other covered employees, the employer must determine whether that employee contributed to the accident, using the best information available at the time of the decision.

#### **Random Testing Rate**

On December 2, 1994, FTA changed section 653.47 by, among other things, adopting a performance-based random drug testing rate. For more information on these changes, see 59 FR 62217–62231.

### **Certification of Compliance**

On October 12, 1994, the FTA published a Federal Register Notice, at 59 FR 51793, entitled "Annual List of Certifications and Assurances for Federal Transit Administration Grants and Cooperative Agreements." In the Notice, FTA compiled a complete listing and the full text of the certifications and assurances necessary to receive financial assistance from the Federal Transit Administration. Instead of submitting a variety of certifications and assurances with each grant application, the grant applicant and its attorney certify compliance with all of the certifications and assurances relevant to any and all grants for which the grant applicant wishes to apply in fiscal year 1995 by signing the single Signature Page, attached to the Notice at 59 FR 51813. The Notice, which will be updated and republished annually for use in future fiscal years, includes a certification of compliance with the FTA drug and alcohol testing program. Accordingly, we are deleting as unnecessary the sample certification in the rule.

# **Retention of Records**

The preamble discussion of this topic contained an error; specifically, it stated in Subpart E, paragraph A, at 59 FR 7587, that "[t]he rule provides three separate record retention periods for different types of records—five years, three years, and one year." Actually, records must be retained for either five years, *two* years, or one year. The regulatory text, however, is accurate, and remains unchanged.

# **Executive Order 12612**

We inadvertently stated in this paragraph, at 59 FR 7589, that FTA was not preempting Indian tribal law. Elsewhere in the preamble, however, we discussed this issue at length and concluded that FTA is preempting Indian tribal law under the standard developed by the Ninth Circuit in *Donovan* v. *Coeur d'Alene Tribal Farm*, 751 F. 2d 1113, 1116 (9th Cir. 1985). There is a comprehensive discussion of

this issue in the **Federal Register**, published on February 15, 1994, at 59 FR 7541, 7549, and 7581.

# **List of Subjects in Part 653**

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

For the reasons set forth in the preamble, the FTA amends Title 49, Code of Federal Regulations, part 653 as follows:

1. The authority for part 653 continues to read as follows:

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

# PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

# § 653.5 [Amended]

a. Paragraph (b) of § 653.5 is amended by removing "part 219" and adding "parts 219 and 382, as appropriate".

2. The note to § 653.5 is amended by changing the phrase "and 6" to the phrase "and 16".

# § 653.7 [Amended]

- 3. In § 653.7, the definition of *accident* is amended in paragraph (3) by removing the period at the end of the first sentence and adding a semicolon; and by removing the second and third sentences.
- 4. The definition of *large operator* is amended by adding the word "urbanized" after the word "an" and before the word "area".
- 5. The definition of *safety-sensitive function* is amended in paragraph (4) by adding the words "section 3 funding and is in an area of less than 50,000 in population or" after the word "receives" and before the word "section".
- 6. The definition of *small operator* is amended by removing the words "in an area" and adding in their place the words "in a nonurbanized area or in an urbanized area."
- 7. The definition of *vehicle* is amended by adding the words "or for ancillary services" after the word "transportation" and before the period.
- 8. In § 653.7 a new definition following the definition of "covered employee" is added as follows:

# § 653.7 [Definitions]

\* \* \* \* \*

Disabling damage means damage which 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 motor vehicles that could have been driven,

but would have been further damaged if so driven.

- (2) Exclusions.
- (i) Damage which 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 taillight damage.
- (iv) Damage to turn signals, horn, or windshield wipers which makes them inoperative.

§ 653.13 [Amended]

- 9. Section 653.13(a) is amended by adding the word "primarily" after the word "operating" and before the word "in" and by adding the word "urbanized" after the word "an" and before the word "area".
- 10. Section 653.13(b) is amended by removing the words "operating in an area" and adding in their place the words "operating primarily in a nonurbanized area or in an urbanized area".

#### § 653.37 [Amended]

11. Section 653.37(a) is amended by adding the word "or" after the word "result" and before the word "refuses".

#### § 653.43 [Amended]

12. Section 653.43(c) is redesignated as § 653.65, Supervisor acting as collection site person, in subpart D.

### §653.45 [Amended]

- 13. Section 653.45(a)(1) is amended by removing the phrase "on duty in" and adding in its place the word "operating".
- 14. Section 653.45(a)(2)(i) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.
- 15. Section 653.45(a)(2)(ii) is amended by removing the phrase "on duty in" and adding the word "operating" in its place.

Appendix A to Part 653 [Removed and Reserved]

16. Appendix A to Part 653, Sample Certification of Compliance, is removed and reserved.

Date Issued: February 27, 1995.

# Gordon J. Linton,

Administrator.

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