

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 61, 63, 65, 121 and 135

[Docket No. 27065; Notice No. 92-17]

RIN: 2120-AE43

Alcohol Misuse Prevention Program
for Personnel Engaged in Specified
Aviation ActivitiesAGENCY: Federal Aviation
Administration (FAA), DOT.ACTION: Notice of proposed rulemaking
(NPRM).

SUMMARY: This notice proposes regulations to establish an alcohol testing program for air carrier employees who perform safety-sensitive duties, which would implement the FAA-related provisions of the Omnibus Transportation Employee Testing Act of 1991, which was enacted on October 28, 1991. As proposed in this NPRM, employees who perform safety-sensitive duties directly or by contract for aviation employers that hold a certificate issued under certain regulatory provisions, operators as defined in the regulations, or air traffic control facilities not operated by the FAA or the U.S. military would have to be subject to an FAA-approved alcohol misuse prevention program (AMPP). The proposed rule would require alcohol testing of these employees, proscribe certain alcohol-related conduct, and establish specified consequences for engaging in alcohol misuse. Employers would also be required to provide written materials to covered employees explaining the program and to submit reports to the FAA on the results of the program. This proposed rule is intended to ensure that public safety is maintained by preventing alcohol misuse by safety-sensitive aviation employees.

DATES: Comments must be received on or before April 14, 1993. There will be public hearings on this proposal, details about which will be published in the *Federal Register*.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 27065, 800 Independence Avenue SW., Washington, DC 20591. Comments that are delivered to this address must be marked "Docket No. 27065." Comments may be examined in room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Julie B. Murdoch, Office of Aviation Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 7th Street SW., Washington, DC 20590; telephone (202) 366-6710.

SUPPLEMENTARY INFORMATION:

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number of this NPRM.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Current Laws and Regulations

A variety of laws and regulations currently restrict the consumption of alcohol by some aviation employees. Federal criminal law prohibits any person from operating or directing the operation of a common carrier while under the influence of alcohol. 18 U.S.C. 342. A blood alcohol level of .10 percent is considered presumptive evidence that the person is under the influence. 18 U.S.C. 343(1).

The FAA's regulations concerning alcohol misuse would be supplemented but not changed by the rule proposed here. Currently, under the FAA's rules, no person may act or attempt to act as a crewmember of a civil aircraft within 8 hours after consuming any alcoholic beverage, while under the influence of alcohol, or while having .04 percent by weight or more of alcohol in the blood. (14 CFR 91.17(a).) In limited circumstances, the FAA's regulations require crewmembers to submit to alcohol tests requested by State or local law enforcement officers and, upon request, to furnish the results of such tests to the Administrator. (14 CFR 91.17(c).) Refusal to take a properly authorized law enforcement alcohol test or to furnish the results can result in the denial, revocation, or suspension of an airman certificate issued under part 61 or 63. (14 CFR 61.16 and 63.12a.)

Holders of or applicants for medical certificates issued under 14 CFR part 67 are subject to additional regulations regarding alcohol use. First, a diagnosis of alcoholism is a disqualifying factor for a medical certificate. A diagnosed

alcoholic must be evaluated by the Federal Air Surgeon and meet certain recovery criteria prior to receiving a medical certificate. However, to facilitate recovery and to prevent the unnecessary loss of skilled employees, a program established by the FAA, the airline industry, and the pilots' unions has enabled hundreds of alcoholic pilots to safely return to duty. The program combines confrontation, therapy, and stringently monitored aftercare.

Part 67 also provides that any individual who applies for a medical certificate must permit access by the Administrator to information in the National Driver Register concerning drug- and alcohol-related driving offenses. (14 CFR 67.3.) If an individual has had two or more such offenses within 3 years after the effective date of the rule, the FAA may suspend or revoke a part 61 airman certificate held by the individual or deny the individual's application for such certificate. (14 CFR 61.15.)

Discussion of Amendments

OST Common Preamble

OST, seeking to determine the extent of any alcohol problem in the transportation industries, issued an advance notice of proposed rulemaking (ANPRM) on November 2, 1989. The ANPRM asked for comment on a variety of issues related to preventing alcohol misuse by transportation workers, and several hundred comments were received. A thorough discussion of these comments and of the general issues related to alcohol use in the transportation industries is found in the common preamble published elsewhere in today's *Federal Register*. The OST preamble also addresses the multi-modal aspects of the Omnibus Transportation Employee Testing Act of 1991 (the Act) (Pub. L. 102-143, title V), which provides the statutory mandate for the rule proposed in this notice and for the related notices of other operating administrations. This common preamble is incorporated into this notice by reference. Any aspects of the proposed rule that are not discussed below are addressed in the common preamble.

Proposed Alcohol Misuse Prevention Program (AMPP)

The rule proposed in this NPRM would use three primary tools for reducing the threat of alcohol misuse in aviation. First, by amending parts 65, 121, and 135, the rule would prohibit certain alcohol-related conduct by employees performing safety-sensitive duties. Second, under the provisions of new appendix J to part 121, such

employees would be subject to pre-employment/pre-duty, random, post-accident, reasonable suspicion, return to duty, and follow-up alcohol testing. This testing would be federally-mandated but would be administered by the affected employers. Third, in accordance with requirements in appendix J, employees subject to the rule would be provided with materials designed to educate them about the provisions of the rule and the consequences of engaging in alcohol misuse.

Other Requirements Imposed by Employers; Requirement for Notice

The scope of the FAA's proposed rule is limited to prohibiting alcohol misuse and to providing for testing when there is a direct implication for aviation safety. Should an aviation employer determine that, as a matter of company policy, a different program should be implemented, the employer would be able to establish such a program. Any such program, however, would have to be clearly separate from the program that would be required under this rule, with appropriate notice given prior to tests under this rule. These provisions should preclude the commingling of employer-directed and FAA-mandated programs—a problem that has been of significant concern to the FAA in the context of anti-drug programs.

