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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Parts 653, 654, and 655

[Docket No. FTA-2000-8513]
RIN 2132-AA71

Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations

AGENCY: Federal Transit Administration, Department of Transportation

ACTION: Final rule.

SUMMARY: The Federal Transit Administration (FTA) has combined its drug and alcohol testing regulations. This final rule incorporates guidance that FTA has issued in the past several years in letters of interpretation, audit findings, newsletters, training classes, safety seminars, and public speaking engagements. In addition, this final rule conforms FTA's rule to the Department of Transportation's (DOT) revised drug and alcohol testing rule published on December 19, 2000.

DATES: The effective date of this final rule is August 1, 2001.

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SUPPLEMENTARY INFORMATION:

Electronic Access

Electronic access to this rule and other safety rules may be obtained through the FTA Office of Safety and Security home page at http://transit-safety.volpe.dot.gov.

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Regulatory Information

On April 30, 2001, FTA published a notice of proposed rulemaking (NPRM) proposing changes to conform its drug and alcohol testing regulation (49 CFR Part 655) to the December 19, 2000 revision of DOT's transportation workplace testing procedures at 49 CFR Part 40. (66 FR 21551). While several of the amendments to Part 40 became effective on January 18, 2001, the entire revised Part 40 will become effective on August 1, 2001.

Generally, final rules must be published at least 30 days before their effective dates. However, the Administrative Procedure Act (5 U.S.C. sec. 553(d)(3)) creates an exception to this general rule on the basis of good cause found by the agency. FTA is making this conforming rule effective immediately, rather than 30 days from the date of publication in the Federal Register to ensure that FTA's drug and alcohol testing regulation is consistent with the Department's Part 40 testing procedures, which are effective on August 1, 2001. This consistency is necessary in order to avoid overlap, conflict, duplication, or confusion among DOT drug and alcohol testing regulations. Unless this rule goes into effect immediately, there would be a 30-day period in which Part 40 would be in effect without FTA's conforming amended final rule. Since the new Part 40 was published over seven months ago, affected parties have had ample time to prepare to implement the changes in Part 40 to which this rule conforms.

I. Background

The Omnibus Transportation Employee Testing Act of 1991 (the Act) mandated the Secretary of Transportation to issue regulations to combat prohibited drug use and alcohol misuse in the transportation industry. (Pub. L. 102-143, October 28, 1991, FTA sections codified at 49 U.S.C. 5331). In December 1992, FTA issued two NPRMs to prevent prohibited drug use and alcohol misuse by ``safety-sensitive'' employees in the transit industry. In February 1994, FTA adopted drug and alcohol testing rules, which were promulgated at 49 CFR Parts 653 and 654.

Omnibus Transportation Employee Testing Act of 1991

The Act requires FTA to issue regulations requiring recipients of Federal transit funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test safety-sensitive employees for the use of alcohol or drugs in violation of law or federal regulation. With respect to railroad operations, the Act allows FTA to defer to regulations issued by the Federal Railroad Administration (FRA).

As a condition of FTA funding, the Act requires recipients to establish alcohol and drug testing programs. The Act mandates four types of testing: pre-employment, random, reasonable suspicion, and post-accident. In addition, the Act permits return-to-duty and follow-up testing under specific circumstances. The Act requires that recipients follow the testing procedures set out by the Department of Health and Human Services (DHHS).

The Act does not require recipients to follow a particular course of action when they learn that a safety-sensitive employee has violated a law or Federal regulation concerning alcohol or drug use. Rather, the Act directs FTA to issue regulations establishing consequences for the use of alcohol or prohibited drugs by individuals performing safety-sensitive functions in the transit industry. Possible consequences include education, counseling, rehabilitation programs, and suspension or termination from employment.

In authorizing this regulatory scheme, the Act has pre-empted inconsistent State or local laws, rules, regulations, ordinances, standards, or orders. However, provisions of State criminal law, which impose sanctions for reckless conduct leading to actual loss of life, injury, or damage to property, are not pre-empted by the Act.

Previous Action by FTA

On December 15, 1992, FTA issued two notices of proposed rule making to prevent prohibited drug use and alcohol misuse (49 CFR Parts 653 and 654). (57 FR 59646 and 57 FR 59660). The rules established a process whereby safety-sensitive employees would be tested on a pre-employment, random, reasonable suspicion, post-accident, return-to-duty, and follow-up basis.

In the December 1992 Federal Register notice, FTA stated that it was ``considering combining the final FTA alcohol and drug testing regulations into one part in the Code of Federal Regulations.'' At that time, FTA noted that while the drug and alcohol testing rules shared many similarities, there were still enough differences to warrant two distinct CFR Parts. On February 15, 1994, FTA adopted two separate rules: The drug testing rule, 49 CFR Part 653, and the alcohol testing rule, 49 CFR Part 654. (59 FR 7549 and 59 FR 7572).

Since the rules were first published, there have been two notable amendments as well as several minor (technical) amendments. In December 1998, FTA amended its post-accident regulation to allow an employer to seek post-accident test results from law enforcement agencies where the employer has been unable to timely perform such a test. (63 FR 67612). FTA has stressed the limited applicability of this amendment.

In January 1999, FTA amended its definition of ``[m]aintaining a revenue service vehicle or equipment,'' located under safety-sensitive function (Sec. 653.7 and Sec. 654.7). (64 FR 425). The amended definition included covered employees of both

recipients and contractors performing overhaul and rebuilding services of engines, parts, and vehicles. Previously, employees of contractors who were performing safety-sensitive functions did not have to comply with FTA drug and alcohol testing.

In issuing the amended definition, FTA noted that it would be unduly burdensome to subject the covered employees of contractors to the drug and alcohol regulations if the overhaul/rebuilding work was done on an ad hoc or one-time basis where no long-term contract between the grantee and its contractor existed. (64 FR 426). FTA will continue to exclude the covered employees of contactors who perform safety-sensitive functions on an ad hoc or one-time basis.

When the drug and alcohol rules initially became effective, FTA began an aggressive outreach effort to assist affected entities in complying with the new rules. FTA offered numerous courses throughout the country on implementation. Additionally, in April 1994, FTA published Implementation Guidelines for Drug and Alcohol Regulations in Mass Transit and made them available to anyone seeking help implementing the rules. The guidelines were published in the Federal Register several months prior to the effective date of the rules. They provided step-by-step instructions on how to most effectively comply with Parts 653 and 654. FTA will issue updated guidelines to assist with the implementation of Part 655.

Additionally, FTA has issued numerous letters of interpretation on the rules. Public response to these letters, especially since they became available on FTA's external Web page, has been highly favorable. Employers and employees found that the letters were very helpful in explaining the rules. FTA will continue to offer interpretive guidance with respect to Part 655.

To determine compliance with the rules, FTA's Office of Safety and Security began auditing grantee drug and alcohol testing programs in March 1997. The audits quickly evolved into opportunities for FTA to provide extensive technical assistance. Through the audits, FTA has gained a better understanding of the difficulties that grantees encounter when implementing the rules. In addition, audits have shown FTA where the rules can be strengthened and improved. The impetus to combine Parts 653 and 654 is due, in no small part, to the audit program.

II. Overview of Rule

This rule combines the drug and alcohol testing rules, found at 49 CFR Parts 653 and 654, and conforms these rules to the Department's drug and alcohol testing procedures at 49 CFR Part 40. FTA believes this change will allow the program to be implemented more efficiently and will bring FTA into line with the other operating administrations that fall under the Omnibus Transportation Employee Testing Act of 1991, (Federal Aviation Administration, Federal Railroad Administration, and Federal Motor Carrier Safety Administration), as well as the two other operating administrations that have drug and alcohol testing regulations (Research and Special Programs Administration and U.S. Coast Guard).

The rule applies to direct and indirect recipients of funds under 49 U.S.C. 5307, 5309, 5311, and 23 U.S.C. 103(e)(4). It requires transit operators (employers) who receive these funds to establish and conduct a multifaceted anti-drug and alcohol misuse testing program. The regulation conditions financial assistance on the implementation of a program. Failure of an employer to develop and implement a program in compliance with this regulation may result in the suspension of Federal transit funding.

