



December 22, 2021

**To:** Federal Transit Administration, Department of Transportation  
**Re:** Title VI Implementation: Request for Information, 86 Fed. Reg. 60,735  
(November 3, 2021)  
**Docket No.** USCIS-2021-0006

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> (“Policy Integrity”) respectfully submits the following comments to the Federal Transit Administration (“FTA”) regarding its request for information (“RFI”) on its implementation of Title VI of the Civil Rights Act<sup>2</sup> through the Title VI Circular (“the Circular”).<sup>3</sup> Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decision-making through scholarship in the fields of administrative law, economics, and public policy.

Policy Integrity recommends that FTA update its Title VI Circular to ensure that low and zero-emission vehicles are distributed in a nondiscriminatory way across the transit systems it finances. These comments make two specific recommendations:

- **FTA should require that transit providers equitably allocate clean vehicles across communities.** This will encourage transit providers to consider transportation emissions as another aspect of equity while planning and implementing transit projects.
- **FTA should monitor transit providers’ distribution of clean vehicles by expanding existing reporting requirements.** This will enable FTA and the public to more easily identify inequitable distribution of clean vehicles.

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<sup>1</sup> This document does not purport to present New York University School of Law’s views, if any.

<sup>2</sup> Civil Rights Act of 1964 § VI, 42 U.S.C. §§ 2000e *et seq*; *see also* 49 U.S.C. § 5332 (detailing the Department of Transportation’s obligations under Title VI).

<sup>3</sup> 86 Fed. Reg. 60,735 (Nov. 3, 2021) (Docket No. FTA-2021-0014).

## I. FTA Should Require Nondiscrimination in the Distribution of Clean Transportation

FTA seeks comment on whether to “consider incorporating guidance and instructions into the Title VI Circular on topics or policy matters not discussed in the questions above or not currently covered in the Circular.”<sup>4</sup> As FTA expands its financing of low carbon transportation,<sup>5</sup> it should ensure that the Circular explicitly requires nondiscrimination in the distribution and routing of such clean vehicles. Since the Circular was last updated in 2012, two major developments have occurred that render this further guidance appropriate.

First, clean transportation technology has become significantly more technologically and economically viable over the last decade.<sup>6</sup> Indeed, FTA recently announced plans to allocate \$5.6 billion from the Bipartisan Infrastructure Law toward grants for low or no emission vehicles.<sup>7</sup> And transit agencies around the country have already begun to shift toward electric buses and other clean fleet technologies.<sup>8</sup>

Second, the acknowledgement of disproportionate burdens from transportation emissions faced by communities of color has evolved considerably. The transportation sector is not only the largest source of greenhouse gas emissions in the country, but is also a significant source of criteria pollutants like fine particulate matter and nitrogen oxides that significantly endanger public health,<sup>9</sup> leading to as many as 20,000 premature deaths every year in the United States.<sup>10</sup> And extensive scientific literature shows that people of color disproportionately bear the burden

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<sup>4</sup> *Id.* at 60,735.

<sup>5</sup> *See, e.g.*, Press Release, Fed. Transit Admin., U.S. Department of Transportation Announces Key Priorities, Funding for Public Transportation Under the Bipartisan Infrastructure Law (Nov. 15, 2021), <https://www.transit.dot.gov/about/news/us-department-transportation-announces-key-priorities-funding-public-transportation>.

<sup>6</sup> *See, e.g.*, U.S. Department of Energy, DOE Estimates That Electric Vehicle Battery Pack Costs in 2021 Are 87% Lower Than in 2008 (Oct. 4, 2021), <https://www.energy.gov/eere/vehicles/articles/fotw-1206-oct-4-2021-doe-estimates-electric-vehicle-battery-pack-costs-2021>; *see also* U.S. EPA, *The 2021 EPA Automotive Trends Report* at 54-58 (Nov. 2021), <https://www.epa.gov/system/files/documents/2021-11/420r21023.pdf>.

<sup>7</sup> Press Release, *supra* note 5.

