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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 655

[Docket No. FTA-2013-0012]

RIN 2132-AB09

Alcohol and Controlled Substances Testing

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Final rule.

SUMMARY: This final rule is issued to revise sections of the Alcohol and Controlled Substances (D&A) Testing regulation to reflect recent amendments to the law. The final rule also includes technical corrections to the D&A testing regulation to more clearly explain existing compliance requirements, update regulatory terms, and remove repealed statutory provisions. Because this rule merely implements a statutory provision without agency interpretation FTA finds that public comment is unnecessary under the circumstances.

DATES: This final rule is effective on [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: For program issues, contact Vincent Valdes, Office of Transit Safety and Oversight (TSO), Federal Transit Administration, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001 (telephone: 202-366-4052); or e-mail: Vincent.Valdes@dot.gov). For legal issues, contact Bruce Walker, Office of Chief Counsel (TCC), FTA, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001

(telephone: 202-366-9109); (e-mail: Bruce.Walker@dot.gov). Office hours are from 8 a.m. to 6 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

FTA is publishing this rule without a prior proposal because it merely incorporates recent statutory changes to FTA's drug and alcohol testing program and makes other minor technical amendments. Specifically, this rule amends 49 CFR part 655 to implement 49 U.S.C. 5331(g)(2), as amended by § 20022 of the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141 (2012) (MAP-21). The new legislation provides the Secretary of the Department of Transportation (DOT) with the option of barring a recipient from receiving Federal public transportation funds, in an amount the Secretary considers appropriate, for non-compliance with FTA's D&A regulations which are codified at 49 CFR part 655. This authority is delegated to the FTA Administrator pursuant to 49 CFR 1.91.

With this rule, FTA is amending part 655 to implement this discretionary statutory enforcement remedy available to the Administrator. Additionally, this rule makes several technical corrections to part 655 that include: (1) removing reference to 23 U.S.C. 103(e)(4) from 49 CFR part 655 as it relates to recipients of the Federal Highway Administration's Interstate Substitute Program which has been repealed; (2) replacing the terms "mass transportation" and "mass transit" with the term "public transportation" as defined in 49 U.S.C. 5331(a)(3); and (3) revising Subpart I to more clearly explain the statutory requirement to establish a compliant D&A testing program as a condition for

receiving Federal transit funds and the associated compliance and certification requirements for recipients.

This rule simply adopts the statute without agency interpretation and includes ministerial technical corrections; therefore, pursuant to 5 U.S.C. 553(b)(3)(A), FTA finds good cause to publish this as a final rule without public comment because prior notice and comment would be unnecessary under the circumstances. Further, for these reasons, FTA also finds good cause pursuant to 5 U.S.C. 553(d)(2), to make the rule effective upon publication in the Federal Register.

II. Overview and General Discussion of the Rule

A. Purpose.

In order to implement 49 U.S.C. 5331(g)(2), as amended by section 20222 of MAP-21, this rule amends 49 CFR part 655 to effect the FTA Administrator's discretionary authority to bar a recipient from receiving Federal transit funds, in an amount deemed appropriate, should the recipient fail to comply with the requirements of 49 CFR part 655. FTA is also using this rule to make technical corrections to Part 655 to reflect updates that have occurred since its initial publication.

B. Section-by-Section Discussion

1. 23 U.S.C. 103(e)(4) Applicability

The Federal Highway Administration's Interstate Substitute Program authorized the Secretary to incur obligations for public transit projects, in those instances when certain interstate route projects were procedurally withdrawn, and properly authorized to be substituted with a public transportation project. To ensure that recipients of these

substituted funds were subject to FTA's D&A requirements, Congress enacted section 342 of the National Highway System Designation Act, Pub. L. 104-59 (1995). The legislation amended 49 U.S.C. 5331(b) to specifically make recipients of 23 U.S.C. 103(e)(4) funding subject to FTA's D&A regulations.

In 2001, FTA issued 49 CFR part 655 to implement the drug and alcohol testing requirements of 49 U.S.C. 5331(b). Although at the time, the Interstate Substitute Program had been repealed, 49 U.S.C. 5331(b) continued to statutorily apply to recipients of 23 U.S.C. 103(e)(4) funds. In 2005, enacted a technical correction with section 3030(b) of SAFETEA-LU which amended 49 U.S.C. 5331(b) by removing its applicability to recipients of 23 U.S.C. 103(e)(4) program funds. FTA is now correcting Part 655 by removing reference to 23 U.S.C. 103(e)(4) recipients as follows: 1) § 655.3(1)(ii) and § 655.3(2)(ii); 2) the definition of recipient in § 655.4, §655.81; and 3) § 655.82 (a) and (c).