The regulation requires the testing of safety-sensitive employees for the use of controlled substances and the misuse of alcohol; however the regulation also requires education and awareness about the problems associated with prohibited drug use and alcohol misuse. In addition, the regulation mandates that each employer have a policy statement describing its program policies and procedures. The statement must include the consequences for prohibited drug use and alcohol misuse.

The regulation specifies that safety-sensitive employees are prohibited from using five illegal substances (marijuana, cocaine, opiates, amphetamines, and phencyclidine). Safety-sensitive employees are also prohibited from misusing alcohol. The rule requires testing of safety-sensitive employees in five situations: (1) Pre-employment (including transfer to a safety-sensitive position within the organization; (2) Reasonable suspicion; (3) Random; (4) Post-accident; and (5) Return-to-duty/follow-up (periodic). Drug testing is required in all five situations. Alcohol testing is required for all situations except for pre-employment.

The rule requires the use of the Department-wide drug and alcohol testing procedures contained in 49 CFR Part 40. If a covered employee tests positive for illegal drug use or alcohol misuse or otherwise violates the rule, the employee must be removed from his or her safety-sensitive position. The employee must then be informed about education and rehabilitation programs. Should the employer decide to retain a covered employee whose test result has been verified positive, the employee must be evaluated by a substance abuse professional. Prior to returning an employee to a safety-sensitive function, the employer must ensure that the employee has successfully completed rehabilitation; the rule does not require the employer to pay for rehabilitation.

Any action on the part of FTA for noncompliance is against recipients of Federal transit funds, i.e., transit systems, metropolitan planning organizations (MPOs), states, and third party contractors that perform safety-sensitive functions. MPOs and states are affected by this regulation if they receive Federal transit funds and (1) they provide transit service or they provide funding

to a subrecipient. MPOs or states that fund or manage transit providers, but do not provide transit service, must ensure that transit provider employers provide a certification of compliance.

FTA's relationship is with its grantees. Many grantees that receive transit funds operate mass transit services. Typical among these are large transit entities that receive funds under sections 49 U.S.C. 5307, 5309, and 5311. In addition, some grantees (typically states) pass Federal transit funds to smaller subrecipients within the state.

This rule eliminates the distinction between large and small operators. The term ``employer'' is now used to include both small and large operators, as well as entities providing service under contract or other arrangement with the transit operator.

III. Section-by-Section Discussion of the Comments

In this section, FTA will discuss the differences between the rules in Parts 653 and 654 and the final rule in Part 655. The responses to comments on each section are also included herein. There is no discussion for sections that have remained substantially the same. FTA also did not discuss comments that addressed Department-wide issues, which are more properly addressed in Part 40, or issues that were beyond the scope of the NPRM.

FTA received 84 comments in response to the NPRM. The breakdown among commenter categories follows:

Nonprofits, and special transit providers: 10
City and County transit providers: 19
State agencies: 20
Labor unions: 3
Trade associations: 9
Individual citizens: 12
Private businesses: 11.

FTA considered all comments filed in a timely manner, as well as all statements and material presented at the public meetings on the NPRM.

Subpart A--General

A. Definitions (Sec. 655.4)

Employer: In the NPRM, FTA proposed that, in addition to direct recipients of FTA funding, the term ``employer'' include state recipients that pass the money to subrecipients and grantees that have contractors performing transit operations. The definition change was proposed to provide states and grantees access to covered employees' drug and alcohol test records in order to certify compliance with FTA drug and alcohol testing rules by subrecipients and contractors.

FTA received a significant number of comments regarding the designation of states as employers. Several states were concerned that being named an employer in order to access drug and alcohol records would have legal and technical implications that may expose the state to potential litigation. States were also concerned that they may become the warehouse of records and be responsible for responding to potential employers requesting information that is required under 49 CFR 40.25. Grantees that utilize contractors to provide transit services offered similar concerns. Regardless, a significant number of commenters acknowledged the necessity of having access to test results of covered employees since Subpart I requires recipients to certify that their contractors and/or subrecipients are complying with the drug and alcohol testing program. Numerous commenters stated that this objective could be accomplished by amending 49 CFR 655.73--Access to Facilities and Records.

FTA Response. FTA agrees with the commenters and has remedied this situation with the addition of paragraph 49 CFR 655.73 (i). An employer may disclose drug and alcohol testing information required to be maintained under this part only to the state oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures at 49 CFR Parts 40 and 655.

Although several commenters indicated that law enforcement agencies should have access to records maintained under this part upon request, FTA recognizes that individual privacy rights require limited dissemination of this information. This section does not authorize release of information maintained under this part to a law enforcement agency based solely on the request of the law enforcement agency.

Second chance policy: FTA proposed adding this definition to the rule with the understanding that grantees have the discretion to adopt a second chance policy, i.e., a policy allowing an employee (who has previously violated the Federal drug and/or alcohol regulations) to return to a safety-sensitive position after completing rehabilitation.

FTA received a limited number of comments on this subject. A few commenters expressed appreciation for the definition while most questioned the necessity for its inclusion since it is the employer's discretion to implement a ``second chance policy''.

FTA Response. FTA opts not to include ``second chance policy'' under definitions at this time. Since the decision to retain a covered employee is within the discretion of the employer, the phrase will not be defined in the final rule.

Taxi cab drivers and other transportation providers: FTA requested comments regarding its guidance and policy relating to this category of contractors. According to FTA policy, drug and alcohol testing rules do not apply to taxi cab drivers when patrons (using publicly subsidized vouchers) or transportation providers can choose from a variety of taxicab operators.

A number of commenters on this subject expressed concern that many rural and small urban communities have limited availability of taxi service. One commenter questioned FTA's regulatory authority to include taxi operators under the drug and alcohol testing rule. Other commenters indicated that a taxi operator is performing a safety-sensitive function whether the patron or the provider selects the taxi service and should be subject to the rule.

FTA Response. The intent of FTA's regulatory scheme is not to impose Federal regulations on the taxi industry; however, taxi companies that contract with transportation service providers receiving Federal transit funds are subject to compliance with the drug and alcohol rules. FTA policy continues to recognize the practical difficulty of administering a drug and alcohol testing program to taxi companies that only incidentally provide transit service. Therefore, the drug and alcohol testing rules apply when the transit provider enters into a contract with one or more entities to provide taxi service. The rules do not apply when the patron (using subsidized vouchers) selects the taxi company that provides the transit service. This guidance reflects the FTA Master Agreement, which requires recipients to include appropriate clauses in third party contracts requiring contractors to comply with applicable Federal requirements. It also recognizes the practical difficulty of administering a drug and alcohol testing program to entities that only incidentally provide taxi service on behalf of a transportation service provider.

Dispatchers. FTA requested comments on the duties and responsibilities of dispatchers in the different transit systems. The objective was to determine whether the duties and responsibilities vary significantly enough to warrant modification of the current rule.

A significant number of commenters indicated that bus dispatchers whose duties are of an administrative nature and primarily communicate directions to a bus operator do not perform a safety-sensitive function. Other commenters indicated that their dispatchers did indeed perform safety-sensitive functions, including but not limited to responding to emergency situations and should remain subject to the rules. The majority of the commenters in rural and small urban areas indicated that their dispatchers did not perform safety-sensitive functions.

FTA Response. The comments confirm that bus dispatchers perform a myriad of duties depending on the employer. FTA's rules apply to anyone who performs a safety-sensitive function, which includes the control of the ``dispatch or movement of a revenue service vehicle.''

Since each employer uses its own terminology to describe job categories that involve safety-sensitive functions, each employer must continue to decide whether a particular employee performs any of the functions listed in the definition of ``safety-sensitive function,'' including bus dispatchers. As noted in previous guidance, the key consideration remains the type of work performed rather than any particular job title. Based on the comments received, FTA will not attempt a universal definition of ``dispatchers'' at this time. Instead, FTA will allow each employer to determine whether a particular dispatcher performs or may perform a safety-sensitive function.

