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STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, Governor

PUBLIC UTILITIES COMMISSION

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U.S. Department of Transportation
Central Docket Office, PL-401
400 Seventh Street, S.W.,
Washington, D.C. 20590

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DEPT. OF TRANSPORTATION
DOCKETS

Re: Rail Fixed Guideway Systems; State Safety Oversight
FTA Docket No. FTA-2004-17196; RIN 2130-AB16

Dear Sir or Madam:

Enclosed for filing in the above-docketed case, please find an original electronic filing and one extra copy of the attached document entitled "**COMMENTS OF THE CONSUMER PROTECTION AND SAFETY DIVISION OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**". Please return to us the file-stamped copy in the prepaid blue envelope provided for your convenience.

If you have any questions or concerns about this filing please feel free to contact me at (415) 703-1519.

Very truly yours,


Patrick S. Berdge
Staff Counsel

PSB:afm

Enclosure: (2)

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ORIGINAL

**BEFORE THE UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL TRANSIT ADMINISTRATION
WASHINGTON, D.C. 20590**

Rail Fixed Guideway Systems; State
Safety Oversight

FTA Docket No. FTA—2004—17196
RIN 2130—AB16

**COMMENTS OF THE
CONSUMER PROTECTION AND SAFETY DIVISION
OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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INTRODUCTION

The Consumer Protection and Safety Division Staff (“Staff”) of the California Public Utilities Commission (“California” or “Commission”) commends the Federal Transit Administration (“FTA”) for what staff believes is an improvement to the FTA’s present safety oversight rules and requirements in these proposed rules. Staff submits these comments on behalf of California.

The Commission is the designated oversight agency for the State of California pursuant to 49 C.F.R. Part 659.21. California has been performing safety oversight of rail transit and street-running rail systems for over 100 years. It initiated the original program in the 1970s, and revised and expanded the program in the 1980s and 1990s. Currently, California performs safety oversight for six major rail fixed guideway systems, as defined by 49 C.F.R. Part 659.5. California oversight also extends to two systems in design and/or construction that may be classified as “rail fixed guideway systems” (“transit agencies”) if the changes proposed by this rulemaking are adopted, and three that do not meet either the existing or proposed definitions of the federal rule.

I. SUMMARY OF CALIFORNIA’S POSITION ON THE RULEMAKING

- California recommends that the rulemaking clarify that the FTA is not moving away from the demonstrated benefits of a system safety approach towards a rule-based system. (See section III. *supra* at pp. 4-5.)
- The proposed rulemaking significantly expands the rail transit safety program which will require additional resources for both FTA program staff and SSOAs but no additional resources are provided. Thus, the proposed rule is, essentially, an unfunded mandate for California regardless of whether it meets the criteria of the federal Unfunded Mandates Reform Act of 1995. California recommends that the rulemaking provide SSOAs with

additional funding and that implementation be spread over a two-year period. (See section III. A. *supra* at pp. 5-6.)

- California finds the FTA funding only for new SSOAs with new transit agency starts to be inequitable; California recommends that FTA provide funding for all capital projects including monies to existing SSOAs with “new starts” to cover the significant additional costs of safety and security certification. (See section III. A. *supra* at pp. 6-7.)
- The rulemaking should specifically state that transit agencies must provide SSOAs with all relevant accident investigation information and data to permit adequate safety oversight. (See section III. B. *supra* at pp. 7-8.)
- California supports the rulemaking’s Hazard Management Process. (See section III. C. *supra* at p. 9.)
- The rulemaking should make clear that the APTA Manual’s system safety approach is still recognized as an essential and important approach for transit agency safety in general. (See section V. A. *supra* at pp. 10-11.)
- The rulemaking’s definition of *individual* should be deleted. (See section V. B. *supra* at p. 11.)
- California recommends that the defined term ‘hazard’ should be used throughout the rule and the terms ‘hazardous conditions’ deleted. (See section V. C. *supra* at p. 11.)
- California recommends that the rulemaking should make clear that SSOAs need not review every corrective action plan but rather only the overall procedures and methodology used by the transit agencies. Consequently, California recommends that 49 C.F.R. Part 659.31(c) be deleted. (See section V. D. *supra* at pp. 11-12.)
- California recommends that the security audits required under the rulemaking be conducted by qualified professionals over regular intervals and that the FTA

define “qualified professional.” (See section V. E. supra at p. 12.)