<sup>8</sup> *See, e.g.*, Press Release, New York MTA, MTA Unveils Proposal to Redevelop Jamaica Bus Depot for New All-Electric Zero-Emission Bus Fleet (Dec. 14, 2021), <https://new.mta.info/press-release/mta-unveils-proposal-redevelop-jamaica-bus-depot-new-all-electric-zero-emission-bus>; Press Release, Los Angeles County Metro, L.A. Metro Now Running all Zero-Emission Electric Buses on the G (Orange) Line in the San Fernando Valley (Oct. 13, 2021), <https://www.metro.net/about/1-a-metro-now-running-all-zero-emission-electric-buses-on-the-g-orange-line-in-the-san-fernando-valley/>.

<sup>9</sup> *See* Env't Def. Fund, *Clean Cars, Clean Air, Consumer Savings: 100% New Zero Emission Vehicle Sales by 2035 Will Deliver Extensive Economic, Health and Environmental Benefits to All Americans* 4 (Jan. 2021), <https://perma.cc/8URR-U67Y>.

<sup>10</sup> *See* David Farnsworth et al., *Cleaner by the Mile: Electric Trucks Can Have Outsized Environmental and Health Benefits*, Utility Drive (Apr. 14, 2021), <https://perma.cc/FAF4-VM5M> (citing Fabio Caiazzo et al., *Air Pollution and Early Deaths in the United States. Part I: Quantifying the Impact of Major Sectors in 2005*, 79 *Atmospheric Env't* 198 (Nov. 2013)); *see also* Env't Def. Fund, *supra* note 9, at 4 (attributing more than 20,000 premature American deaths to the transportation sector every year).

of this pollution.<sup>11</sup> Because electric vehicles simultaneously reduce both greenhouse gas and criteria pollutants, FTA should ensure that these clean vehicles are distributed across transit systems in a nondiscriminatory way.

Accordingly, FTA should specifically designate the equitable distribution of electric and low-emissions vehicles as an integral component of transit providers' Title VI compliance. Currently, the Circular requires these transit providers to set nondiscriminatory "system-wide service standards and policies"<sup>12</sup> to "ensure equitable distribution of transit amenities across the system,"<sup>13</sup> where service standards include the "age and quality of vehicles assigned to routes."<sup>14</sup> In other words, a transit provider would be prohibited from, for example, exclusively assigning new buses to routes in a majority white community and older buses to routes in a majority Latinx community. The Circular rightly considers vehicle quality a component of "the benefits of the program or activity," and requires recipients to "take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin."<sup>15</sup>

The Circular does not currently provide a definition of "quality," instead providing examples of criteria that *could* be considered under that broad umbrella term.<sup>16</sup> The Circular currently contemplates, but does not require, incorporating emission reducing technology into transit

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<sup>11</sup> Studies show that communities of color are disproportionately exposed to transportation-related emissions such as PM2.5 and nitrogen oxides. Christopher H. Tessum et al., *PM2.5 Polluters Disproportionately and Systemically Affect People of Color in the United States* SCIENCE ADVANCES (Apr. 30, 2021) at 1-3 (finding that PM2.5 pollution from both heavy duty diesel vehicles and light duty gas vehicles disproportionately affects people of color), <https://www.science.org/doi/10.1126/sciadv.abf4491>; see also Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in the Northeast and Mid-Atlantic* (Jan. 28, 2019) (finding that communities of color in the Northeast and Mid-Atlantic breathe 66% more PM2.5 from vehicles than white residents), <https://www.ucsusa.org/resources/inequitable-exposure-air-pollution-vehicles-california-2019>; see also Union of Concerned Scientists, *Inequitable Exposure to Air Pollution from Vehicles in California* (Jan. 28, 2019) (finding that African American Californians are exposed to 43% higher concentrations of PM2.5 than white Californians, while the figure is 39% higher than white communities for Latino Californians), <https://www.ucsusa.org/resources/inequitable-exposure-air-pollution-vehicles-california-2019>. For studies on the relative burdens of NO<sub>2</sub>, see Lara Clark et al., *Changes in Transportation-Related Air Pollution Exposures by Race-Ethnicity and Socioeconomic Status: Outdoor Nitrogen Dioxide in the United States in 2000 and 2010* ENVIRONMENTAL HEALTH PERSPECTIVES (Sep. 2017) (finding that "estimated mean NO<sub>2</sub> concentrations remained 37% higher for nonwhites than whites in 2010"), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5915204/>; see also Demetillo et al., *Space-Based Observational Constraints on NO<sub>2</sub> Air Pollution Inequality From Diesel Traffic in Major US Cities* GEOPHYSICAL RESEARCH LETTERS (Aug. 25, 2021) (finding that in urban areas across the U.S., low-income neighborhoods and communities of color experience an average of 28% more nitrogen dioxide pollution than higher-income and majority-white neighborhoods), <https://agupubs.onlinelibrary.wiley.com/doi/10.1029/2021GL094333>.

