

DEPARTMENT OF TRANSPORTATION**Federal Transit Administration****49 CFR Part 639****[Docket No. FTA-96-1031]****RIN 2132-AA55****Capital Leases****AGENCY:** Federal Transit Administration, DOT.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This document proposes to amend "Capital Leases" to treat maintenance costs under a commercial lease of a capital asset as an eligible capital expense. "Capital Leases" implements section 308 of the Surface Transportation and Uniform Relocation Assistance Act of 1987, which allows capital grants under the Federal transit laws to be used for leasing facilities or equipment if a lease is more cost effective than purchase or construction of such items. FTA believes that this proposal is consistent with industry practice and with recent Federal initiatives to streamline federally assisted procurement practices and to ensure that Federal investment in the nation's transportation infrastructure is properly protected.

DATES: Comments must be submitted by April 1, 1996.**ADDRESSES:** United States Department of Transportation, Central Dockets Office, PL-401, 400 Seventh Street, S.W., Washington, D.C. 20590.**FOR FURTHER INFORMATION CONTACT:** Rita Daguillard, Deputy Assistant Chief Counsel, Office of Chief Counsel, (202) 366-1936, or Douglas Kerr, Office of Program Guidance and Support, (202) 366-1656.**SUPPLEMENTARY INFORMATION:****A. Background**

Under 49 U.S.C. 5307, Federal funds are provided to urbanized areas on the basis of a statutory formula. These funds are available for the acquisition or construction of mass transportation facilities and equipment ("capital assistance grants"), as well as for payment of a portion of the net operating cost of mass transportation facilities and equipment ("operating assistance grants").

Historically, Federal Transit Administration (FTA) recipients have had the discretion to acquire capital assets by long-term or short-term lease, but few have done so, since the significant portion of the lease cost (as much as forty percent) representing imputed interest was ineligible for

reimbursement under Office of Management and Budget (OMB) cost principles (OMB Circular A-87, "Cost Principles for Grants to State and Local Governments").

In 1987, section 308 of the Surface Transportation and Uniform Relocation Assistance Act, Public Law 100-17 (STURAA), expressly authorized the use of section 5307 capital assistance funds to acquire facilities and equipment by lease where leasing is more cost effective than purchase or construction. As explained in the accompanying Senate Report, section 308

Permits grantees to use [section 5307] grant funds to lease major capital cost items such as computers, maintenance of way and other heavy equipment, maintenance of effort rail equipment, radio equipment, bus garages, property or structures for park and ride, and other buildings or facilities used for mass transit purposes. The Committee recognizes that it is often more cost effective for grantees to lease rather than purchase major capital items. Leasing arrangements can also provide transit authorities with flexibility that is needed, for example, to maintain technological advance in their communications and computing equipment or to adapt buildings and other facilities to changing needs. By including this section, the Committee intends to help grantees better manage their operations and conduct long-term and short-term planning. *S. Rep. No. 3, 100th Cong., 1st Sess. 6 (1987).*

On October 15, 1991, FTA issued 49 CFR Part 639 (56 F.R. 51786), which implements section 308. The rule provides that capital grants under section 5307 may be used for leasing facilities or equipment if leasing is more cost effective than purchase or construction of such items. Section 639.27 lists maintenance costs among the factors that a recipient may consider in making its cost-effectiveness determination. Section 639.17, provides that "only costs directly attributable to making a capital asset available to the lessee are eligible for capital assistance" and cites as examples finance charges and ancillary costs such as delivery and installation charges.

B. Proposed Amendment

In reviewing the subject of capital leases, particularly vehicle leases, FTA has noted that maintenance and repair costs are often an integral component of standard commercial lease agreements and that use of capital assistance for such costs is expressly permitted under section 5307. Many commercial vehicle leases, for instance, state that the lessor will provide all maintenance, repairs, and replacement parts needed to keep the capital asset in good operating condition. These services are included in the overall lease cost, rather than

being itemized as a separate charge. In such cases, it is not feasible for lessees to separate maintenance charges from the overall lease cost. Requiring grantees to do so imposes an accounting burden that is inconsistent with Congress' recognition that leasing is often more cost effective and with its intention in section 308 to facilitate grantee operations.