2. 49 U.S.C. 5331(a)(3) Definition of Public Transportation

FTA is revising §§ 655.4 and 655.44 by replacing the terms "mass transportation" and "mass transit." with the term "public transportation." This technical correction is warranted because statutory references to modes of public conveyance have changed since the initial publication of FTA's D&A regulation. To that end, FTA is updating Part 655 to reflect the statutory meaning of public transportation as defined by 49 U.S.C. 5331(a)(3). Specifically, the terms will be replaced in the definitions of accident, employer, and vehicle in § 655.4 and in the text of § 655.44(a)(1) and (2).

3. Section 655.82 Compliance

FTA is amending the text of § 655.82 (a) to more accurately reflect as mandatory, the statutory requirement of 49 U.S.C. 5331(g)(1). As with the current text of paragraph (a), the revised text explains that recipients receiving Federal funding under 49 U.S.C. 5307, 5309, or 5311 are required to establish a D&A testing program, in accordance with 49 CFR part 655, as a condition for receiving Federal financial assistance. However, the revised text provides clarity by indicating that a recipient “shall not” instead of “may not” be eligible for Federal transit assistance for failing to establish and implement a compliant D&A program. This correction more clearly reflects the existing statutory requirement of establishing a compliant D&A program as a condition for receiving Federal financial assistance.

FTA is revising paragraph (b) to implement the additional discretionary remedy authorized by 49 U.S.C. 5331(g)(2) as amended by MAP-21. The revised text indicates that the Administrator now has discretion to bar a recipient’s current or future Federal transit financial assistance in appropriate amounts for failure to comply with the requirements of 49 CFR part 655. Paragraph (c) is also revised to reflect the requirements in the current § 655.82(b) because the criminal fraud provision of 18 U.S.C. 1001 remains in effect.

This rule also redesignates the current requirement of § 655.83(d) as a new § 655.82(d) to better align with the compliance requirements of section § 655.82. Specifically, the amended § 655.82(d) continues to indicate the consequences for non-compliance for recipients who are also subject to the U.S. Coast Guard drug and alcohol

testing requirements. Pursuant to § 655.3(c), ferryboat operators will continue to have administrative relief by only having to observe applicable Coast Guard D&A testing requirements. However, as recipients of Federal transit funds, they remain subject to FTA noncompliance remedies if they fail to comply with the Coast Guard's D&A regulations.

4. Section 655.83 Certification

This rule revises paragraphs (a) and (c) of this section and redesignates § 655.83(d) as a new § 655.82(d) as noted above. The revised paragraph (a) more fully explains the consequence for failing to appropriately certify compliance. In addition, the revised paragraph (c) clarifies the certifying requirements for recipients that administer pass-through funding to subrecipients and contractors. Similar to the current § 655.82(c), the revised paragraph (c) notes the certification requirements for States that administer pass-through Federal transit funding; however, the revision clarifies the existing certification requirements for other recipients who also administer pass-through Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311. Specifically, any recipient who administers pass-through Federal funding is required to certify that its subrecipients and contractors are in compliance with the requirements of part 655. The revised § 655.83(c) also continues to reflect the authority noted in the current § 655.82(c), which permits a recipient who administers pass-through Federal funding to suspend the funding of a subrecipient or contractor for failure to comply with part 655.

Executive Order 12866 and 13563

Executive Order 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory

approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule implement changes made by MAP-21 to FTA's D&A regulation and are administrative in nature. FTA has determined that this action is not a significant regulatory action under section 3(f) of Executive Order 12866, nor is it significant within the meaning of Department of Transportation regulatory policies and procedures.

This rule provides technical corrections to FTA's alcohol misuse and controlled substance testing regulatory requirements and implements an additional administrative remedy for potential violations of those regulatory requirements. The only entities affected by this proposed rule are those public transportation providers currently subject to FTA's alcohol misuse and controlled substance testing regimen. This rule does not require any additional costs associated with compliance. It is anticipated that the economic impact of this rulemaking would be minimal. Accordingly, it has not been reviewed by the Office of Management and Budget.

This rule is not expected to impose any new compliance costs, and would not adversely affect, in any material way, any sector of the economy. There are no significant changes to the existing program with the publication of this rulemaking. Additionally, this rule does not interfere with any action planned by another agency and does not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

The requirements of the Regulatory Flexibility Act (RFA) do not apply when an agency finds good cause pursuant to 5 U.S.C. 553 to adopt a rule without prior notice and comment. Because this rule promulgates discretionary authority enacted by Congress under MAP-21, FTA has determined that it has good cause to adopt the rule without notice and comment; therefore, RFA analysis is not required. Additionally, this administrative action will result in no significant economic impact nor impose any additional cost to small entities that are subject to alcohol misuse and controlled substance testing requirements of 49 CFR part 655.