<sup>12</sup> Fed. Transit Admin., Title VI Requirements and Guidelines for Federal Transit Administration Recipients at Chap. IV-4 (Oct. 1, 2012) [hereinafter Title VI Circular].

<sup>13</sup> *Id.* at Chap. IV-6.

<sup>14</sup> *Id.* at Chap. IV-4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at Chap. IV-7.

providers' quality of service.<sup>17</sup> FTA should explicitly designate vehicle emissions as an integral part of vehicle quality to ensure that low and zero-emission vehicles are distributed in a non-discriminatory manner across the system. Specifically, FTA should require that transit providers allocate no fewer clean vehicles per capita to transit lines and areas serving communities of color than to majority-white lines and areas. Given that transit providers are permitted to consider race, color, or national origin when the provider is attempting to remove or overcome prior discriminatory practices, FTA should also clarify that distributing *more* clean vehicles per capita in communities of color may be appropriate when those communities have historically been underserved by transit services and overburdened by pollution.<sup>18</sup>

## **II. FTA Should Require Recipients to Report on the Distribution of Low Emissions Vehicles**

In tandem with creating allocation requirements, FTA should create reporting requirements that will allow the Agency to monitor recipients' compliance with the above requirement. Under 49 C.F.R. § 21.9(b), recipients of Department of Transportation grants may be required to report on any information deemed necessary to assess nondiscrimination.<sup>19</sup>

FTA can easily incorporate vehicle emissions into the Title VI Program reporting that FTA already requires its recipients to submit.<sup>20</sup> The Title VI Program requirements currently instruct recipients to submit comparative data on the distribution of service quality, including the age of vehicles and on time performance, across lines and areas with low and high minority populations.<sup>21</sup> FTA should also require such comparative reporting on vehicle emissions and include examples of such reporting as it does for other elements of service quality.<sup>22</sup> This reporting should be delineated for each key pollutant, including both criteria pollutants and greenhouse gases.

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<sup>17</sup> *Id.* (“Transit providers deploying vehicles equipped with technology designed to reduce emissions **could choose** to set a policy for how these vehicles will be deployed throughout the service area.”) (emphasis added).

<sup>18</sup> *See* 49 C.F.R. § 21.5(b)(7) (“This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program or activity to which this part applies, the applicant or recipient must take affirmative action to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin.”)

<sup>19</sup> 49 C.F.R. § 21.9 (“Each recipient shall keep such records and submit to the Secretary timely, complete, and accurate compliance reports at such times, and in such form and containing such information, as the Secretary may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part.”).

<sup>20</sup> Title VI Circular, *supra* note 12, at Chap. II-2.

<sup>21</sup> *Id.* at App. J 6-J 7.

<sup>22</sup> *Id.* at Chap. IV-4 to IV-7.

During Title VI Program compliance reviews, FTA can then prescribe improvements in the allocation of clean vehicles and in transit providers' distributional reporting as corrective actions to recipients in non-compliance. Together, the distribution and reporting requirements will help to ensure that persons protected under Title VI receive equitable access to the benefits of lower emission vehicles.

Respectfully,

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