- 49 C.F.R. Part 659.21 should be modified so that it is clear that the certification signed by the rail transit agency’s executive director or general manager of the transit agency’s annual report permits a description of how the transit agency is not in compliance with the system safety and security programs and how compliance will be accomplished by a corrective action plan within six months. (See section V. F. supra at pp. 12-13.)
- Modify the proposed notification requirements of 49 C.F.R. Part 659.27 (a) so that notification is required for
 - injuries and fatalities “resulting from rail transit operations (including testing, maintenance, and any revenue or non-revenue service);”
 - all fatalities should be reported within two hours;
 - the reporting threshold of \$100,000 should be retained;
 - the proposed rule should require that any information supplied to the National Transit Database should also be supplied to the SSOA; and
 - the definition of “medical attention” should be deleted and replaced with “injuries requiring inpatient hospitalization or medical treatment for other than medical observation or in which the injury is broken bones, a loss of any member of the body, or any serious degree of permanent disfigurement, or those resulting in a medical diagnosis of restricted activity.”

(See section V. G. supra at pp. 13-15.)

II. THE PURPOSE OF THIS RULEMAKING

The purpose of the rulemaking is to improve the performance of the state safety oversight program and effect: (1) enhanced program efficiency and authority; (2) increased responsiveness to recommendations and emerging safety and security issues; (3) improved consistency in the collection and analysis of accident causal

factors through increased coordination with other Federal reporting and investigation programs; and (4) improved performance of the hazard management process.¹

III. THE EFFECTS OF THIS RULEMAKING ON CALIFORNIA

The Commission and California's transit agencies fully embraced a systems approach to safety as exemplified by the American Public Transportation Association's ("APTA's") Manual for the Development of Rail Transportation System Safety Program Plans as previously recommended by the FTA. As the rulemaking notes, the APTA Manual system safety approach provides a valuable tool for rail transit agencies in their development of system safety program plans.² The specific standards included in the rulemaking may assist new State Safety Oversight Agencies ("SSOAs") in rules compliance by more clearly empowering state oversight agencies to carry out the safety program because it contains more specific mandates.³ But California did not have difficulty in complying with the FTA's prior rules. Nevertheless, since this rulemaking "does not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions,"⁴ California supports the specific requirements enumerated in the rulemaking as a foundation for basic safety oversight and as a basic method to review rules compliance. However, California remains concerned that the proposed

¹ Section III Need for Rule Revision, 69 Fed. Reg. 11219.

² Section IV Overview of the Proposed Rule, 69 Fed. Reg. 11220.

³ "In September 2002, the NTSB issued recommendations to FTA's Administrator (R-02-18 and -19), stating that the APTA Manual, published on August 20, 1991, does 'not contain the necessary specific guidance for assessing the effectiveness of rules compliance programs; as a result, the guidelines are not effective tools for regulatory authorities or transit agencies.' The NTSB recommended that rail transit agencies should adopt, in their system safety program plans, specific standards covering rules." Section III Need for Rule Revision, *Working Groups*. 69 Fed. Reg. 11219.

⁴ (Section VI Regulatory Process Matters, *e. Executive Order 13132 (Federalism Assessment)*, 69 Fed. Reg. 11227).

rules may not clearly establish the overall goals and theory that make a system safety approach successful.

For example, under the proposed rule, the oversight agency is required to review and approve several documents⁵ yet no criteria are included to provide guidance in making those reviews. Thus, it is not clear whether the FTA's intent is to require the oversight agency to ensure the items listed in the proposed rule are present or, on the other hand, to ensure the plan and its individual components advance overall system safety. California fears that, without specifying minimum systems safety document criteria, the proposed rule risks becoming a paperwork exercise involving bureaucratic approvals but lacking the rational application of a system safety approach.

