

absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: May 23, 2006.

Betty J. Berry,

Acting Regional Administrator, Region 7.
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DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

49 CFR Part 655

[Docket No. FTA-2006-24592]

RIN 2132-AA86

Controlled Substances and Alcohol Misuse Testing

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Transit Administration (FTA) proposes to eliminate duplicative requirements for safety-sensitive employees of some public (mass) transportation systems, who are subject to the alcohol and controlled substances (D&A) testing requirements of both FTA and the United States Coast Guard (USCG), or FTA and the Federal Motor Carriers Safety Administration (FMCSA). Recipients could concurrently comply with FTA's D&A testing program as they comply with the testing requirements of the USCG or FMCSA. However, FTA's post-accident and reasonable suspicion testing requirements would continue to apply when accidents occur while

performing public (mass) transportation activities.

DATES: Comments must be received on or before August 4, 2006. Late filed comments will be considered to the extent practicable.

ADDRESSES: *Written Comments:* Submit written comments to the Docket Management System, U.S. Department of Transportation, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. You may submit comments identified by the docket number (FTA-2006-24592) by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Web Site: <http://dms.dot.gov>. Follow the instructions for submitting comments on the DOT electronic docket site.

- Fax: 1-202-493-2478.
- Hand Delivery: To the Docket Management System, Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this notice. Note that all comments received will be posted without change to <http://dms.dot.gov>, including any personal information provided.

FOR FURTHER INFORMATION CONTACT: For program issues, Gerald Powers, Office of Safety and Security, (202) 366-1080 (telephone); (202) 366-7951 (fax); or Gerald.Powers@dot.gov (e-mail). For legal issues, Bruce Walker, Office of the Chief Counsel, (202) 366-4011 (telephone); (202) 366-3809 (fax); or Bruce.Walker@dot.gov (e-mail).

SUPPLEMENTARY INFORMATION:

I. Background

Authority for This Proposal

Section 3030 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005), provides the Secretary of the Department of Transportation (DOT) discretion to determine whether a public transportation provider is adequately covered for drug and alcohol (D&A) testing purposes, by the D&A alcohol testing requirements of the USCG or another DOT agency.

Previous Action by FMCSA and FTA

FMCSA published a **Federal Register** notice on August 17, 2001 which eliminated duplicative D&A testing

requirements for holders of Commercial Drivers Licenses (CDLs) who provide public transportation services. These motor carrier operators are subject to FMCSA regulations; however, because they receive Federal funding for public transportation activities, they are also subject to FTA's D&A regulation. FMCSA stated that its testing requirements do not apply to transit employers who are required to comply with FTA testing requirements (*see* 49 CFR 382.103(d)). However, FMCSA made a policy determination that CDL holders would remain subject to its rule for specific violations; hence, the potential for duplicative oversight may continue to exist.

Subsequently, FTA undertook administrative steps to eliminate duplicative testing requirements for ferry operators by revising its policy for these operators with its **Federal Register** notice dated April 22, 2002. Before the notice, ferry operators receiving Federal transit funds were required to comply with the testing requirements of both FTA and USCG.

FTA consulted with the USCG and both agencies agreed that ferries were primarily regulated by the USCG. FTA determined that for safety purposes, it was sufficient for these operators to comply with USCG's D&A testing requirements. However, because the USCG does not require random alcohol testing, it was determined the operators would remain subject to FTA's random alcohol testing requirements.

FTA now proposes to adopt a regulatory provision that parallels FMCSA's rule for motor carrier operators who receive Federal transit funding and to codify its previously published policy guidance for ferry operators. FTA seeks comments on this proposed rule which would allow safety-sensitive employers to concurrently comply with FTA testing requirements when they comply with FMCSA or USCG D&A requirements.

II. Overview and General Discussion of the Proposed Rule

A. This notice of proposed rulemaking (NPRM) would provide regulatory relief to public transportation providers by eliminating duplicative testing requirements. The NPRM proposes to amend the applicability section of the FTA's D&A regulation at 49 CFR 655.3 by revising the introductory text of paragraph (a) and adding new paragraphs (c), (d), and (e).

Specifically, FTA proposes that a private or nonprofit motor-carrier employer, with employees who perform safety-sensitive functions regulated by both FTA and FMCSA, may determine

whether or not a majority (more than 50 percent) of these employees are regulated by FMSCA. If so, the employer may opt to comply with the FMSCA testing requirements only for that class of employees. However, for safety purposes, FTA's post-accident requirements, section 655.44, would apply when an accident, as defined in section 655.4 occurs in the performance of public (mass) transportation activities.

In exercising this option, an employer would also have discretion in determining the timeframe and the manner in which the employees' safety-sensitive functions are apportioned (i.e., daily, monthly, or annually). For audit purposes this determination would be made annually, at the beginning of the calendar year, and remain applicable throughout that calendar year.

We note that FMSCA testing regulations do not apply to transit maintenance employees. Therefore, maintenance workers servicing transit vehicles would remain subject to 49 CFR part 655.

B. The USCG has primary oversight over maritime operations, including ferryboats, whereas FTA's regulatory oversight stems from the fact that it provides Federal transit funding to a limited number of ferry operations. Therefore, FTA proposes as ferry operators comply with the D&A testing requirements of the USCG, they be deemed in concurrent compliance with FTA's D&A regulation.