Employers Who Would Be Required To Establish Programs

During the development and implementation of the FAA's industry anti-drug program, the FAA carefully considered the appropriate scope of the rule. After the implementation of the rule, the FAA amended the scope to eliminate most of the operations that do not require a part 121 or part 135 certificate. The amendment was based on the FAA's determination that the minimal benefit to public safety that might accrue from inclusion of these operators did not warrant the cost and intrusiveness of drug testing (56 FR 43974; September 5, 1991).

This NPRM proposes to include essentially the same classes of employers as are covered by the anti-drug rule: 14 CFR part 121 certificate holders, 14 CFR part 135 certificate holders, sightseeing operators who meet the criteria of 14 CFR 135.1(c), and air traffic control (ATC) facilities not operated by the FAA or the U.S. military would have to establish alcohol misuse prevention programs. Companies with employees who perform safety-sensitive functions by contract for these employers would be permitted to establish and manage programs under

this appendix. However, while a contractor company that manages its own program would perform all of the functions required of an "employer" in proposed appendix J, the certificate holders, operators, and ATC facilities would remain responsible for ensuring that all covered employees who perform services for them are subject to an approved program.

One change from the coverage in the anti-drug rule should be noted: ATC facilities operated under contract with the FAA were not included in the FAA's anti-drug rule. It was originally presumed that employees of such facilities were sufficiently subject to the supervision and control of the FAA that inclusion in the FAA's program (for its own employees) would be feasible. Subsequently, however, it was determined that the scope of the FAA's authority did not extend to such inclusion. Therefore, employees of contract ATC facilities should be subject to the FAA's rules for the aviation industry, and would be included under the scope of the proposed alcohol misuse rule.

Employees Who Would Be Subject to the Rule

This proposed rule would cover employees performing certain specified safety-sensitive functions. The FAA proposes to retain essentially the same coverage as the anti-drug rule, that is persons performing any of the following duties: Flight crewmember, flight attendant, flight instruction, aircraft dispatch, aircraft maintenance, ground security coordinator, aviation screening, and air traffic control. The anti-drug rule included flight test duties in its list of covered functions. As a practical matter, these duties are subsumed in the category of flight crewmember duties; therefore, the flight test category would not be included in this rule. Additionally, the category of ground security coordinator duties has been specified separately to reflect the coverage intended by the term "aviation security" in the anti-drug rule.

The FAA has been carefully evaluating the scope of covered functions since implementation of the anti-drug rule in 1989 and finds that the scope remains appropriate and should be adopted for this rule. At this point the FAA is uncertain whether the increased benefit to safety that could accrue by including other functions warrants the imposition of an alcohol testing requirement on individuals performing those functions. However, the FAA is soliciting comment on this issue, with specific focus on the following questions:

1. Are there additional functions with sufficient safety implications to warrant regulating alcohol-related conduct and imposition of a testing requirement?

2. Do air carriers have any data on the size of the additional population that would be affected and the incidence of alcohol misuse by this population?

3. What additional costs would be incurred by inclusion of other functions and what would be the offsetting benefits (*i.e.*, in terms of accident prevention, productivity, etc.)?

The FAA is also considering whether the class of maintenance personnel covered by this rule should be limited to those persons who are in charge of maintenance operations, who perform required inspections, and who have the authority to return an aircraft to service after maintenance has been performed. The FAA seeks comment on the following questions:

1. Should the maintenance population covered by the alcohol misuse rule be limited to supervisors, inspectors, and persons authorized to return aircraft to service?

2. Is the inspection and supervisory system for maintenance sufficiently comprehensive to remove or reduce the safety impact of the actual maintenance work?

3. Would restriction of the covered population have an adverse effect on safety?

4. What cost savings would accrue from limiting the population?

Prohibited Alcohol-Related Conduct

The NPRM would prohibit specific alcohol-related conduct by covered employees. Further, an employer would be prohibited from using a covered employee if the employer had actual knowledge that the employee had engaged in such conduct. Each of the prohibitions has been carefully tailored to minimize the restriction on the otherwise lawful use of alcohol by covered employees by limiting the time of the prohibition to at or near the time of the performance of covered functions. The FAA does not, however, propose to list the specific actions within a safety-sensitive function that would trigger coverage under this rule. This would be determined by the employer based on the requirements of the FAA's regulations and the employer's experience and knowledge of the employees' duties. These determinations would have to be included in the company policy required under the new appendix J and would be subject to FAA review.

The specific prohibitions are:
Alcohol Concentration: The NPRM proposes to establish that a covered

employee would be in violation of the rule with an alcohol concentration of .04 or greater. A concentration of .04 is consistent with the FAA's current regulations regarding alcohol use by crewmembers, and is based on research conducted by the FAA and other DOT agencies into the impairing effects of different amounts of alcohol. Unlike the FAA's present regulatory provisions, however, the proposed rule would also prohibit employers from using an employee to perform a safety-sensitive function if the employee's test result was .02 or greater, but less than .04, until either the employee's next duty period if at least 8 hours has elapsed or the employee is tested again within the 8 hours and has a test result below .02.

Performance of covered functions while under the influence of alcohol: As noted above, the FAA's current regulations prohibit any person from acting or attempting to act as a crewmember while under the influence of alcohol. The FAA's experience in enforcing this provision indicates that it is a useful tool in preventing alcohol misuse. Therefore, the FAA proposes to adopt a similar prohibition in this rule. While the FAA does not propose to specifically define "under the influence," preferring rather to leave open case-by-case analysis, the FAA notes that the proposed rule does provide that "under the influence" would have to be shown by behavior or appearance characteristic of alcohol misuse, or by an adverse effect on the employee's ability to perform his or her assigned functions. Further, if an employer determined that sufficient evidence existed to believe the employee to be under the influence of alcohol, the employer would be required to administer a reasonable suspicion test.