California believes the FTA system safety approach has proven effective at improving safety for transit agencies. For instance, under a system safety approach, rail transit agencies in California are currently able to respond quickly to perceived hazards and implement corrective actions in the shortest possible time. Therefore, California recommends that the rulemaking clarify that the FTA is not moving away from the demonstrated benefits of a system safety approach towards a rule-based system.

**A. The Increased Financial Burden Of The Rulemaking
On Transit Agencies And The SSOAs**

The proposed rulemaking represents an expansion of the rail transit safety program and will require additional resources for both FTA program staff and SSOAs. The proposed rule, however, provides no additional resources and is,

⁵ E.g., system safety program plans, system security plans, internal safety audit annual reports, and corrective actions plans

essentially, an unfunded mandate.⁶ The FTA Office of Safety and Security has dealt with significant work expansion in the last few years. The number of transit agencies is increasing significantly and the workload related to security and terrorism has also increased. California has noticed as the Office of Safety and Security has risen to the occasion but it has also observed an overall, albeit slight, diminution of the FTA's oversight of the program. For example, quarterly teleconferences have not occurred in the last year.

The proposed rule unquestionably will increase workload related to the program. This increased burden goes beyond the adjustments described in the rulemaking in Section VI. a. (69 F.R. 11226-11227) related to additional transit agencies and salary increases for staff. California is concerned the rulemaking may require additional funding beyond current state spending levels. During the one-year reporting period provided in 49 C.F.R. Part 659.33 (69 F.R. 11232), California's budget will be in deficit and its ability to raise fees and taxes to cover the additional costs to comply with the rulemaking will be severely restricted. Under these circumstances, California recommends that compliance should be spread over a two-year period.

The rulemaking states that FTA makes funds available to support the development of the oversight program. "State oversight agencies are able to receive funding from the rail transit agency, so long as the oversight agency state safety oversight expenses are incurred during the pre-revenue service phase of the capital project..." (Section V Section-By-Section Analysis, *Designation of Oversight Agency* (§ 659.9), 69 Fed. Reg. 11221.) California has several new start projects it is

⁶ The FTA has concluded that the proposed rules "would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995... This proposed rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year (2 U.S.C. 1532). As noted above, the estimated \$2.1 million annual cost of implementing the rule is well below this threshold." Section VI Regulatory Process Matters, *d. Unfunded Mandates Reform Act of 1995*, 69 Fed. Reg. 11227.

required to oversee and certify—yet it is ineligible to receive these funds because it has an existing oversight agency. California contends this is inequitable. Although, approximately one-quarter of the transit agencies in the nation are located in California, new transit districts are being created in California just as they are in states that currently have no transit agencies. FTA’s policy ignores the increased complexity and costs inherent in expanding the number and size of transit agencies. Limiting SSOA funding as provided in the rulemaking creates a significant and disproportionate fiscal hardship on California. California recommends that FTA funding for all capital projects include monies to the SSOAs for the significant additional costs of safety and security certification.

B. Increased Responsiveness To Recommendations And Emerging Safety And Security Issues

California has found transit agencies to be generally responsive to helpful recommendations as well as safety and security issues as they emerge. Nonetheless, the rulemaking will further assist California in the area of concern regarding accident investigation reporting to the SSOA.

California has encountered increasing difficulties in obtaining accident information from some transit agencies due to liability concerns associated with the release of accident information in personal injury litigation. As permitted in the proposed rule, § 659.11 (69 Fed. Reg. 11229), California has a statutory provision making accident investigation reports inadmissible in court.² But, California also has a Public Records Act (Cal. Gov. Code, § 6250 et seq.) similar to the federal government’s Freedom of Information Act which permits citizens to obtain accident information from the California SSOA. Because of this potential release of accident information, a few transit agencies have refused to provide the Commission with

² California Public Utilities Code § 315 provides in pertinent part that “[n]either the order or recommendation of the commission or any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

their underlying accident investigation information and reports alleging that they are protected by the transit agency's attorney-client privilege.