Maintenance contractors. In the NPRM, FTA reiterated that maintenance contractors that perform safety-sensitive functions are subject to the drug and alcohol testing rules, for the reasons noted in the preamble to the 1999 rule change, i.e., fairness and safety (64 FR 425, January 5, 1999). Most comments on this subject concerned the difficulty employers have in requiring maintenance contractors to implement a drug and alcohol program. Much of the discussion related to the difficulty in finding maintenance contractors willing to comply with the drug and alcohol testing requirements, particularly where the maintenance contractor provides service on an occasional basis. A number of commenters offered that maintenance shops cannot afford to implement an ongoing program for the amount of transit-related business generated. As a result, this would severely restrict the grantee/subrecipient's ability to properly maintain FTA-funded vehicles. The majority of comments urged the FTA to completely exempt maintenance contractors from the drug and alcohol testing regulations.

Several urban grantees commented on the fact that the type of work they are contracting out is often performed by small shops focusing on a very narrow repair area. These maintenance contractors have limited administrative staff, which causes them difficulty in administering a drug and alcohol program.

FTA Response. FTA recognizes these concerns, but also recognizes the public safety interest inherent in testing safety-sensitive employees. FTA has developed a middle ground to alleviate some of the problems associated with this issue. FTA still recognizes that recipients funded with 49 U.S.C. 5311 funds and which contract out maintenance service are excluded from the drug and alcohol testing rules. In addition, recipients of Federal transit funds under 49 U.S.C. 5307 and 5309 in an area less than 200,000 in population and which contract out such services are no longer required to comply with Part 655. Also, maintenance providers of safety-sensitive functions for a grantee on an ad hoc or one-time basis are not required to comply.

Volunteers. FTA proposed to clarify when volunteers are covered employees subject to the drug and alcohol testing rules. Most commenters indicated that the proposed language needed further clarification.

FTA Response. FTA has reviewed the proposed language and amends the definition of covered employee by deleting reference to the volunteers' ``expectation of in-kind or tangible benefits.'' Instead, a volunteer is deemed a covered employee when he or she receives remuneration in excess of their actual personal expenses incurred while performing the volunteer service.

B. Stand-Down Waivers for Drug Testing (655.5)

FTA proposed procedures on stand-down waivers to conform with 49 CFR Part 40.

Most of the commenters to this section expressed support. However, one commenter expressed opposition to the provision claiming that it undercuts the confidentiality principles inherent in the FTA's drug and alcohol testing program. Another commenter indicated that FTA should provide additional criteria not identified in 49 CFR Part 40.

FTA Response. FTA is aware of the confidentiality concerns and will carefully review each petition to determine if the facts and justification warrant a waiver. The requirements for obtaining a waiver are provided in 49 CFR 40.21. The proposed rule will be incorporated in the final rule to conform with 49 CFR Part 40.

Subpart B--Program Requirements

A. Policy Statement Contents (Sec. 655.15)

FTA proposed limiting information required in a Policy Statement to that listed in section 655.15. FTA also clarified who must approve the policy. In most instances, a grantee will have a governing board that can adopt the policy. However, where there is no governing board or the governing board does not have approval authority, the highest-ranking official with authority to approve the policy may do so. FTA also noted that employers may incorporate by reference 49 CFR Part 40 in their Policy Statements, provided it is available for review by employees when requested.

Most commenters expressed support for the effort to simplify this requirement. However, one commenter noted that eliminating the requirement to address specific sections of 49 CFR Part 40 and making Part 40 available to the employee creates the potential for misunderstanding by the employee. Another commenter indicated that specific employee rights should be required in this section. A few commenters also recommended that FTA impose schedules for when the employee and supervisor training requirement should occur and the frequency with which it should be scheduled.

FTA Response. FTA believes that simplifying the contents required in the Policy Statement reduces the administrative burden while maintaining an employer's discretion to craft a Policy Statement that includes additional requirements not mandated by FTA. FTA also believes that it would be an undue burden to mandate an industry-wide training schedule. The final rule recognizes the diversity of employee-management relationships within the transit industry and also strikes a reasonable balance with the requirement for employee and supervisor training. However, a grantee may choose to include additional requirements not mandated by FTA, i.e., recurring training and employee rights. If a grantee does so, the grantee's policy shall indicate that those additional requirements are the employer's, and not FTA's. FTA also believes that it is reasonable for employers to incorporate by reference 49 CFR Part 40 in their Policy Statements and make it available for review by employees when requested.

Subpart E--Types of Testing

A. Pre-employment Drug Testing (Sec. 655.41)

FTA notified the public of the intent to eliminate the phrase ``hire'' in this provision of the rule. Previously, employers were required to administer a drug test and receive a negative result before hiring an employee.

FTA also notified the public of its proposal to require a pre-employment test for covered employees who are away from work for more than 90 consecutive calendar days and plan to return to a safety-sensitive function. It is FTA's intent that employers assure themselves that employees can successfully pass a drug test before returning them to safety-sensitive functions.

The majority of commenters support the change in the provision that allows a covered employee to be hired prior to receiving a negative drug test result. These comments indicated that the rule balances the employer's personnel concerns with the public safety interest by ensuring that the new covered employee is not permitted to perform a safety-sensitive function for the first time until a negative drug test result is received. However, one commenter stated that the public safety interest is better served by prohibiting the hiring of a covered employee prior to receiving a drug test result. Another comment indicated that FTA should adopt pre-employment provisions similar to the Federal Motor Carrier Safety Administration (FMCSA).

Many commenters supported clarification of the rule regarding the time required to elapse before an absent covered employee should take another pre-employment drug test. A majority of rural and small urban employers are in favor of this rule because they employ seasonal and temporary workers. A few comments indicated that there is no basis to retest a covered employee after a 90-day absence. However, one employer indicated that a pre-employment test should be administered after 90 days regardless of whether the employee was in the employer's random pool or not. Another commenter indicated that pre-employment testing should be administered following consecutive absences as short as 30 days.

FTA Response. FTA has reviewed the comments and will incorporate the NPRM language into the final rule. FTA believes that deleting the phrase ``hire'' in this section provides an employer with the discretion to administer a pre-employment drug test anytime before the employee first performs a safety-sensitive function. FTA also believes the 90-day period is reasonable. It gives the employer the discretion to decide whether or not the covered employee is retained in the random pool during his or her absence. If the employee is retained in the random pool, then pre-employment testing is not required. In determining whether to retain the employee in the random pool, one consideration is the likelihood of the employee's return to perform safety-sensitive functions.

B. Pre-Employment Alcohol Testing (Sec. 655.42)

FTA noted in the NPRM that its pre-employment alcohol testing requirements were suspended due to a court decision and subsequent legislation. Most commenters indicated that FTA's new rule should also omit the pre-employment alcohol testing provisions, primarily because alcohol consumption is a legal activity. Others indicated that since pre-employment testing would not be conducted under FTA authority, this section should not be included in the final rule.

FTA Response. The NPRM language is included in the final rule to conform with the other DOT agency drug and alcohol testing programs. All six DOT agencies with testing programs are adding this section to their respective rules. This section allows, but does not require, employers to conduct pre-employment alcohol testing. If an employer chooses to conduct pre-employment alcohol testing, the employer must conduct the testing in accordance with all of the requirements of 49 CFR Part 40.

C. Reasonable Suspicion Testing (Sec. 655.43)

Several commenters responding to this section indicated that FTA should not interfere with an employer's ability to require two or more trained supervisors to participate and/or agree on referring an employee for reasonable suspicion testing. One commenter indicated that employers should be allowed to authorize other personnel to make reasonable suspicion testing observations similar to the FMCSA. Two commenters indicated that this testing requirement should not be required at all because the consumption of alcohol is legal. Other commenters indicated that provisions found in 49 CFR 654.37(c) and (d) should be incorporated in the final rule.