Moreover, since regular maintenance is necessary to ensure the availability and adequate functioning of a capital asset, FTA believes that it is an essential and inseparable element of the lease agreement. Congress has expressly recognized this relationship in allowing capital assistance to be used to acquire "associated capital maintenance items" under section 5307(b)(1), where such items would otherwise have to be funded under the operating assistance program. FTA therefore proposes to recognize maintenance charges as eligible capital costs under a commercial lease directly attributable to the lessee's use of the asset within the definition of section 639.17.

This proposal is consistent with several recent initiatives, including the President's National Performance Review, Executive Order 12931 (Federal Procurement Reform), and the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355, 108 Stat. 3243 (October 13, 1994)), which direct Federal agencies to remove administrative burdens in procurement processes. They encourage and facilitate the procurement of commercially available items by exempting agencies from unnecessarily burdensome government-unique certifications and accounting requirements that add costs and discourage companies from doing business with them. Section 8203 of FASA, for instance, requires that agencies use uniform, simplified contracts for the procurement of commercial items and that they revise all procurement procedures not required by law to eliminate impediments to use of such contracts. FTA believes that requiring its recipients to account separately for maintenance costs under a commercial lease is unnecessarily burdensome and makes such leases more costly and cumbersome to administer. Recognizing these costs explicitly in section 639.17 should facilitate recipients' acquisition and maintenance of capital assets by allowing them to enter into standard commercial lease agreements more easily and at less cost.

Moreover, this proposal is consistent with FTA's recently issued Circular 4220.1C ("Third Party Contracting Requirements," October 1, 1995), which

reduces FTA requirements; provides grantees increased flexibility in soliciting, awarding, and administering contracts; reduces FTA's role in third party procurement activity; and allows recipients to use their own procurement practices that reflect State or local laws, provided that they conform to applicable Federal law. FTA notes that neither section 308 of the STURAA nor the accompanying Senate Report indicates that maintenance costs should not be treated as eligible capital expenses.

Accordingly, consistent with common industry practice and Federal procurement streamlining measures, FTA proposes to amend 49 CFR 639.17 to recognize maintenance costs as "costs directly attributable to making a capital asset available to the lessee."

C. Request for Comments

FTA seeks comment on its proposal to recognize maintenance costs as eligible capital expenses under leasing agreements.

Regulatory Impacts

A. Executive Order 12866

FTA has determined that this action is not significant under Executive Order 12866 or the regulatory policies and procedures of Department of Transportation regulatory policies and procedures. Since this final rule makes only a technical amendment to current regulatory language, it is anticipated that the economic impact of this

rulemaking will be minimal; therefore, a full regulatory evaluation is not required.

B. Regulatory Flexibility Act

In accordance with 5 U.S.C. 603(a), as added by the Regulatory Flexibility Act, Pub. L. 96-354, FTA certifies that this rule will not have a significant impact on a substantial number of small entities within the meaning of the Act.

C. Paperwork Reduction Act

This action does not contain a collection of information requirement for purposes of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, *et seq.*

D. Executive Order 12612

This action has been reviewed under Executive Order 12612 on Federalism and FTA has determined that it does not have implications for principles of federalism that warrant the preparation of a Federalism Assessment. If promulgated, this rule will not limit the policy making or administrative discretion of the States, nor will it impose additional costs or burdens on the States, nor will it affect the States' abilities to discharge the traditional governmental functions or otherwise affect any aspect of State sovereignty.

List of Subjects in 49 CFR Part 639

Government contracts, Grant programs—Transportation, Mass transportation.

Accordingly, for the reasons described in the preamble of this document, FTA is proposing to amend title 49, Code of Federal Regulations, part 639 as follows:

PART 639—[AMENDED]

1. The authority citation on Part 639 is revised to read as follows:

Authority: 49 U.S.C. 5307; 49 CFR 1.51.

2. Section 639.17 is revised to read as follows:

§ 639.17 Eligible lease costs.

(a) All costs directly attributable to making a capital asset available to the lessee are eligible for capital assistance, including, but not limited to—

- (1) Finance charges, including interest;
- (2) Ancillary costs such as delivery and installation charges; and
- (3) Maintenance costs.

(b) The cost of materials, supplies and services provided under the terms of the lease may not be eligible for capital assistance, if they would not be eligible for capital assistance under a traditional purchase or construction grant.

Issued on: January 26, 1996.

Gordon J. Linton,

Administrator.

[FR Doc. 96-1830 Filed 1-30-96; 8:45 am]

BILLING CODE 4910-57-U