The rulemaking provides that accident investigations be conducted by transit agencies according to procedures reviewed and formally approved by the SSOA and submitted to the FTA. (Section V Section-By-Section Analysis, *Investigations* (§ 659.29), 69 Fed. Reg. 11225.) Further, the transit agency must document each accident meeting the relevant threshold “in a final report that includes a description of investigation activities, identified causal factors, and a corrective action plan.” (Ibid.) The proposed rule for accident investigations relies on transparency between the transit agency, the SSOA and the FTA. The rule cannot succeed unless the SSOA and the FTA have unfettered access to the underlying accident information and data. Therefore, California interprets § 659.29 as requiring all transit agencies to release essential and relevant accident information and data to SSOAs and to the FTA. This permits the SSOA to adequately review and approve the transit agency's determination of causality and the proposed corrective action. California recommends that the rulemaking specifically state that transit agencies must provide SSOAs with all relevant accident investigation information and data to permit adequate safety oversight.

C. Improvement of The Hazard Management Process

California supports the FTA's proposal to require transit agencies to develop a process to identify and resolve hazard conditions during operation, system extensions, modifications, or changes. (Section III Need for Rule Revision, 69 Fed. Reg. 11219.) Whether the transit agency uses an APTA Manual based, military based, or other system safety methodology, the SSOA must require that the transit agency define the rail transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process; (2) specify the sources of, and the mechanisms to support, the on-going identification of hazards; (3) define the process by which identified hazards will be evaluated and

prioritized for elimination or control; (4) identify the mechanism used to track to resolution the identified hazard(s); (5) define minimum thresholds for the notification and reporting to oversight agencies of hazardous conditions; and (6) specify the process by which the rail transit agency will provide on-going reporting of hazard resolution activities to the oversight agency. (Section V Section-By-Section Analysis, *Hazard Management Process* (§ 659.25), 69 Fed. Reg. 11224.)

The FTA contends that this process will “ensure a continuous dialogue regarding hazard management between the oversight agency and the rail transit agency” and provide the SSOA with “an improved understanding of this process, as applied in the rail transit industry, and a greater context from which to assess rail transit agency hazard evaluation processes and corrective action plans.” (Id., 69 Fed. Reg. 11225.) California agrees with the FTA and expects that the new requirements will assist in the creation and implementation of a more fully integrated, system-wide hazard management identification process.

IV. WAYS TO MINIMIZE THE INFORMATION COLLECTION BURDEN WITHOUT REDUCING THE QUALITY OF THE COLLECTED INFORMATION

As part of the Paperwork Reduction Act, the FTA has asked for public comment on ways to minimize the information collection burden without reducing the quality of the collected information. (Section VI Regulatory Process Matters, *f. Paperwork Reduction Act*, 69 Fed. Reg. 11227.) The burden of information collection for purposes of transit safety and security is undeniably onerous but, at the same time, extremely valuable and necessary. Information concerning safety and security plans will improve overall system safety and security, as will accident and hazards information and data collection. The quality and appropriateness of corrective action plans are dependent on the collection of sound and thorough information. California has no quick solutions to the difficulty and expense of the collection of this kind of necessary information. Even so, California remains open to

all recommendations in this regard, and expects that in technological innovation, time, and experience, will enable both the transit agencies and the reviewing agencies (the SSOAs, the FTA, and the NTSB) to more easily identify essential and critical information and the most efficient methodologies to obtain such information.

V. RECOMMENDED CHANGES TO THE PROPOSED RULES

California believes that some changes to the rulemaking would be helpful in implementing its purpose.

A. Clarification Of The FTA's Purpose And Intent Of The Information Collection Requirement Would Assist In Implementing The Proposed Rules

Since its inception the FTA program has been focused on a system safety approach to safety oversight. The initial rule relied heavily on the APTA Manual that focuses on and explains the system safety approach. California recommends that the rulemaking clarify that the FTA is not moving away from the demonstrated benefits of a system safety approach towards a rule-based system. The benefit to new SSOAs and basic rules compliance of the specific requirements contained in the rulemaking should be recognized as the primary purpose of the rulemaking; the FTA should make clear that the APTA Manual's system safety approach is still recognized as an essential and important approach for transit agency safety in general.