The FAA recognizes that an "under the influence" provision would impose a subjective standard on covered employees and that that standard may in the rare case provide supervisors or employers with a means to harass or unfairly stigmatize employees. It is the intent of the FAA, therefore, that use of this provision to impose sanctions under this rule would be limited to the unusual situation in which an employer could not administer a reasonable suspicion test. The indicators of alcohol misuse are commonly recognized and a reasonable suspicion test supported by such indicators, with a result indicating an alcohol concentration of .04 or greater, would provide the employer with objective, rather than subjective, evidence of alcohol misuse on which to take action.

The FAA has considered whether to permit an employer to take action under this rule against a covered employee for violating the under the influence provision even if an alcohol test result indicated an alcohol concentration below .04. The FAA in no way proposes to limit the employer's authority to remove the employee from the performance of safety-sensitive duties if the employer believed, notwithstanding an alcohol test result, that the employee was impaired (and, in fact, the employer would be required to remove the employee, at least temporarily, if the employee's alcohol concentration was .02 or greater but less than .04). However, to prevent any possibility of harassment and in light of the fact that the FAA has proposed a comprehensive alcohol testing program, the FAA has determined that employers should not be permitted to take other action under this rule for alleged impairment that is not supported by the test result when a test is administered. Any such action would have to be under the employer's independent authority.

On-Duty Use

It is the FAA's intent that this provision would apply to any covered employee who, while not actually performing a safety-sensitive function, could be called at any time to perform. Such an employee (for example, a supervisor) would have to refrain from using alcohol or would be in violation of this provision.

Pre-Duty Use

This notice proposes a two-tiered prohibition with respect to pre-duty use of alcohol. As noted above, the FAA already prohibits any person from acting or attempting to act as a crewmember within 8 hours after the consumption of any alcoholic beverage. This prohibition applies to all persons, including those in general aviation. It was based on a determination by the FAA that a specified period of abstinence would decrease the likelihood that an individual would be impaired by alcohol while acting as a crewmember. (Many air carriers voluntarily impose a longer abstinence period for their crewmembers.) The FAA is aware that individuals who drink to excess may still be impaired even after abstaining for 8 hours; however, the 8-hour rule establishes an adequate behavioral limitation for the majority of persons who are not heavy drinkers. The FAA has determined that the 8-hour limit remains appropriate for crewmembers, and proposes to include a similar prohibition under this rule. This provision would, to some extent,

duplicate the restrictions in 14 CFR 91.17(a), but would be limited in application to the covered employees of the specified employers under the rule. Additionally, the rule would prohibit the employers from using covered employees who have impermissibly used alcohol—a restriction that does not currently exist in the FAA's regulations.

The FAA proposes a 4-hour pre-duty use limitation on the remaining classes of covered employees. Imposition of an 8-hour rule on all covered employees could have a safety benefit; however, the FAA is concerned that the nature of the safety-sensitive functions other than crewmember duties are sufficiently different that an 8-hour limitation on pre-duty use of alcohol for those classes could constitute an unwarranted intrusion by the Federal government into the off-duty life of aviation industry employees.

The FAA is asking for comment on whether covered employees performing safety-sensitive functions other than crewmember duties should be subject to a pre-duty alcohol use limitation. If so, how long should the period be; if not, why not?

Use Following An Accident

Under the proposed rule, a covered employee with actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident would be required to refrain from using alcohol for 8 hours unless the employee had been given a post-accident test or the employer had determined that the employee's performance could not have contributed to the accident. The restriction on use, as proposed, would primarily affect those employees whose performance of duties may have contributed to the accident and whose consumption of alcohol prior to the time of the accident would be relevant information that should not be masked by post-accident consumption. While the prohibition would be imposed on covered employees, employers would be encouraged to attempt to control the actions of the affected employees as circumstances permit.

Refusal to Submit to a Required Alcohol Test

A refusal to submit to random, post-accident, reasonable suspicion, or follow-up testing would be, in addition to a rule violation (as discussed in the common preamble), a potential basis for the denial, suspension, or revocation of a certificate issued under 14 CFR part 61, 63, or 65. The inclusion of such provisions is necessary both to deter

noncompliance with the rule and to emphasize the important role that testing plays in increasing aviation safety. The FAA does not propose to attach any consequences other than preclusion from performing a safety-sensitive function to an individual's choice not to submit to pre-employment/pre-duty or return to duty testing.

Required Alcohol Testing

As previously mentioned, under the proposed rule aviation employees who perform safety-sensitive functions for certain employers would be subject to several types of alcohol testing: pre-employment/pre-duty, post-accident, random, reasonable suspicion, and return to duty and follow-up (after engaging in prohibited conduct or refusing to submit to required testing). Additionally, a covered employee who had an alcohol concentration of .02 or greater but less than .04 on any test would have to undergo another test if the employer wanted to permit the employee to perform a safety-sensitive function within 8 hours of the first test. All testing would have to be conducted using the DOT-wide procedures for alcohol testing contained in proposed amendments to 49 CFR part 40 issued by OST this day. The procedures would be incorporated by reference into the FAA's rule.

Pre-Employment/Pre-Duty Testing

The procedures and rationale for pre-employment/pre-duty alcohol testing are addressed in the OST common preamble.

The FAA is requesting specific comment on whether the proposed procedure for using the results of prior pre-employment/pre-duty alcohol tests is useful. It is particularly interested in knowing whether employers would be likely to use this option, whether they would hesitate to use another employer's result, and whether the need to obtain prior test results and the other required evidence would make the option too burdensome to provide a real benefit to employers.

Post-Accident Testing

The FAA's current anti-drug rule requires post-accident testing for drug use, and the proposed alcohol misuse rule includes an analogous provision for alcohol testing. The triggering event for such testing would be the same as in the anti-drug rule. Similarly, the employees subject to testing would be the same—covered employees whose performance of safety-sensitive functions either contributed to an accident or cannot be completely discounted as a contributing

factor. Additionally, the purpose of this testing would be the same as under the anti-drug rule: to determine if an employee should be removed from the performance of safety-sensitive functions.