FTA Response. FTA believes that the public safety interest is furthered with the inclusion of this requirement and the final rule is amended to include the language of 49 CFR 654.37(c) and (d). FTA also notes that the proposed bar to an employer requiring two or more trained supervisors to make such referrals is not included in the final rule. FTA also agrees that an employer should be permitted to authorize and train other company officers to make reasonable suspicion observations; therefore this section and section 655.14 of subpart B are amended accordingly.

D. Post-Accident Testing (Sec. 655.44)

FTA noted in the NPRM that its post-accident testing regulation was previously amended to allow an employer, in extremely limited circumstances, to use the post-accident test results administered by local law enforcement only when the employer is unable to perform a post-accident test within the required time frame.

Of the few comments received on this section, most indicated support for the limited exception to use post-accident test results from local law enforcement. However, a commenter indicated that the rule does not state that this provision is to be used in limited circumstances. Another commenter stated that the employer should not be permitted to use post-accident test results administered by local law enforcement because the standards for these tests may be less than those imposed by DOT. One commenter stated that FTA should not require post-accident testing when it is also required by FMCSA.

FTA Response. FTA noted that the proposed rule did not state the limited exception under which an employer may use the test results of a law enforcement agency. The final rule is amended to indicate that an employer may use the post-accident test results of a law enforcement agency when the employer is unable to test within the required time frame established by FTA and the test is performed to the applicable standards of the entity authorized to administer the drug or alcohol test. FTA and FMCSA are amending their respective post-accident testing rule to eliminate the requirement for duplicative post-accident testing of operators.
E. Random Testing (Sec. 655.45)

FTA reiterated in the NPRM that a primary purpose of random testing is deterrence. Deterrence is most effectively achieved with random, unpredictable drug and alcohol testing that is conducted throughout all workdays and hours of service.

Although the majority of commenters supported the concept of random drug testing, a significant number indicated that employers in rural areas have an increased burden complying with this provision. They have difficulty in obtaining testing services after normal business hours within their areas and/or because of distances between testing service providers and the employer. Four commenters also noted that the NPRM incorrectly stated the current random alcohol testing rate.

FTA Response. The proposed language is incorporated in the final rule with some modification. The concern reflected by employers in rural areas is noted; however, FTA believes that the public safety interest is promoted with random testing that is truly random and unpredictable. However, FTA believes that requiring random testing to be conducted at least quarterly strikes a reasonable balance while considering the rule's impact on employers in rural areas. Additionally, FTA is reviewing the recommendation to allow individual rural transit systems to apply to have its random testing rate based on its individual performance and program instead of industry-wide data.

Paragraph (a) of this section is amended to read 10% instead of 25%. Paragraph (i) of this section is also amended to reflect that random testing for alcohol misuse is subject to safety-sensitive performance limitations while testing for drug use is permitted anytime during the workday.

Subpart H--Administrative Requirements

A. Retention of Records (Sec. 655.71) and Reporting Results in a Management Information System (Sec. 655.72)

The NPRM proposed changing FTA's Management Information System (MIS) reporting requirement from census reporting to stratified random sampling because it now has an accurate portrait of the current state of drug and alcohol testing (including positive rates) in the transit industry. Most commenters indicated that FTA's intent to reduce the paperwork requirement is better achieved by using technology (e.g., web based/electronic submission). A few commenters stated that the proposed rule does not reduce their administrative burden. Most commenters indicated that sampling reduces some of the burden on rural transit systems; however, a commenter noted that states are still required to collect subrecipient's data. Other commenters indicated that FTA should have one uniform period for record retention.

FTA Response. FTA believes sampling will reduce the paperwork burden on a portion of the industry while still maintaining a high confidence level in the results. Transit employers are still required to prepare an MIS form annually; however, they will only be required to submit an MIS form when requested by FTA. However, FTA's record retention time periods reflect those of the other DOT modes for administrative uniformity. FTA will review the feasibility of web-based submission of data and will issue further guidance on this issue.

B. Access to Facilities and Records (Sec. 655.73)

As previously discussed in section 655.4 of subpart A, FTA received a number of comments indicating that states should not be included under the definition of ``employer'' in order to gain access to records. Many commenters also objected to state regulatory agencies and law enforcement agencies having independent access to employee records. The majority of comments

indicated that only those state agencies and grantees with oversight responsibilities and which are required to certify compliance should have access to the employee's drug and alcohol testing information.

FTA Response. The final rule is amended by adding paragraph (i) to this section. An employer may release information to the state agency or grantee with oversight responsibility of FTA transit funds which is required to certify compliance under this part.

IV. Effect of the Americans With Disabilities Act of 1990 on Alcohol Testing Programs

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on employers' responsibilities toward employees with disabilities. According to Title I, an employer must provide reasonable accommodations for work for persons with disabilities. Some covered workers are considered persons with disabilities for purposes of protection under the ADA. This issue was treated more fully in the 1994 DOT-wide preamble (59 FR 7302, 7311-7314, February 15, 1994).

V. Regulatory Process Matters

A. Executive Order 12866

FTA has evaluated the industry costs and benefits of this rule, which require that transit industry personnel who perform safety-sensitive functions be covered by a program to control illegal drug abuse and alcohol misuse in mass transportation operations. This rule makes no noteworthy substantive changes. Any incremental costs are negligible, and the policy and economic impact will have no significant effect.

B. Departmental Significance

This rule is a ``non-significant regulation'' as defined by the Department's Regulatory Policies and Procedures because, while it involves an important Departmental policy that is likely to generate a great deal of public interest, in the larger scheme, it is simply a combination of two existing regulations (49 CFR Parts 653 and 654). It also conforms FTA's drug and alcohol testing regulations with the Department's drug and alcohol testing regulations (49 CFR Part 40), to which FTA grantees already are subject.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601-612), FTA has made a preliminary assessment of the possible effects of the rule on small businesses. To the extent possible, FTA has made efforts to acknowledge the differences between small and large entities, and has endeavored to make accommodations when possible. Experience with Parts 653 and 654 has shown that the rule has had a significant impact on a substantial number of small entities. FTA believes that this new rule will provide greater clarity and ease of implementation for small entities.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act of 1995 (PWRA) (44 U.S.C. 3501, et. seq.) The Office of Management and Budget has approved FTA's PWRA request for Parts 653 and 654. This rule includes the same information collection devices; therefore, FTA believes it already has OMB approval. The Management Information System (MIS) forms currently required by Parts 653 and 654 may be modified in the future, but will continue to be required by FTA, without changes, under Part 655.

E. Executive Order 13132

This action has been reviewed under Executive Order 13132 on Federalism. FTA has determined that this action has significant Federalism implications to warrant a Federalism assessment. However, FTA has limited discretion because this rulemaking is mandated by Congress in the Omnibus Transportation Employee Testing Act of 1991.

The 1991 legislation mandated FTA to issue regulations requiring grantees of funds under 49 U.S.C. 5307, 5309, and 5311, and 23 U.S.C. 103(e)(4) to test their safety-sensitive employees for the use of drugs and the misuse of alcohol in violation of law or Federal regulation.

Before passage of the Omnibus Transportation Employee Testing Act of 1991, safety issues were largely handled as a local matter. This Act clarifies the Federal role by including specific Federal pre-emption language. This Act also makes it clear

that, in the area of substance abuse testing, Federal regulations are to take precedence over any inconsistent State or local specifications.

Although Congress has pre-empted State or local law, FTA has preserved the role of local entities in mass transit safety. This regulation does not disturb testing programs which were created by virtue of a grantee's own authority and which are not inconsistent with this regulation.

F. Other Executive Orders

There are a number of other Executive Orders that can affect rulemakings. These include Executive Orders 13084 (Consultation and Coordination with Indian Tribal Governments), 12988 (Civil Justice Reform), 12875 (Enhancing the Intergovernmental Partnership), 12630 (Governmental Actions and Interference with Constitutionally Protected Property Rights), 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations), 13045 (Protection of Children from Environmental Health Risks and Safety Risks), and 12889 (Implementation of North American Free Trade Agreement). We have considered these Executive Orders in the content of this rule, and we believe that the rule does not directly affect the matters covered by the Executive Orders.