Further, the rulemaking should make clear that the fundamental purpose of accident investigations is to determine causal factors and take corrective actions to prevent reoccurrence, not to attribute blame and liability. Additionally, the review and approval process set forth in the rulemaking should be identified as a means of assuring that the SSOAs will properly consider and address the problems identified in the transit agency's accident review and system safety review process.

B. Delete The Definition Of *Individual*

The proposed 49 C.F.R. Part 659.5 defines *Individual* as “a passenger; employee; contractor; rail transit facility occupant; other transit facility worker; or trespasser.” (§ 659.5 Definitions, 69 Fed. Reg. 11228.) The proposed definition uses “Rail Transit Facility Occupant”, but this term is not defined. In addition, the definition is overly restrictive. It should include all persons since it is used when defining a fatality for reporting purposes in 649.27. California does not believe that any fatality should go unreported and seeks a broad definition. California proposes that the word ‘individual’ be replaced in the proposed rule with the word ‘person’. Therefore, California recommends that the definition of individual be deleted.

C. Delete The Term “Hazardous Condition”

The proposed 49 C.F.R. Part 659.5 defines the term ‘*hazard*’, but the term ‘hazardous condition’ appears in several places in the proposed rule. California recommends that the defined term ‘hazard’ should be used throughout the rule.

D. Modify The Corrective Action Process So That SSOA’s Are Responsible For Reviewing The Transit Agency’s Methodology And Procedures For Corrective Action Plans Rather Than Every Transit Agency Corrective Action Plan

The proposed system security plan at 49 C.F.R. Part 659.31(c) requires that “[t]he corrective action plan should identify the action to be taken by the rail transit agency and the schedule for its implementation.” (§ 659.31(c) Corrective action plans, 69 Fed. Reg. 11232.) The SSOA should not be burdened with reviewing each and every transit agency corrective action plan but rather the methodology and procedures for corrective actions plans in general. Further, the rulemaking requires a formal approval process for corrective actions that could delay implementation. Where the SSOA believes further investigation or review of a particular corrective action plan is needed, the SSOA is free to do so. Thus, California recommends that 49 C.F.R. Part 659.31(c) be deleted.

E. Modify The Security Audit Requirement So That Such Audits Are Conducted Periodically And By Qualified Professionals

The proposed system security plan at 49 C.F.R. Part 659.17 (b)(2) requires transit agencies to document the process of managing threats and vulnerability, but there is no requirement for periodic security audits. (§ 659.17 System security plan, 69 Fed. Reg. 11230.) California recommends that these security audits be conducted by qualified professionals over regular intervals and that the FTA define “qualified professional.”

F. Modify The Transit Agency Internal Safety And Security Reviews Requirement To Permit Corrections Prior To Certification

The transit agency internal safety and security review requirements at 49 C.F.R. Part 659.21, demand that the annual report must be accompanied by a formal letter of certification signed by the rail transit agency’s executive director or general manager indicating that the rail transit agency is in compliance with its system safety program plan and system security plan. The proposed wording is confusing. If the internal safety review determines the transit agency is not in compliance with the system safety program plan⁸ then the general manager cannot certify compliance in the end of year report. California proposes the following changes:

- (e) The annual report must be accompanied by a formal letter signed by the rail transit agency’s executive director or general manager certifying that the rail transit agency is implementing its system safety program plan and system security plan and that the transit agency will implement corrective action resolving all issues resulting from its reviews within six months.

⁸ Determining compliance with the system safety program plan and security plan is the purpose of the internal safety review.

(§ 659.21 (e) Rail transit agency internal safety and security reviews. 69 Fed. Reg. 11231.)

G. Modify The Proposed Notification Requirements

The proposed rule, 49 C.F.R. Part 659.27 (a) (§ 659.27 Notification, 69 Fed. Reg. 11231) should be modified because the proposed rule requires reporting beyond California's needs while, at the same time, it fails to require the reporting of incidents California believes are important. For instance, California does not need information on events unrelated to the operation of the rail fixed guideway system such as incidents that occur in offices, parking lots and other locations controlled by the transit agency that do not involve rail transit operations. On the other hand as mentioned in the paragraphs below, the proposed rule excludes the reporting of some fatalities and relevant injuries. California views its jurisdiction broadly and requires information on events occurring during non-revenue hours, pre-operation testing, and maintenance activities. Nevertheless, California does not wish to extend its safety oversight beyond the functions of a rail fixed guideway system.