Since alcohol passes through the human system quickly, testing would have to occur within a short time following the accident. An employer who was unable to conduct a timely post-accident test would have to submit an explanatory report to the FAA.

Random Testing

As required by the Act, the proposed rule includes random alcohol testing for covered employees. The FAA has tailored the testing to ensure that testing reasonably serves the FAA's interest in aviation safety. Selection procedures like those in current FAA-approved anti-drug plans would have to be used to ensure randomness of testing.

The anti-drug rule included a "moonlighting" provision for employees working for multiple employers because random drug testing can take place at any time the employee is at work, is intended to detect any drug use, and can detect drug use that may have occurred substantially prior to the test. Because random alcohol testing would be tied to the performance of safety-sensitive functions (and the misuse of alcohol at or near the time of performance), employees who work for more than one employer would have to be in the random testing pool of each employer.

Reasonable Suspicion Testing

The anti-drug rule contains a provision for "reasonable cause" testing of employees who may have used illegal drugs. This proposed rule, like the Act, refers to reasonable suspicion testing; however, the same type of testing is meant by both terms. The FAA recognizes that logistical requirements associated with obtaining an alcohol test may cause some delay in administration of the test and that employers will not maintain or have immediate access to testing equipment at every location where reasonable suspicion testing may have to be conducted. While reasonable suspicion testing should be conducted as close in time as possible to the time of the observations, factors such as being at a remote location or air carrier outstation or having to delay testing while waiting to use equipment shared with another employer would be considered in determining if the timing of a test comported with requirements of the rule. Further, the FAA realizes that a delay in excess of 2 hours from the time of the observations on which the decision to test was made would cause

the alcohol concentration determined by the test to decline and possibly drop below .04 or .02.

In some situations, where an unavoidable delay would vitiate the usefulness of a test, it could be appropriate for the employer to take action based on the employee being under the influence of alcohol rather than attempt to obtain an essentially irrelevant test result. The FAA would review each such situation to determine whether the facts supported the employer's determination that it was unable, without substantial difficulty or cost, to conduct a timely reasonable suspicion test.

In the anti-drug rule, the FAA required part 121 and large part 135 certificate holders to have two supervisors, at least one of whom was trained in the detection of drug use, substantiate and concur in the decision to conduct a reasonable cause drug test. All other covered employers could conduct a test if one trained supervisor substantiated the decision to test. Under this proposed rule, a reasonable suspicion alcohol test could be conducted by any employer based on the observations of one supervisor who has been trained in the detection of the symptoms of alcohol misuse.

Return to Duty and Follow-Up Testing

The specific requirements for these types of tests are discussed in the OST common preamble.

Retesting After Result of .02 or Greater But Less Than .04

Retesting under this provision was previously discussed in the context of the proposed alcohol concentration prohibitions. The FAA is seeking comment on whether the proposed "retest or return" procedure gives employers enough flexibility (or too much) in handling covered employees with low-level alcohol concentrations.

Recordkeeping and Reporting: Confidentiality

This rule would require employers to maintain detailed records related to their alcohol misuse prevention programs, including records of alcohol tests performed under this rule. The records would have to be maintained in a secure location and could be released only as required under the rule or with the express written consent of the employee.

The FAA is aware that some employers have hesitated to release information related to drug test results to subsequent employers. Under the anti-drug rule, such releases are based on the general permissive authority

given to employers to release information upon the written consent of the employee. This rule would require the release of employee-specific information to a subsequent employer if the original employer receives a written request from the employee. Providing a regulatory mandate for such release and removal of employer discretion should relieve employers' concerns about possible litigation.

The rule would also provide express authority to the FAA to conduct on-site inspections of employer's alcohol programs, including the alcohol testing process. The FAA's experience with compliance monitoring under the anti-drug rule has indicated that the individuals managing employers' programs are frequently persons with human resources or administration backgrounds. These people often have had no experience with other FAA inspections (e.g., flight standards) and are often unaware of the FAA's authority to conduct such inspections. While the Administrator or his designee has such authority even absent a regulatory provision, the FAA determined that inclusion of such a provision in this rule would be appropriate to ensure industry awareness of the FAA's authority to monitor compliance.

Finally, the reporting of statistical information by employers (and other planholders) is an essential tool for monitoring compliance with the rule. Although the anti-drug rule requires both semi-annual and annual reporting, the FAA's experience with these reports indicates that annual reporting is sufficient to ensure that the FAA can adequately monitor the rule. This NPRM therefore proposes only annual reporting.

Consequences of Engaging in Misuse of Alcohol or Refusing To Submit to Testing

The Omnibus Transportation Employee Testing Act of 1991 (the Act) amended the Federal Aviation Act of 1958 (the FAA Act) and the statutes that apply to the Federal Railroad Administration, the Federal Highway Administration, and the Federal Transit Administration. While these amendments have much common language, especially in the area of testing, they are not identical. Of greatest significance, the amendments to the FAA Act contain a section entitled "Prohibition on Service," which does not appear in the amendments to the other modes' statutes.

The "Prohibition on Service" section is found at new FAA Act section 614(b). Under subsection 614(b)(1), an

individual may not remain on duty in a safety-sensitive function if he or she has violated the prohibitions on the use of alcohol. This legislative provision on continued duty is reflected in each of the subsections of the FAA's proposed rule addressing prohibited conduct (see, e.g., proposed 14 CFR 65.46a). Each proposed section states either directly or by implication that the employee may not report for duty or remain on duty requiring the performance of safety-sensitive functions while engaging in conduct prohibited by the rule. These sections further provide that no employer who has actual knowledge that an employee is in violation of the rule may permit the employee to perform or continue to perform safety-sensitive functions. Additionally, proposed appendix J, section V, paragraph A would expressly prohibit an employee who has engaged in conduct prohibited by the rule from performing safety-sensitive functions. This section, consistent with the proposed rules of the other DOT OAs, would also require removal from duty for refusal to submit to a required alcohol test.