List of Subjects

49 CFR Part 653

Drug abuse, Drug testing, Grant programs--transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 654

Alcohol abuse, Drug testing, Grant programs--transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

49 CFR Part 655

Alcohol abuse, Drug abuse, Drug testing, Grant programs--transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set forth in the preamble and under the authority of 49 U.S.C. 5331, the agency amends Chapter VI of Title 49 of the Code of Federal Regulations as set forth below:

PART 653--[REMOVED]

1. Remove part 653.

PART 654--[REMOVED]

2. Remove part 654.

3. Add part 655 to read as follows:

PART 655--PREVENTION OF ALCOHOL MISUSE AND PROHIBITED DRUG USE IN TRANSIT OPERATIONS

Authority: 49 U.S.C. 5331; 49 CFR 1.51.

Subpart A--General

Sec. 655.1 Purpose.

The purpose of this part is to establish programs to be implemented by employers that receive financial assistance from the Federal Transit Administration (FTA) and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions.

Sec. 655.2 Overview.

(a) This part includes nine subparts. Subpart A of this part covers the general requirements of FTA's drug and alcohol testing programs. Subpart B of this part specifies the basic requirements of each employer's alcohol misuse and prohibited drug use program, including the elements required to be in each employer's testing program. Subpart C of this part describes prohibited drug use. Subpart D of this part describes prohibited alcohol use. Subpart E of this part describes the types of alcohol and drug tests to be conducted. Subpart F of this part addresses the testing procedural requirements mandated by the Omnibus Transportation Employee Testing Act of 1991, and as required in 49 CFR Part 40. Subpart G of this part lists the consequences for covered employees who engage in alcohol misuse or prohibited drug use. Subpart H of this part contains administrative matters, such as reports and recordkeeping requirements. Subpart I of this part specifies how a recipient certifies compliance with the rule.

(b) This part must be read in conjunction with 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs.

Sec. 655.3 Applicability.

(a) Except as specifically excluded in paragraph (b) of this section, this part applies to:

(1) Each recipient and subrecipient receiving Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4); and

(2) Any contractor of a recipient or subrecipient of Federal assistance under:

(i) 49 U.S.C. 5307, 5309, or 5311; or

(ii) 23 U.S.C. 103(e)(4).

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR Part 219 and Sec. 655.83 for its railroad operations, and shall follow this part for its non-railroad operations, if any.

Sec. 655.4 Definitions.

For this part, the terms listed in this section have the following definitions. The definitions of additional terms used in this part but not listed in this section can be found in 49 CFR Part 40.

Accident means an occurrence associated with the operation of a vehicle, if as a result:

(1) An individual dies; or

(2) An individual suffers bodily injury and immediately receives medical treatment away from the scene of the accident; or

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles (including non-FTA funded vehicles) incurs disabling damage as the result of the occurrence and such vehicle or vehicles are transported away from the scene by a tow truck or other vehicle; or

(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle is removed from operation.

Administrator means the Administrator of the Federal Transit Administration or the Administrator's designee.

Anti-drug program means a program to detect and deter the use of prohibited drugs as required by this part.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official that the recipient has complied with the provisions of this part. (See Sec. 655.82 and Sec. 655.83 for certification requirements.)

Contractor means a person or organization that provides a safety-sensitive service for a recipient, subrecipient, employer, or operator consistent with a specific understanding or arrangement. The understanding can be a written contract or an informal arrangement that reflects an ongoing relationship between the parties.

Covered employee means a person, including an applicant or transferee, who performs or will perform a safety-sensitive function for an entity subject to this part. A volunteer is a covered employee if:

(1) The volunteer is required to hold a commercial driver's license to operate the vehicle; or

(2) The volunteer performs a safety-sensitive function for an entity subject to this part and receives remuneration in excess of his or her actual expenses incurred while engaged in the volunteer activity.

Disabling damage means damage that precludes departure of a motor vehicle from the scene of the accident in its usual manner in daylight after simple repairs.

(1) Inclusion. Damage to a motor vehicle, where the vehicle could have been driven, but would have been further damaged if so driven.

(2) Exclusions. (i) Damage that can be remedied temporarily at the scene of the accident without special tools or parts.

(ii) Tire disablement without other damage even if no spare tire is available.

(iii) Headlamp or tail light damage.

(iv) Damage to turn signals, horn, or windshield wipers, which makes the vehicle inoperable.

DOT or The Department means the United States Department of Transportation.

DOT agency means an agency (or ``operating administration'') of the United States Department of Transportation administering regulations requiring drug and alcohol testing. See 14 CFR part 121, appendices I and J; 33 CFR part 95; 46 CFR parts 4, 5, and 16; and 49 CFR parts 199, 219, 382, and 655.

Employer means a recipient or other entity that provides mass transportation service or which performs a safety-sensitive function for such recipient or other entity. This term includes subrecipients, operators, and contractors.

FTA means the Federal Transit Administration, an agency of the U.S. Department of Transportation.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.

Positive rate means the sum of the annual number of positive results for random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part divided by the sum of the annual number of random drug tests conducted under this part plus the annual number of refusals to submit to a random drug test authorized under this part.

Railroad means:

(1) All forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:

(i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service that was operated by the Consolidated Rail Corporation as of January 1, 1979; and

(ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads.

(2) Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311; or under 23 U.S.C. 103(e)(4).

Refuse to submit means any circumstance outlined in 49 CFR 40.191 and 40.261.

Safety-sensitive function means any of the following duties, when performed by employees of recipients, subrecipients, operators, or contractors:

(1) Operating a revenue service vehicle, including when not in revenue service;

(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver's License;

(3) Controlling dispatch or movement of a revenue service vehicle;

(4) Maintaining (including repairs, overhaul and rebuilding) a revenue service vehicle or equipment used in revenue service. This section does not apply to the following: an employer who receives funding under 49 U.S.C. 5307 or 5309, is in an area less than 200,000 in population, and contracts out such services; or an employer who receives funding under 49 U.S.C. 5311 and contracts out such services;

(5) Carrying a firearm for security purposes.

Vehicle means a bus, electric bus, van, automobile, rail car, trolley car, trolley bus, or vessel. A mass transit vehicle is a vehicle used for mass transportation or for ancillary services.

Violation rate means the sum of the annual number of results from random alcohol tests conducted under this part that have alcohol concentrations of .04 or greater plus the annual number of refusals to submit to alcohol tests authorized under this part, divided by the sum of the annual number of random alcohol tests conducted under this part plus the annual number of refusals to submit to a drug test authorized under this part.

Sec. 655.5 Stand-down waivers for drug testing.

(a) An employer subject to this part may petition the FTA for a waiver allowing the employer to stand down, per 49 CFR Part 40, an employee following a report of a laboratory confirmed positive drug test or refusal, pending the outcome of the verification process.

(b) Each petition for a waiver must be in writing and include facts and justification to support the waiver. Each petition must satisfy the requirements for obtaining a waiver, as provided in 49 CFR 40.21.

(c) Each petition for a waiver must be submitted to the Office of Safety and Security, Federal Transit Administration, U.S. Department of Transportation, 400 Seventh Street, SW. Washington, DC 20590.

(d) The Administrator may grant a waiver subject to 49 CFR 40.21(d).

Sec. 655.6 Preemption of state and local laws.

(a) Except as provided in paragraph (b) of this section, this part preempts any state or local law, rule, regulation, or order to the extent that:

(1) Compliance with both the state or local requirement and any requirement in this part is not possible; or

(2) Compliance with the state or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.

(b) This part shall not be construed to preempt provisions of state criminal laws that impose sanctions for reckless conduct attributed to prohibited drug use or alcohol misuse leading to actual loss of life, injury, or damage to property, whether the provisions apply specifically to transportation employees or employers or to the general public.

