed DOT program, policy, or activity.~~	3
9 - 10	These provisions provide for identification, consideration, and possible elimination or mitigation of potential impacts at the very earliest stages of decisionmaking, well in advance of NEPA. Doing so requires conducting an EJ analysis before a preferred alternative has been selected so that the equity impacts of each alternative can be evaluated and an equitable alternative developed. ~~In reviewing the potential impacts of implementing a Statewide, metropolitan, or local plan, when disproportionate effects appear likely, you should work with affected populations, including EJ populations, to consider possible alternatives and/or strategies to mitigate anticipated disparities.~~ The consideration of alternatives and selection of the preferred alternative shall be accompanied by robust public participation.	6
11	**Determining Disproportionately High and Adverse Effects**	4

	~~You should consider the following factors when determining if disproportionately high and adverse human health or environmental impacts exist:~~ ~~1. Whether a high or substantial impact exists which adversely affects an EJ population;~~ ~~2. Whether effects on EJ populations exceed those borne by non-EJ populations;~~ ~~3. Whether cumulative or indirect effects would adversely affect an EJ population;~~ ~~4. Whether mitigation and enhancement measures will be taken; and~~ ~~5. Whether there are off-setting benefits to EJ populations.~~ The Equal Employment Opportunity Commission (EEOC) uses the "four-fifths rule" for purposes of determining the disproportionality of impacts on protected classes. That rule 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." (29 C.F.R. § 1607.4 (D).) In other words, "four-fifths" establishes a benchmark for when disparities are significant.	
31	In selecting the preferred alternative, your NEPA document should include a discussion of the magnitude and distribution of disproportionately high and adverse human health or environmental effects on EJ populations for all reasonable alternatives. This EJ analysis should include consideration of the affected community's views on the project and the potential benefits and burdens of the project, and alternatives that have less impact on EJ populations. The NEPA document should include a discussion of the appropriateness of the method used to identify these alternatives. It is important to note that the EJ discussion	6

	in your NEPA document is an additional and separate requirement from your obligation to conduct an EJ analysis at the early stages of planning, i.e. before a preferred alternative has been selected.	
23	FTA and FHWA have adopted joint regulations (*see* 23 CFR part 450) to implement the planning provisions in the Federal transportation statutes. These regulations detail a process of collaborative transportation decisionmaking led by State DOTs and MPOs, which incorporates the participation of the public and other stakeholders. Your planning activities should be supplemented by data collection through both national services (*e.g.*, Census Bureau) and locally developed and administered data collection (*e.g.,* customer surveys). Additionally, you should develop and implement strategies for meaningful engagement of the community, including members of EJ populations as a part of the planning process. Through effective public engagement you are able to identify and understand the needs of the community as a whole, and incorporate those needs into your transportation plans. This includes the requirement that MPOs develop and adopt a Public Participation Plan that, among other things, must "at a minimum, describe explicit procedures, strategies, and desired outcomes for: . . . [s]eeking out and considering the needs of those traditionally under-served by existing transportation systems, such as low-income and minority households, who may face challenges accessing employment and other services. . ." (23 C.F.R. § 450.316 (a) (1).) MPO Public Participation Plans must be developed with the participation of minority and low-income populations, and must "Demonstrate explicit consideration and response to public input during the development" of their long- and short-range plans. (23 C.F.R. § 450.316 (a) (1) (vi).)	10
31	As you identify adverse environmental effects and project benefits, you should be careful to identify cumulative impacts on the imposition of burdens or the denial of benefits to EJ populations. According to the NEPA regulations of the Council on Environmental Quality, a cumulative impact is: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions	17

	regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. (40 C.F.R. §1508.7.) In the context of an evolving transportation system, cumulative impacts that fall on an EJ population can occur across the system, as well as over time.	
35	Whenever a proposed action could have an adverse disproportionate impact on a minority population, the recipient shall conduct both a Title VI analysis and an EJ analysis, as described in FTA's Environmental Justice Circular. It is important to keep in mind that the steps for conducting these two analyses, while overlapping, are not identical. It is also important to keep in mind that the actions required to address disparities are not the same for Title VI as for Environmental Justice. For instance, in the event that a disparate impact is found, Title VI does not allow the action to be "mitigated." Instead, the recipient may not proceed at all unless (a) the action is "necessary to meet a legitimate, important goal that is integral to the [recipient's] mission," and (b) there is no less discriminatory alternative. On the other hand, even if an action with a disparate impact may proceed under Title VI, it must still be mitigated to the extent practicable under the EJ Circular.	12
37 - 38	For example, while a bus rehabilitation project may not impose disproportionately high or adverse health or environmental effects on minority or low-income populations, the ***use*** of those buses subsequent to the rehabilitation may be subject to a Title VI service equity analysis to ensure that age and quality of vehicles assigned to a particular area does not result in a disparate impact on the basis of race, color, or national origin. In addition, if there are substantive changes to the service levels for which the rehabilitated or other buses will be used, *i.e.,* the vehicles are deployed in such a way that the nature and quantity of service in a particular area is changed, then a service equity analysis must be conducted to determine whether this change results in a disparate impact on the basis of race, color, or national origin. Furthermore, in the case of flat fare increases, recipients should analyze whether the burden of those increases will fall more heavily on a minority population as a result of its unaffordability. The requirements for that particular analysis are part of the	15

	compliance determinations made for Federal transit recipients under FTA's Title VI circular, and you are encouraged to review that document.	
App., i	Disproportionate Impact means that the benefits of an action flow to a minority population at less than four-fifths the rate at which they flow to a non-minority population, or that the adverse impact falls on a non-protected population at less than four-fifths the rate at which it falls on a minority population.	4