Section 614(b)(2) of the FAA Act, "Effect of Rehabilitation," states that no covered employee may perform a safety-sensitive function after engaging in prohibited conduct unless he or she has completed a rehabilitation program under the provisions of section 614(c) of the FAA Act. Section 614(c)(1) requires the Administrator to prescribe regulations that provide, at a minimum, for the identification of employees in need of assistance in resolving problems with misuse of alcohol. Further, the section gives the Administrator the authority to determine the circumstances under which such employees would be required to participate in any required rehabilitation. The provisions recognize that rehabilitation may not be appropriate or warranted in all cases of prohibited conduct.

The legislative requirement of section 614(b)(2) is implemented in proposed appendix J, section V, paragraph E, "Required evaluation." This proposed section would require that the employee be evaluated in accordance with proposed section VI of the appendix prior to performing covered functions. The evaluation process is discussed further below.

The proposed rule contains a provision, analogous to the one in the anti-drug rule, under which employers would be required to notify the Federal Air Surgeon of any instance in which a holder of a part 67 medical certificate violated the provisions of the rule or

refused to submit to a required alcohol test (with the exception of pre-employment/pre-duty tests). The employer would also have to forward to the FAA copies of the evaluations conducted by the SAP. The Federal Air Surgeon would use this information to determine whether further action should be taken with respect to the medical certificate. No such employee could return to the performance of safety-sensitive functions without the Federal Air Surgeon's recommendation.

Section 614(b)(3) of the FAA Act, "Performance of prior duties prohibited," provides sanctions for employees who engage in prohibited use of alcohol after the date of the Omnibus Transportation Employee Testing Act. This subsection is found only in the amendments to the FAA Act and has no parallel in the amendments to the other modes' statutes. It provides that, under certain circumstances discussed below, an individual shall not be permitted to perform the duties related to air transportation that he or she performed prior to the date he or she engaged in the impermissible use of alcohol. The legislation does not require that the individual's employment be terminated, nor that he or she be reassigned to perform non-safety-sensitive functions. However, it is an absolute bar to the performance of the same duties the employee performed before the violation.

This bar applies under four circumstances. The first occurs if the individual misuses alcohol "while on duty." The remaining prohibitions all relate to rehabilitation: the absolute bar to returning to duty applies if an employee misuses alcohol after the date of enactment, and

1. Had previously misused alcohol and undergone a program of rehabilitation under the regulations promulgated pursuant to the Act;
2. Refused to undertake any required rehabilitation; or
3. Failed to complete any required rehabilitation.

The proposed rule would implement the prohibitions in two ways. First, proposed appendix J, section V, paragraph B, "Permanent disqualification for service" would prohibit an employee who has engaged in prohibited conduct from performing safety sensitive functions if the employee violated the on-duty use prohibition or if the employee twice violated the provisions of the rule after its effective date. As drafted, this bar would apply to the performance of any safety-sensitive function. Although this bar would be more extensive than that required by the Act, the FAA believes

that the alternative of a narrow bar would lead to anomalous results; for example, a person might be barred from performing screening duties but could serve as a pilot. Additionally, the bar on two-time violators would apply both to persons who had gone through rehabilitation and to those who, after evaluation by a SAP, were determined not to need treatment. Otherwise, an employee who was found to need treatment and had an instance of recidivism would be sanctioned, but an employee who did not need assistance but simply chose to engage in misuse of alcohol would not be sanctioned.

Second, the bar following a refusal or failure of rehabilitation would be implicitly implemented by the requirement that prior to returning to duty performing safety-sensitive functions each employee must be evaluated by an SAP to determine whether the employee properly met the requirements for rehabilitation established during the initial evaluation. An employee who did not meet the requirements, whether by failure or refusal, would be precluded from returning to the performance of safety-sensitive functions. The FAA has chosen, however, not to propose a definite time period during which the employee must comply. The rule would thus allow for the denial phase that most people go through when first confronted with evidence of an alcohol problem.

Alcohol Misuse Information and Training

Unlike the FAA's current anti-drug program, this NPRM does not propose to require training for covered employees, other than for supervisors who would make reasonable suspicion testing determinations. Whereas the dangers posed by various drugs and the indicators of use of the different drugs are not widely recognized, the hazards and indicators of alcohol misuse are a matter of common knowledge. Therefore, basic alcohol awareness training appears to be unnecessary. With respect to supervisors who would direct reasonable suspicion tests, however, the FAA believes that the rule should include a training requirement. This training would be sufficiently detailed to ensure that reasonable suspicion testing is directed only on specific bases meeting the requirements of this rule.

The FAA is specifically seeking comment on whether the rule should include alcohol awareness training for all employees.

Employee Referral, Evaluation, and Treatment

In drafting the proposed rule, representatives from other OAs and the FAA gave considerable thought to the issue of rehabilitation of employees who engage in alcohol misuse. During the rulemaking on the anti-drug rule, the FAA received comments from industry, labor organizations, and others stressing the sometimes conflicting needs of employer flexibility and employee health. In the end, the FAA was largely silent on the issue of rehabilitation. Although, as discussed above, the Act does address the need for rehabilitation, it has left to the discretion of the Administrator the method for approaching that need.

The FAA has chosen not to prescribe regulations with respect to specific types of rehabilitation. Rather, it is proposing a process under which each covered employee who engages in alcohol misuse or who refuses to submit to testing would be advised of all resources available to the employee. Further, each such employee would be evaluated by a SAP who would determine whether and what assistance the employee needed in resolving problems associated with alcohol misuse. Whether the employer would provide any required treatment or would hold a position open for the employee upon completion of the treatment would be a matter for employer/employee negotiation.