Sec. 655.7 Starting date for testing programs.

An employer must have an anti-drug and alcohol misuse testing program in place by the date the employer begins operations.

Subpart B--Program Requirements

Sec. 655.11 Requirement to establish an anti-drug use and alcohol misuse program.

Each employer shall establish an anti-drug use and alcohol misuse program consistent with the requirements of this part.

Sec. 655.12 Required elements of an anti-drug use and alcohol misuse program.

An anti-drug use and alcohol misuse program shall include the following:

(a) A statement describing the employer's policy on prohibited drug use and alcohol misuse in the workplace, including the consequences associated with prohibited drug use and alcohol misuse. This policy statement shall include all of the elements specified in Sec. 655.15. Each employer shall disseminate the policy consistent with the provisions of Sec. 655.16.

(b) An education and training program which meets the requirements of Sec. 655.14.

(c) A testing program, as described in Subparts C and D of this part, which meets the requirements of this part and 49 CFR Part 40.

(d) Procedures for referring a covered employee who has a verified positive drug test result or an alcohol concentration of 0.04 or greater to a Substance Abuse Professional, consistent with 49 CFR Part 40.

Sec. 655.13 [Reserved]

Sec. 655.14 Education and training programs.

Each employer shall establish an employee education and training program for all covered employees, including:

(a) Education. The education component shall include display and distribution to every covered employee of: informational material and a community service hot-line telephone number for employee assistance, if available.

(b) Training. (1) Covered employees. Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms that may indicate prohibited drug use.

(2) Supervisors. Supervisors and/or other company officers authorized by the employer to make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use and at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

Sec. 655.15 Policy statement contents.

The local governing board of the employer or operator shall adopt an anti-drug and alcohol misuse policy statement. The statement must be made available to each covered employee, and shall include the following:

(a) The identity of the person, office, branch and/or position designated by the employer to answer employee questions about the employer's anti-drug use and alcohol misuse programs.

(b) The categories of employees who are subject to the provisions of this part.

(c) Specific information concerning the behavior and conduct prohibited by this part.

(d) The specific circumstances under which a covered employee will be tested for prohibited drugs or alcohol misuse under this part.

(e) The procedures that will be used to test for the presence of illegal drugs or alcohol misuse, protect the employee and the integrity of the drug and alcohol testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.

(f) The requirement that a covered employee submit to drug and alcohol testing administered in accordance with this part.

(g) A description of the kind of behavior that constitutes a refusal to take a drug or alcohol test, and a statement that such a refusal constitutes a violation of the employer's policy.

(h) The consequences for a covered employee who has a verified positive drug or a confirmed alcohol test result with an alcohol concentration of 0.04 or greater, or who refuses to submit to a test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional, as required by 49 CFR Part 40.

(i) The consequences, as set forth in Sec. 655.35 of subpart D, for a covered employee who is found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(j) The employer shall inform each covered employee if it implements elements of an anti-drug use or alcohol misuse program that are not required by this part. An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

Sec. 655.16 Requirement to disseminate policy.

Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug and alcohol misuse policies and procedures.

Sec. 655.17 Notice requirement.

Before performing a drug or alcohol test under this part, each employer shall notify a covered employee that the test is required by this part. No employer shall falsely represent that a test is administered under this part.

Secs. 655.18-655.20 [Reserved]

Subpart C--Prohibited Drug Use

Sec. 655.21 Drug testing.

(a) An employer shall establish a program that provides testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up.

(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:

(1) Marijuana;

(2) Cocaine;

(3) Opiates;

(4) Amphetamines; and

(5) Phencyclidine.

(c) Consumption of these products is prohibited at all times.

Secs. 655.22-655.30 [Reserved]

Subpart D--Prohibited Alcohol Use

Sec. 655.31 Alcohol testing.

(a) An employer shall establish a program that provides for testing for alcohol in the following circumstances: post-accident, reasonable suspicion, random, and return to duty/follow-up. An employer may also conduct pre-employment alcohol testing.

(b) Each employer shall prohibit a covered employee, while having an alcohol concentration of 0.04 or greater, from performing or continuing to perform a safety-sensitive function.

Sec. 655.32 On duty use.

Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions. No employer having actual knowledge that a covered employee is using alcohol while performing safety-sensitive functions shall permit the employee to perform or continue to perform safety-sensitive functions.

Sec. 655.33 Pre-duty use.

(a) General. Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.

(b) On-call employees. An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:

(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.

(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

Sec. 655.34 Use following an accident.

Each employer shall prohibit alcohol use by any covered employee required to take a post-accident alcohol test under Sec. 655.44 for eight hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

Sec. 655.35 Other alcohol-related conduct.

(a) No employer shall permit a covered employee tested under the provisions of subpart E of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 to perform or continue to perform safety-sensitive functions, until:

(1) The employee's alcohol concentration measures less than 0.02; or

(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against an employee based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of this part from taking any action otherwise consistent with law.

Subpart E--Types of Testing

Sec. 655.41 Pre-employment drug testing.

(a)(1) Before allowing a covered employee or applicant to perform a safety-sensitive function for the first time, the employer must ensure that the employee takes a pre-employment drug test administered under this part with a verified negative result. An employer may not allow a covered employee, including an applicant, to perform a safety-sensitive function unless the employee takes a drug test administered under this part with a verified negative result.

(2) When a covered employee or applicant has previously failed or refused a pre-employment drug test administered under this part, the employee must provide the employer proof of having successfully completed a referral, evaluation and treatment plan as described in Sec. 655.62.

(b) An employer may not transfer an employee from a nonsafety-sensitive function to a safety-sensitive function until the employee takes a pre-employment drug test administered under this part with a verified negative result.

(c) If a pre-employment drug test is canceled, the employer shall require the covered employee or applicant to take another pre-employment drug test administered under this part with a verified negative result.

(d) When a covered employee or applicant has not performed a safety-sensitive function for 90 consecutive calendar days regardless of the reason, and the employee has not been in the employer's random selection pool during that time, the employer shall ensure that the employee takes a pre-employment drug test with a verified negative result.

Sec. 655.42 Pre-employment alcohol testing.

An employer may, but is not required to, conduct pre-employment alcohol testing under this part. If an employer chooses to conduct pre-employment alcohol testing, the employer must comply with the following requirements:

(a) The employer must conduct a pre-employment alcohol test before the first performance of safety-sensitive functions by every covered employee (whether a new employee or someone who has transferred to a position involving the performance of safety-sensitive functions).

(b) The employer must treat all covered employees performing safety-sensitive functions the same for the purpose of pre-employment alcohol testing (i.e., you must not test some covered employees and not others).

(c) The employer must conduct the pre-employment tests after making a contingent offer of employment or transfer, subject to the employee passing the pre-employment alcohol test.

(d) The employer must conduct all pre-employment alcohol tests using the alcohol testing procedures set forth in 49 CFR Part 40.

(e) The employer must not allow a covered employee to begin performing safety-sensitive functions unless the result of the employee's test indicates an alcohol concentration of less than 0.02.

Sec. 655.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug and/or alcohol test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug and/or engaged in alcohol misuse.

(b) An employer's determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. A supervisor(s), or other company official(s) who is trained in detecting the signs and symptoms of drug use and alcohol misuse must make the required observations.

(c) Alcohol testing is authorized under this section only if the observations required by paragraph (b) of this section are made during, just preceding, or just after the period of the workday that the covered employee is required to be in compliance with this part. An employer may direct a covered employee to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions.

(d) If an alcohol test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

Sec. 655.44 Post-accident testing.

(a) Accidents. (1) Fatal accidents. (i) As soon as practicable following an accident involving the loss of human life, an employer shall conduct drug and alcohol tests on each surviving covered employee operating the mass transit vehicle at the time of the accident. Post-accident drug and alcohol testing of the operator is not required under this section if the covered employee is

tested under the fatal accident testing requirements of the Federal Motor Carrier Safety Administration rule 49 CFR 389.303(a)(1) or (b)(1).