Paperwork Reduction Act

This rule does not contain a collection of information that is subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Under the provisions of the Paperwork Reduction Act, FTA may not conduct or sponsor, and a person is not required to respond to or may not be penalized for failing to comply with, a collection of information unless it displays a currently valid OMB control number.

Executive Order 13132, Federalism

Executive Order 13132 sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have Federalism implications. That is, regulations that have substantial direct effects on the States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must closely examine the statutory authority supporting any action that would limit the policymaking discretion of the States, and to the extent practicable, must consult with

State and local officials before implementing any such action.

FTA has reviewed this rule under the threshold criteria of Executive Order 13132 on Federalism and certifies that the rule would not have Federalism implications as defined by the Executive Order. The rule would not significantly affect the rights, roles, and responsibilities of States, and would not involve preemption of State law, nor would it limit State policymaking discretion.

Unfunded Mandates Reform Act

This rule is not an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, 2 USC 1501 et seq., and any enforceable duties that FTA would impose are a condition of Federal assistance or a duty arising from participation in a voluntary Federal program. This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$148.1 million or more in any one year (2 U.S.C. 1532).

Executive Order 13175 (Tribal Consultation)

FTA has analyzed this action under Executive Order 13175, and believes that it would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Indian tribal governments; and would not preempt tribal law. Therefore, a tribal summary impact statement is not required.

Executive Order 12988 (Civil Justice Reform)

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce regulatory burden.

Accordingly, for reasons discussed in the preamble, FTA amends 49 CFR part 655 as follows:

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

1. The authority citation for part 655 is revised to read as follows:

Authority: 49 U.S.C. 5331 (as amended); 49 CFR 1.91

2. Amend § 655.3 by revising paragraphs (a)(1) and (2) to read as follows:

§ 655.3 Applicability.

(a) * * *

(1) Each recipient and subrecipient receiving Federal assistance under 49 U.S.C. 5307, 5309, or 5311; and

(2) Any contractor of a recipient or subrecipient of Federal assistance under 49 U.S.C. 5307, 5309, 5311.

* * * * *

3. In § 655.4:

a. In paragraph (4) of the definition of “accident,” remove the words “mass transit” and add in their place the words “public transportation”;

b. In the definition of “employer,” remove the words “mass transportation” and add in their place the words “public transportation”;

c. Revise the definition of “recipient”; and

d. In the definition of “vehicle,” remove the words “mass transit” and “mass transportation” and add in their place the words “public transportation”.

The revision reads as follows:

§ 655.4 Definitions.

* * * * *

Recipient means a person that receives Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 directly from the Federal Government.

* * * * *

§ 655.44 [Amended]

4. In § 655.44, remove the words “mass transit” from paragraphs (a)(1)(i) and (a)(2)(i) and add the words “public transportation” in their place.

5. Revise § 655.81 to read as follows:

§ 655.81 Grantee oversight responsibility.

A recipient shall ensure that a subrecipient or contractor who receives 49 U.S.C. 5307, 5309, or 5311 funds directly from the recipient complies with this part.

6. Revise § 655.82 to read as follows:

§ 655.82 Compliance as a condition of financial assistance.

(a) A recipient shall not be eligible for Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311, if a recipient fails to establish an anti-drug and alcohol misuse program in compliance with this part.

(b) If the Administrator determines that a recipient that receives Federal financial assistance under 49 U.S.C. 5307, 5309, or 5311 is not in compliance with this part, the Administrator may bar the recipient from receiving Federal financial assistance in an amount the Administrator considers appropriate.

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

(d) Notwithstanding § 655.3, a recipient operating a ferryboat regulated by the USCG who fails to comply with the USCG chemical and alcohol testing requirements, shall be in noncompliance with this part and may be barred from receiving Federal financial assistance in an amount the Administrator considers appropriate.

7. Amend § 655.83 by revising paragraphs (a) and (c) and removing paragraph (d).

The revisions read as follows:

§ 655.83 Requirement to certify compliance.

(a) A recipient of Federal financial assistance under section 5307, 5309, or 5311 shall annually certify compliance with this part to the applicable FTA Regional Office.

* * * * *

(c) Recipients, including a State, that administers 49 U.S.C. 5307, 5309, or 5311 Federal financial assistance to subrecipients and contractors, shall annually certify compliance with the requirements of this part, on behalf of its applicable subrecipient or contractor to the applicable FTA Regional Office. A recipient administering section 5307, 5309, or 5311 Federal funding may suspend a subrecipient or contractor from receiving Federal transit funds for noncompliance with this part.

Issued on: June 20, 2013

Peter Rogoff,
Administrator

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