Employer Alcohol Misuse Prevention Program Plans

The FAA proposes to include a requirement that employers submit alcohol misuse prevention program (AMPP) plans to the FAA for approval prior to implementation of a program under the rule. The plan approval process was used during the implementation of the anti-drug rule and proved invaluable in assisting the industry in establishing programs and educating the industry about the requirements of the rule. Additionally, the plan submission requirement provided the FAA with the ability to readily determine which companies were failing or refusing to comply with the rule. The FAA also uses the plans in its ongoing compliance and enforcement efforts.

Under the proposed alcohol misuse rule, the FAA would require that the plans be submitted by certified mail, return receipt requested. With the exception of consortia core plans, the plans would be deemed approved by the FAA 60 days after the date on the

receipt unless the FAA notified the plan submitter otherwise.

The elements that would be required in the plans include the AMPP manager; the type of evidential breath testing (EBT) device to be used for testing; the person or company that will be collecting breath specimens; and the person or company that will be providing EBT maintenance and breath alcohol technician training. The plan would also identify the SAP and include certification that the plan submitter agreed to comply with the provisions of the alcohol misuse prevention regulations.

As mentioned above, the FAA proposes to permit companies whose employees perform covered services by contract to an employer to establish independent alcohol misuse prevention programs. Contractor companies would be able to submit plans directly to the FAA for approval and to implement approved plans for their own employees. Each plan submitter, whether a contractor company or an employer, would be responsible for maintaining a program in accordance with the approved plan and the final rule. A contractor company, for example, would be required to maintain the confidentiality of records pertaining to its employees and could disclose such records only in accordance with the rule. The FAA's experience with the anti-drug program indicates that permitting contractor companies to manage their own programs is generally the most efficient method through which to ensure coverage of contractor employees. As with the anti-drug program, the FAA would exercise control over the contractor companies that establish programs by retaining the ability to revoke the plan approval of any contractor company that fails to properly implement its approved AMPP plan. Because employers would be able to use only contractor employees who were subject to an FAA-approved program, potential revocation of such approval would provide a strong incentive to contractor companies to properly implement their programs.

The FAA also proposes to permit employers and contractor companies to join consortia for purposes of complying with the rule. The proposed consortia system, which is based on the system developed under the anti-drug rule, would require an entity (or a group of employers/contractors) to develop a core program and submit a plan to the FAA for approval. The core program would have to contain all of the operational elements of the plan. Once the FAA approved the core program, the consortium would be able to seek

clients ("riders"). Both the client and the consortium would submit a rider plan to the FAA, which would essentially just identify the employer/contractor company program manager and include a certification by both the consortium and the client that each understands its responsibilities under the proposed rule.

Although the preparation of plans by the industry and review of the plans by the FAA could be somewhat burdensome, the FAA has found in its anti-drug program that the utility of these plans more than offsets any burden.

Phased Implementation

The NPRM includes a proposed schedule for phased implementation of the AMPP for the aviation industry. For each class of employers, the rule would require plan submission by a certain date and implementation of the approved plan 6 months later. Employers would have 8 months after their specified plan submission date to ensure that contractor employees are subject to an approved program. Part 121 and large part 135 certificate holders (more than 50 covered employees) and air traffic control facilities would be required to comply with the rule first, with implementation proposed to occur 12 months after the effective date of the rule. Part 135 certificate holders with 11 to 50 covered employees would be in the second phase of implementation (18 months after the effective date), with small part 135 certificate holders and § 135.1(c) operators in the last phase (24 months after the effective date of the final rule).

The FAA used phased implementation in establishing the anti-drug program, and found it to be the most efficient method through which to ensure that the industry had adequate time to comply with the rule and that the FAA had sufficient resources to review the required plans. Although implementation of this rule would be phased over two years, the actual process of implementation should be facilitated by the experience the FAA and the industry with implementation of the anti-drug rule. Virtually all of the employers who would be subject to this rule are also subject to the anti-drug rule and have experience in establishing and maintaining testing and training programs. While the operational aspects of this rule would be somewhat different from those of the anti-drug rule, the time to comply as currently contemplated in the NPRM should be more than sufficient.

The FAA invites comment on the proposed implementation schedule,

especially with respect to any specific difficulties the industry foresees could impede implementation of the rule.

Employees Located Outside the U.S.

As proposed, this rule would apply to direct employees of U.S. air carriers who perform safety-sensitive functions outside the U.S. after January 2, 1995. The rule would not permit testing of such employees, however, if the FAA receives written documentation from an employer demonstrating that such testing would be inconsistent with the laws and regulations of the country in which the testing would occur. Employers would have to submit copies, in English, of applicable laws and regulations. It is within the purview of this agency to regulate the conduct of direct employees of holders of FAA-issued operating certificates, regardless of the location of the employees. However, the FAA is mindful of the fact that employee testing is impermissible in many countries, and does not wish to pose an impossible burden on its regulated employers. The delayed effective date of the rule should permit adequate time for employers to determine whether alcohol testing comports with the laws and regulations of the countries in which its employees are located.

Paperwork Reduction Act Approval

Proposed appendix J to part 121 would require each employer to submit to the FAA: An alcohol misuse prevention program plan for approval by the FAA; notification to the FAA of alcohol misuse by holders of airman medical certificates issued under 14 CFR part 67; notification to the FAA of refusals to submit to alcohol testing by holders of airman certificates issued under 14 CFR parts 61, 63, and 65; and annual statistical reports summarizing data on the employer's alcohol misuse prevention program. To provide the notifications and reports to the FAA, employers will be required to maintain records related to each covered employee, including test results.

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96-511), the recordkeeping and reporting requirements proposed in this notice will be submitted to the Office of Management and Budget (OMB) for approval. Comments on these requirements should be submitted to the Office of Information and Regulatory Affairs (OMB), New Executive Office Building, room 3001, Washington, DC 20503; attention: FAA Desk Officer. A copy should be submitted to the FAA docket. Commenters should especially provide their views on the accuracy of

the FAA's estimate of the burdens associated with these requirements, the practical utility of the information to be obtained, and less burdensome reporting alternatives to those proposed in this notice. The following is a synopsis of the assessment of the paperwork burden associated with this notice:

Title: Alcohol Misuse Prevention Program for Personnel Engaged in Specified Aviation Activities.