The section on fatality is confusing in the context of a two-hour notification. Determining cause of death (i.e., suicide) is often impossible within a two-hour window. Nonetheless, all fatalities should be reported to the SSOA within two-hours.

The proposed rule on injuries excludes necessary information. A person struck and injured by a rail transit vehicle would not be reportable under the proposed rule. Many California incidents involve a rail transit vehicle colliding with a pedestrian or motor vehicle and resulting in a single injury. California believes it is important to capture these incidents in the notification requirements. In addition, the proposed rule conflicts with the National Transit Database, which requires the reporting of one person injured in a collision.

The rule's reference to medical attention is not clear. Many California transit agencies transport, to medical facilities, persons involved in a transit incident even if there is no obvious need for medical treatment. These persons are examined by a medical professional and often are released without further treatment or with basic first aid. Both the current and the proposed rule here are unclear as to whether examination or first-aid qualifies as medical attention requiring immediate reporting. Further complicating the issue is the fact that medical professionals often refuse to confirm or deny whether a person received medical treatment after being transported to a medical facility. California recommends the development of a detailed national standard for reporting injuries and recommends the FTA provide guidelines that address the details of incident reporting.

The property damage reporting limits are a significant decrease from the current \$100,000 requirement. Lowering this threshold to \$25,000 increases the number of events reported. California does not believe this information is required in the two-hour notification period. In addition, the proposed rule limits the applicable items considered under the property damage requirement to a defined list. California contends that the existing rule, which includes all property damage, provides the necessary information and, therefore, recommends that the existing rule be retained.

California is concerned that transit agencies are reporting information to the National Transit Database that is not available to state oversight agencies. Therefore, California recommends that the proposed rule require any information supplied to the National Transit Database also be supplied to the SSOA.

Finally § 659.27 (§ 659.27 Notification, 69 Fed. Reg. 11231) should be modified to include any or all injuries requiring inpatient hospitalization or medical treatment for other than medical observation or in which the injury is broken bones,

a loss of any member of the body, or any serious degree of permanent disfigurement, or those resulting in a medical diagnosis of restricted activity.²

California recommends the following changes to § 659.27 (a) Notification:

- (a) The oversight agency must require the rail transit agency to notify the oversight agency within (2) hours of any event involving a rail transit vehicle or resulting from rail transit operations (including testing, maintenance, and any revenue or non-revenue service) ~~taking place on rail transit controlled property~~ where one of more of the following occurs:
- (1) A fatality, ~~where an individual is confirmed dead within 30 days of a transit related incident, excluding suicides and deaths from illness;~~
 - (2) Injuries requiring [inpatient hospitalization or medical treatment for other than medical observation or in which the injury is broken bones, a loss of any member of the body, or any serious degree of permanent disfigurement, or those resulting in a medical diagnosis of restricted activity;] ~~immediate medical attention away from the scene for two or more individuals;~~
 - (3) Property damage ~~to rail transit vehicles, other rail transit property or facilities~~ that equals or exceeds \$100,000;
 - (4) An evacuation due to life safety reasons; or
 - (5) A main line derailment.
- [(b) The oversight agency must require notification from the rail transit agency, within 30 days after the end of the month in which an incident occurs, of any incident that meets the National Transit Database reporting requirements.]
- (§ 659.27 (a) Notification. 69 Fed. Reg. 11231.)

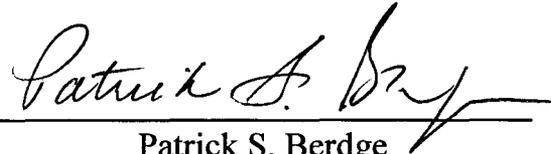
² See California Labor Code § 6302 defining serious injury or illness for purposes of the Division of Occupational Safety and Health, Dept. of Industrial Relations, State of California.

CONCLUSION

California appreciates this opportunity to comment on the FTA's proposed rulemaking.

Respectfully submitted,

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