USCG and FTA testing requirements are substantially similar. FTA believes that the USCG regulatory scheme sufficiently addresses transit safety concerns; therefore, it would be prudent for ferry operators to comply with only one set of Federal testing requirements. However, since USCG regulations do not require random alcohol testing, for safety purposes, ferry operators would remain subject to FTA's random alcohol testing requirements at 49 CFR 655.45.

FTA remains responsible for ensuring compliance for recipients of public (mass) transportation. Therefore, to facilitate oversight, the administrative requirements of subpart G, H, and I of 49 CFR part 655 would continue to apply to ferry operators and motor carrier operators receiving Federal public (mass) transportation funds.

E.O. 12866, Regulatory Planning and Review

Under Executive Order 12866, 58 FR 51735, October 4, 1993, the Department of Transportation (DOT) must examine whether this proposed rule is a "significant regulatory action." A significant regulatory action is subject to

Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines "significant regulatory action" as one that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$120 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) creates a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This proposed rule provides administrative relief from current regulatory alcohol misuse and controlled substance testing requirements for public transportation providers; therefore, FTA believes this proposed rule is a nonsignificant regulatory action under section 3(f) of Executive Order 12866. Accordingly, it has not been reviewed by the Office of Management and Budget.

This proposed rule is not expected to impose any new compliance costs. The only entities affected by this proposed rule are those public transportation providers that are currently subject to the alcohol misuse and controlled substance testing regimen. These requirements, if adopted will relieve these entities of duplicative Federal testing requirements. There would be no significant changes to the existing program with the publication of this rulemaking. Further, this discretionary rulemaking is provided for under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59, August 10, 2005).

Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act requires a Federal agency to conduct an initial regulatory flexibility analysis describing impacts to small entities when developing a Notice of Proposed Rulemaking in accordance with 5 U.S.C. 553. Currently, approximately 3000 employers are subject to FTA D&A testing requirements. Of this number, a small percentage is also subject to the D&A testing requirements of FMSCA or the USCG. This proposed rule would have the effect of eliminating the

administrative burden on those few employers who are subject to multiple testing requirements by permitting them to comply with the testing requirements of only one Federal agency. The lessening of this administrative burden on these affected entities will result in no significant economic impact to these employers.

This proposed rule will not impose any additional costs on small entities that are subject to alcohol misuse and controlled substance testing requirements. As noted above, certain public transportation providers who may be subject to the testing requirements of more than one DOT agency or the USCG will be provided statutory relief by complying with the testing requirements of only one Federal agency. FTA certifies that no further analysis is necessary because the proposed rule will not have a significant economic impact on a substantial number of small entities. FTA invites public comment on this analysis.

Paperwork Reduction Act

This proposed 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 proposed 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 provides for relief from duplicative Federal alcohol misuse and controlled substance testing requirements for certain public transportation providers. The rule would not significantly affect the rights,

roles, and responsibilities of States, and would involve no preemption of State law, nor would it limit State policymaking discretion.

Unfunded Mandates Reform Act

The proposed rule would not be an unfunded Federal mandate within the meaning of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 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.

List of Subjects in 49 CFR Part 655

Alcohol testing, Drug testing, Grant programs—Transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, transit, and transportation.

For the reasons set forth in the preamble, the Federal Transit Administration proposes to amend part 655 of title 49 of the Code of Federal Regulations as follows:

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

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

Authority: 49 U.S.C. 5331 (as amended); 49 CFR 1.51.

2. Amend § 655.3 to revise the introductory text of paragraph (a) and to add paragraphs (c), (d) and (e) to read as follows:

§ 655.3 Applicability.

(a) Except as specifically excluded in paragraphs (b), (c), and (d) of this section, this part applies to:

* * * * *

(b) * * *

(c) A recipient operating a ferry regulated by the United States Coast Guard (USCG) and receiving Federal funding for public (mass) transportation activities shall follow 46 CFR parts 4 and 16, 33 CFR part 95. However, section 655.45 of this part is applicable for random alcohol testing.

(d) A private or nonprofit employer with safety-sensitive employees, per both this part and 49 CFR part 382, may annually determine whether or not a majority (more than 50 percent) of these employees are regulated by part 382. If so, the employer may comply with the drug and alcohol testing requirements of part 382 for that calendar year. However, reasonable suspicion and post-accident testing per this part (§§ 655.43 and 655.44) remain

applicable for operators when performing public (mass) transportation activities. In addition, the provisions of this part remain applicable for those safety-sensitive employees who perform maintenance on vehicles or equipment used for public (mass) transportation service.

(e) A recipient's failure to comply with the alcohol misuse and controlled substances testing requirements of the USCG or the Federal Motor Carrier Safety Administration, as described in paragraphs (c) and (d) above, may result in a finding of noncompliance by FTA.

(1) A finding of noncompliance may cause a recipient to become ineligible for Federal public transportation funding.

(2) Subpart G of this part is applicable to a covered employee: (i) With a verified positive drug test result, (ii) who has a confirmed alcohol test result of 0.04 or greater, or (iii) who refuses to submit to a test.

(3) Recipients remain subject to subparts H and I of this part.

Issued on: May 30, 2006.

Sandra K. Bushue,

Deputy Administrator.

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