Need For Information: The information is needed to respond to regulations promulgated in accordance with the Omnibus Transportation Employee Testing Act of 1991, enacted on October 28, 1991.

Proposed Use of Information: The information submitted is intended to be the basis for monitoring industry implementation of and compliance with the FAA Alcohol Misuse Prevention Program. The information will also be used to evaluate the effectiveness of the program.

Frequency:

Alcohol Misuse Prevention Program Plan: One time submission for FAA approval (followed by any necessary amendments to the approved plan if any changes or revisions occur).

Notification of Refusals/Alcohol Misuse: As required.

Statistical Report: Annual.

Burden Estimate: 23,862.

Respondents: Specified aviation employers.

Average Burden, Hours/Respondent/Year: 4.

Economic Summary

This section summarizes a full regulatory evaluation prepared by the FAA and contained in the docket that provides detailed estimates of the economic consequences of this regulatory action. In addition to a summary of the regulatory evaluation, this section also contains a regulatory flexibility determination required by the Regulatory Flexibility Act of 1980 (Pub.L. 96-354) and an international trade impact assessment.

Costs

The FAA calculated costs for three random testing scenarios: 10 percent, 25 percent, and 50 percent. The total costs of testing for all occupational categories for these scenarios have a net present value, over ten years, of \$29.9 million, \$41.6 million, and \$60.8 million, respectively. In addition to testing costs, there are also costs associated with short-notice replacement of employees

who misuse alcohol and evaluating these employees. Adding the testing and follow-up costs, the total ten year discounted costs for the 10 percent random testing scenario, the 25 percent random testing scenario, and the 50 percent random testing scenario total \$34.1 million, \$46.6 million, and \$66.6 million, respectively.

Benefits

The FAA believes that major benefits would accrue from these proposals. The first is the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to alcohol misuse. The second is the potential reduction in absenteeism, lost worker productivity, and medical costs, and improved general safety in the work place

resulting from the deterrence of alcohol misuse.

The FAA has estimated that the cost of human fatalities in the event of an accident could be as high as \$160.5 million. The estimated cost of a National Transportation Safety Board (NTSB) accident investigation is \$1.2 million. Therefore, if this proposed rule prevents one accident attributed to alcohol-impaired performance by a person who performs sensitive safety-related functions in commercial aviation during the 10-year period from 1993 to 2002, discounted benefits of \$107.4 million could be realized.

The FAA estimates that productivity gains of \$44.7 million, \$50.7 million, and \$59.6 million, discounted over ten years, would accrue to the aviation industry from the reduction of alcohol

misuse, for the 10 percent, 25 percent, and 50 percent random testing scenarios, respectively.

Consequently, the total quantifiable discounted benefits that are expected to result from promulgation of the proposed rule amount to \$152.1 million, \$158.1 million, and \$167.0 million, discounted, over ten years, for the 10 percent, 25 percent, and 50 percent random testing scenarios, respectively.

Cost/Benefit Analysis

Given the costs and benefits discussed above, as summarized in the following table, the FAA finds that all three random testing scenarios are cost beneficial (all costs discounted over ten years):

	10% random	25% random	50% random
Costs	\$34.1 mil	\$46.6 mil	\$66.6 mil.
Benefits	152.2 mil	158.1 mil	167.0 mil.
Benefit/Cost Ratio	4.47	3.40	2.51
Net Benefits	118.1 mil	111.5 mil	100.4 mil.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small entities are not unnecessarily burdened by government regulations. The RFA requires agencies to review rules that may have a "significant economic impact on a substantial number of small entities."

Under FAA Order 2100.14A, the criterion for a "substantial number" is a number that is not less than 11 and that is more than one third of the small entities subject to the rule. For operators of aircraft for hire, a small operator is one that owns, but not necessarily operates, nine or fewer aircraft. The FAA's criteria for "significant impact" are \$4,330 or more per year for an unscheduled operator, \$111,250 or more per year for a scheduled operator whose entire fleet is made up of airplanes with over 60 seats, and \$62,170 or more per year for other scheduled carriers.

This proposed rule would primarily affect holders of certificates issued under parts 121 and 135. The FAA calculated estimated compliance costs for small part 121 and 135 operators owning 9 aircraft. Although the average small operator owns 4 aircraft, this analysis assumes 9 aircraft as a worst case scenario. For a part 121 small operator, the annual costs are expected to be \$8,849, for part 135 Scheduled, \$3,164, and for part 135 Unscheduled, \$1,849. Accordingly, the annual costs expected to be imposed on such small

operators would not exceed the thresholds for significant impact outlined above. Therefore, the FAA finds that this proposed rule would not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

The FAA finds that this proposed rule would affect all part 121 and part 135 air carriers. All safety-sensitive part 121 and part 135 employees would be covered. The FAA finds that this proposed rule would not have an adverse impact on trade opportunities for either U.S. firms doing business overseas or foreign firms doing business in the United States. While there would be increased costs to carriers as a consequence of this proposed rule, these costs would be offset by the benefits summarized above and an increase in public confidence.

Federalism Implications

The rule proposed herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this proposal does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Significance

This proposed rule, if adopted, is not likely to result in an annual effect on the economy of \$100 million or more, although it may result in an increase in costs for consumers, industry, or Federal, State, or local agencies. Although the proposed rule is not "major" as defined in Executive Order 12291, the FAA has determined that this proposal involves issues of substantial interest to the public. Therefore, the FAA has determined that the NPRM is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

A draft Regulatory Impact Analysis of the proposed rule has been placed in the regulatory docket. A copy may be obtained by contacting the person identified under "FOR FURTHER INFORMATION CONTACT."

Cross-Reference Table

As noted above, a number of DOT agencies in addition to the FAA are publishing notices of proposed rulemaking in today's Federal Register, all of which are introduced by a common preamble prepared by OST. The following cross-reference table identifies the relevant provision of the FAA's NPRM by the subject heading used in the DOT preamble and the location of each provision in the FAA's proposed rule.