(ii) The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(2) Nonfatal accidents. (i) As soon as practicable following an accident not involving the loss of human life in which a mass transit vehicle is involved, the employer shall drug and alcohol test each covered employee operating the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee's performance can be completely discounted as a contributing factor to the accident. The employer shall also drug and alcohol test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) If an alcohol test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the alcohol test was not promptly administered. If an alcohol test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and maintain the record. Records shall be submitted to FTA upon request of the Administrator.

(b) An employer shall ensure that a covered employee required to be drug tested under this section is tested as soon as practicable but within 32 hours of the accident.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

(d) The decision not to administer a drug and/or alcohol test under this section shall be based on the employer's determination, using the best available information at the time of the determination that the employee's performance could not have contributed to the accident. Such a decision must be documented in detail, including the decision-making process used to reach the decision not to test.

(e) Nothing in this section shall be construed to require the delay of necessary medical attention for the injured following an accident or to prohibit a covered employee from leaving the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

(f) The results of a blood, urine, or breath test for the use of prohibited drugs or alcohol misuse, conducted by Federal, State, or local officials having independent authority for the test, shall be considered to meet the requirements of this section provided such test conforms to the applicable Federal, State, or local testing requirements, and that the test results are obtained by the employer. Such test results may be used only when the employer is unable to perform a post-accident test within the required period noted in paragraphs (a) and (b) of this section.

Sec. 655.45 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees; the random alcohol testing rate shall be 10 percent. As provided in paragraph (b) of this section, this rate is subject to annual review by the Administrator.

(b) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug and alcohol testing is based, respectively, on the reported positive drug and alcohol violation rates for the entire industry. All information used for this determination is drawn from the drug and alcohol Management Information System (MIS) reports required by this part. In order to ensure reliability of the data, the Administrator shall consider the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry's verified positive results and violation rates. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rates for random drug and alcohol testing of covered employees. The new minimum annual percentage rate for random drug and alcohol testing will be applicable starting January 1 of the calendar year following publication.

(c) Rates for drug testing. (1) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of Sec. 655.72 for the two preceding consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(2) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of Sec. 655.72 for the calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug or random alcohol testing to 50 percent of all covered employees.

(d) Rates for alcohol testing. (1)(i) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of Sec. 655.72 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(ii) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of Sec. 655.72 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(2)(i) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of Sec. 655.72 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(ii) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of Sec. 655.72 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

(e) The selection of employees for random drug and alcohol testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with employees' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rates for random drug and alcohol testing determined by the Administrator. If the employer conducts random drug and alcohol testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug and alcohol testing at the same minimum annual percentage rate under this part.

(g) Each employer shall ensure that random drug and alcohol tests conducted under this part are unannounced and unpredictable, and that the dates for administering random tests are spread reasonably throughout the calendar year. Random testing must be conducted at all times of day when safety-sensitive functions are performed.

(h) Each employer shall require that each covered employee who is notified of selection for random drug or random alcohol testing proceed to the test site immediately. If the employee is performing a safety-sensitive function at the time of the notification, the employer shall instead ensure that the employee ceases to perform the safety-sensitive function and proceeds to the testing site immediately.

(i) A covered employee shall only be randomly tested for alcohol misuse while the employee is performing safety-sensitive functions; just before the employee is to perform safety-sensitive functions; or just after the employee has ceased performing such functions. A covered employee may be randomly tested for prohibited drug use anytime while on duty.

(j) If a given covered employee is subject to random drug and alcohol testing under the testing rules of more than one DOT agency for the same employer, the employee shall be subject to random drug and alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function.

(k) If an employer is required to conduct random drug and alcohol testing under the drug and alcohol testing rules of more than one DOT agency, the employer may--

(1) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or

(2) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

Sec. 655.46 Return to duty following refusal to submit to a test, verified positive drug test result and/or breath alcohol test result of 0.04 or greater.

Where a covered employee refuses to submit to a test, has a verified positive drug test result, and/or has a confirmed alcohol test result of 0.04 or greater, the employer, before returning the employee to duty to perform a safety-sensitive function, shall follow the procedures outlined in 49 CFR Part 40.

Sec. 655.47 Follow-up testing after returning to duty.

An employer shall conduct follow-up testing of each employee who returns to duty, as specified in 49 CFR Part 40, subpart O.

Sec. 655.48 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

If an employer chooses to permit a covered employee to perform a safety-sensitive function within 8 hours of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer shall retest the covered employee to ensure compliance with the provisions of Sec. 655.35. The covered employee may not perform safety-sensitive functions unless the confirmation alcohol test result is less than 0.02.

Sec. 655.49 Refusal to submit to a drug or alcohol test.

(a) Each employer shall require a covered employee to submit to a post-accident drug and alcohol test required under Sec. 655.44, a random drug and alcohol test required under Sec. 655.45, a reasonable suspicion drug and alcohol test required under Sec. 655.43, or a follow-up drug and alcohol test required under Sec. 655.47. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

(b) When an employee refuses to submit to a drug or alcohol test, the employer shall follow the procedures outlined in 49 CFR Part 40.

Sec. 655.50 [Reserved]

Subpart F-Drug and Alcohol Testing Procedures

Sec. 655.51 Compliance with testing procedures requirements.

The drug and alcohol testing procedures in 49 CFR Part 40 apply to employers covered by this part, and must be read together with this part, unless expressly provided otherwise in this part.

Sec. 655.52 Substance abuse professional (SAP).

The SAP must perform the functions in 49 CFR Part 40.

Sec. 655.53 Supervisor acting as collection site personnel.

An employer shall not permit an employee with direct or immediate supervisory responsibility or authority over another employee to serve as the urine collection person, breath alcohol technician, or saliva-testing technician for a drug or alcohol test of the employee.

Secs. 655.54-655.60 [Reserved]

Subpart G-Consequences

Sec. 655.61 Action when an employee has a verified positive drug test result or has a confirmed alcohol test result of 0.04 or greater, or refuses to submit to a test.

(a) (1) Immediately after receiving notice from a medical review officer (MRO) or a consortium/third party administrator (C/TPA) that a covered employee has a verified positive drug test result, the employer shall require that the covered employee cease performing a safety-sensitive function.

(2) Immediately after receiving notice from a Breath Alcohol Technician (BAT) that a covered employee has a confirmed alcohol test result of 0.04 or greater, the employer shall require that the covered employee cease performing a safety-sensitive function.

(3) If an employee refuses to submit to a drug or alcohol test required by this part, the employer shall require that the covered employee cease performing a safety-sensitive function.

(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure the employee meets the requirements of 49 CFR Part 40 for returning to duty, including taking a return to duty drug and/or alcohol test.

Sec. 655.62 Referral, evaluation, and treatment.

If a covered employee has a verified positive drug test result, or has a confirmed alcohol test of 0.04 or greater, or refuses to submit to a drug or alcohol test required by this part, the employer shall advise the employee of the resources available for evaluating and resolving problems associated with prohibited drug use and alcohol misuse, including the names, addresses, and telephone numbers of substance abuse professionals (SAPs) and counseling and treatment programs.

Secs. 655.63-655.70 [Reserved]

Subpart H--Administrative Requirements

Sec. 655. 71 Retention of records.

(a) General requirement. An employer shall maintain records of its anti-drug and alcohol misuse program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of retention. In determining compliance with the retention period requirement, each record shall be maintained for the specified minimum period of time as measured from the date of the creation of the record. Each employer shall maintain the records in accordance with the following schedule:

(1) Five years. Records of covered employee verified positive drug or alcohol test results, documentation of refusals to take required drug or alcohol tests, and covered employee referrals to the substance abuse professional, and copies of annual MIS reports submitted to FTA.

(2) Two years. Records related to the collection process and employee training.

(3) One year. Records of negative drug or alcohol test results.

(c) Types of records. The following specific records must be maintained:

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Documents generated in connection with decisions to administer reasonable suspicion drug or alcohol tests.

(iv) Documents generated in connection with decisions on post-accident drug and alcohol testing.

(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine or breathe sample.

(2) Records related to test results:

(i) The employer's copy of the custody and control form.

(ii) Documents related to the refusal of any covered employee to submit to a test required by this part.

(iii) Documents presented by a covered employee to dispute the result of a test administered under this part.

(3) Records related to referral and return to duty and follow-up testing: Records concerning a covered employee's entry into and completion of the treatment program recommended by the substance abuse professional.

(4) Records related to employee training:

(i) Training materials on drug use awareness and alcohol misuse, including a copy of the employer's policy on prohibited drug use and alcohol misuse.

(ii) Names of covered employees attending training on prohibited drug use and alcohol misuse and the dates and times of such training.

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug and alcohol testing based on reasonable suspicion.

(iv) Certification that any training conducted under this part complies with the requirements for such training.

(5) Copies of annual MIS reports submitted to FTA.

Sec. 655.72 Reporting of results in a management information system.

(a) Each recipient shall annually prepare and maintain a summary of the results of its anti-drug and alcohol misuse testing programs performed under this part during the previous calendar year.

(b) When requested by FTA, each recipient shall submit to FTA's Office of Safety and Security, or its designated agent, by March 15, a report covering the previous calendar year (January 1 through December 31) summarizing the results of its anti-drug and alcohol misuse programs.

(c) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, contractor, consortium or joint enterprise or by a third party service provider acting on the recipient's or employer's behalf.

(d) Drug use information: Long Form. Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix A of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) Number of covered employees subject to testing under the anti-drug regulations of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected by type of test (i.e., pre-employment, follow-up, random, etc.) and employee category.

(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.

(5) Number of negatives verified by an MRO by type of test and employee category.

(6) Number of persons denied a position as a covered employee following a verified positive drug test.

(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in Sec. 655.61).

(8) Number of employees with tests verified positive by an MRO for multiple drugs.

(9) Number of covered employees who were administered drug and alcohol tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random drug test required under this part.

(11) Number of covered employees who refused to submit to a non-random drug test required under this part.

(12) Number of covered employees and supervisors who received training during the reporting period.

(13) Number of fatal and nonfatal accidents which resulted in a verified positive post-accident drug test.

(14) Number of fatalities resulting from accidents which resulted in a verified positive post-accident drug test.

(15) Identification of FTA funding source(s).

(e) Drug Use Information: Short Form. If all drug test results were negative during the reporting period, the employer must use the ``EZ form'' (Appendix B of this part). It shall contain:

(1) Number of FTA covered employees.

(2) Number of covered employees subject to testing under the anti-drug regulation of the other DOT operating administrations subject to 49 CFR Part 40.

(3) Number of specimens collected and verified negative by type of test and employee category.

(4) Number of covered employees verified positive by an MRO or who refused to submit to a drug test prior to the reporting period and who were returned to duty in covered positions during the reporting period (having complied with the recommendations of a substance abuse professional as described in Sec. 655.62).

(5) Number of covered employees who refused to submit to a non-random drug test required under this part.

(6) Number of covered employees and supervisors who received training during the reporting period.

(7) Identification of FTA funding source(s).

(f) Alcohol misuse information: Long Form. Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall be submitted on the FTA Alcohol Testing Management (MIS) Data Collection Form (Appendix C of this part) and shall include the following informational elements:

(1) Number of FTA covered employees by employee category.

(2) (i) Number of screening tests by type of test and employee category.

(ii) Number of confirmed tests, by type of test and employee category.

(3) Number of confirmed alcohol tests indicating an alcohol concentration of 0.02 or greater but less than 0.04, by type of test and employee category.

(4) Number of confirmed alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.

(5) Number of covered employees with a confirmed alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in Sec. 655.61).

(6) Number of fatal and nonfatal accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(7) Number of fatalities resulting from accidents which resulted in a confirmed post-accident alcohol test indicating an alcohol concentration of 0.04 or greater.

(8) Number of covered employees who were found to have violated other provisions of subpart B of this part and the action taken in response to the violation.

(9) Number of covered employees who were administered alcohol and drug tests at the same time, with a positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

(10) Number of covered employees who refused to submit to a random alcohol test required under this part.

(11) Number of covered employees who refused to submit to a non-random alcohol test required under this part.

(12) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(13) Identification of FTA funding source(s).

(g) Alcohol Misuse Information: Short Form. If an employer has no screening test results of 0.02 or greater and no violations of the alcohol misuse provisions of this part, the employer must use the ``EZ'' form (Appendix D of this part). It shall contain (This report may only be submitted if the program results meet these criteria.):

(1) Number of FTA covered employees.

(2) Number of alcohol tests conducted with results less than 0.02 by type of test and employee category.

(3) Number of employees with confirmed alcohol test results indicating an alcohol concentration of 0.04 or greater prior to the reporting period and who were returned to duty in a covered position during the reporting period.

(4) Number of covered employees who refused to submit to a random alcohol test required under this part.

(5) Number of supervisors who have received training in determining the existence of reasonable suspicion of alcohol misuse during the reporting period.

(6) Identification of FTA funding source(s).

Sec. 655.73 Access to facilities and records.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee that is contained in records required to be maintained by Sec. 655.71.

(b) A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the covered employee's use of prohibited drugs or misuse of alcohol, including any records pertaining to his or her drug or alcohol tests. The employer shall provide promptly the records requested by the employee. Access to a covered employee's records shall not be contingent upon the employer's receipt of payment for the production of those records.

(c) An employer shall permit access to all facilities utilized and records compiled in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its employees or to a State oversight agency authorized to oversee rail fixed guideway systems.

(d) An employer shall disclose data for its drug and alcohol testing programs, and any other information pertaining to the employer's anti-drug and alcohol misuse programs required to be maintained by this part, to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee rail fixed guideway systems, upon the Secretary's request or the respective agency's request.

(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer's drug or alcohol testing related to the accident under investigation.

(f) Records shall be made available to a subsequent employer upon receipt of a written request from the covered employee. Subsequent disclosure by the employer is permitted only as expressly authorized by the terms of the covered employee's request.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of a drug or alcohol test under this part (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the covered employee.)

(h) An employer shall release information regarding a covered employee's record as directed by the specific, written consent of the employee authorizing release of the information to an identified person.

(i) An employer may disclose drug and alcohol testing information required to be maintained under this part, pertaining to a covered employee, to the State oversight agency or grantee required to certify to FTA compliance with the drug and alcohol testing procedures of 49 CFR parts 40 and 655.

Secs. 655.74-655.80 [Reserved]

Subpart I--Certifying Compliance

Sec. 655.81 Grantee oversight responsibility.

A grantee shall ensure that the recipients of funds under 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) comply with this part.

Sec. 655.82 Compliance as a condition of financial assistance.

(a) General. A recipient may not be eligible for Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 or under 23 U.S.C. 103(e)(4), if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by this part. Failure to certify compliance with these requirements, as specified in Sec. 655.83, may result in the suspension of a grantee's eligibility for Federal funding.

(b) Criminal violation. A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under 18 U.S.C. 1001.

(c) State's role. Each State shall certify compliance on behalf of its 49 U.S.C. 5307, 5309, 5311 or 23 U.S.C. 103(e)(4) subrecipients, as applicable. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 5307, 5309, 5311 or 103(e)(4) subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

Sec. 655.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall annually certify compliance, as set forth in Sec. 655.82, to the applicable FTA Regional Office.

(b) A certification must be authorized by the organization's governing board or other authorizing official, and must be signed by a party specifically authorized to do so.

(c) A recipient will be ineligible for further FTA financial assistance if the recipient fails to establish and implement an anti-drug and alcohol misuse program in accordance with this part.

Appendixes to Part 655

Editors Note: These Appendixes are the MIS forms required by FTA. They are in the Adobe File.

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Administrator, Federal Transit Administration.

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