Subject heading	- FAA NPRM	Subject heading	FAA NPRM
	(References are to (new) appendix J to 14 CFR part 121, unless noted).	Access to Facilities and Records.	Sec IV, para C.
<i>General:</i>		<i>Consequences for Employees Engaging in Alcohol-Related Conduct:</i>	
Purpose	Section I, paragraph A.	Removal from Safety-Sensitive Function.	Sec V, para A.
Applicability	Sec I, para C (definition of employer); also: 14 CFR 65.46a(a). 14 CFR 121.458(a). 14 CFR 135.253(a).	Required Evaluation and Testing.	Sec V, para E.
Alcohol Testing Procedures	Sec I, para B.	Other Alcohol-Related Conduct	Sec V, para F.
Definitions	Sec I, para C.	<i>Alcohol Misuse Information, Training, and Referral:</i>	
Preemption	Sec I, para D.	Employer Obligation to Promulgate a Policy.	Sec VI, para A.
Other Requirements Imposed by Employers.	Sec I, para E.	Training for Supervisors	Sec VI, para B.
Requirement for Notice	Sec I, para F.	Referral, Evaluation, and Treatment.	Sec VI, Para C.
Starting Dates for Alcohol Testing Programs.	Sec VII, para A (Schedule for submission of plans and implementation).	<i>Major Additional Provisions in FAA NPRM:</i>	
		Refusal to Submit to a Drug or Alcohol Test (certificate action).	14 CFR 61.14. 14 CFR 63.12b. 14 CFR 65.23.
		Testing for Alcohol	14 CFR 65.46(b). 14 CFR 121.459. 14 CFR 135.255.
<i>Prohibited Conduct:</i>		Covered Employees	Sec II.
Alcohol Concentration	14 CFR 65.46a(b). 14 CFR 121.458(b). 14 CFR 135.253(b).	Permanent Disqualification for Service.	Sec V, para B.
Behavior or Appearance	14 CFR 65.46a(c). 14 CFR 121.458(c). 14 CFR 135.253(c). (Under the Influence of Alcohol).	Notice to the Federal Air Surgeon.	Sec V, para C.
On-duty Use	14 CFR 65.46a(d). 14 CFR 121.458(d). 14 CFR 135.253(d).	Notice of Refusals	Sec V, para D.
Pre-duty Use	14 CFR 65.46a(e). 14 CFR 121.458(e). 14 CFR 135.253(e).	Employer's Alcohol Misuse Prevention Program Plan.	Sec VII.
Use Following an Accident	14 CFR 65.46a(f). 14 CFR 121.458(f). 14 CFR 135.253(f).	Employees Outside the U.S.	Sec VIII.
Refusal to Submit to a Required Alcohol Test.	14 CFR 65.46a(g). 14 CFR 121.458(g). 14 CFR 135.253(g).		
<i>Tests Required:</i>			
Pre-employment/pre-duty	Sec III, Para A.		
Post-accident	Sec III, Para B.		
Random	Sec III, para C.		
Reasonable Suspicion	Sec III, para D.		
Return to Duty	Sec III, para E.		
Follow-up	Sec III, para F.		
Retesting * * * .02 or Greater * * *	Section III, para G.		
<i>Handling of Test Results, Record Retention, and Confidentiality:</i>			
Retention of Records	Sec IV, para A.		
Reporting of Results	Sec IV, para B.		

PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS

1. The authority citation for part 61 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

2. Section 61.14 is revised to read as follows:

§ 61.14 Refusal to submit to a drug or alcohol test.

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

3. The authority citation for part 63 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, 1427, 1429, and 1430 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

4. Section 63.12b is revised to read as follows:

§ 63.12b Refusal to submit to a drug or alcohol test.

(a) This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, or an operator as defined in § 135.1(c) of this chapter.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this

List of Subjects

14 CFR Part 61

Air safety, Air transportation, Aircraft, Aircraft pilots, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 63

Air safety, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 65

Air safety, Air traffic, Air transportation, Aircraft, Airmen, Alcohol, Alcoholism, Aviation safety, Safety, Transportation.

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

14 CFR Part 135

Air carriers, Air taxi, Air transportation, Aircraft, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Pilots, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR parts 61, 63, 65, 121, and 135 as follows:

part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

5. The authority citation for part 65 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1421, 1422, and 1427 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

6. Section 65.23 is revised to read as follows:

§ 65.23 Refusal to submit to a drug or alcohol test.

(a) *General.* This section applies to an employee who performs a function listed in appendix I or appendix J to part 121 of this chapter directly or by contract for a part 121 certificate holder, a part 135 certificate holder, an operator as defined in § 135.1(c) of this chapter, or an air traffic control facility not operated by the FAA or the U.S. military.

(b) Refusal by the holder of a certificate issued under this part to take a drug test required under the provisions of appendix I to part 121 or an alcohol test required under the provisions of appendix J to part 121 is grounds for—

(1) Denial of an application for any certificate or rating issued under this part for a period of up to 1 year after the date of such refusal; and

(2) Suspension or revocation of any certificate or rating issued under this part.

7. Section 65.46a is added to read as follows:

§ 65.46a Misuse of alcohol.

(a) This section applies to employees who perform air traffic control duties directly or by contract for an employer that is an air traffic control facility not operated by the FAA or the U.S. military (*covered employees*).

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No employer having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *Under the influence of alcohol.* Notwithstanding the absence of a reasonable suspicion alcohol test under

appendix J to part 121 of this chapter, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No employer having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) *On-duty use.* No covered employee shall use 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.

(e) *Pre-duty use.* No covered employee shall perform air traffic control duties within 4 hours after using alcohol. No employer having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform air traffic control duties.

(f) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J to part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

8. Section 65.46b is added to read as follows:

§ 65.46b Testing for alcohol.

(a) Each air traffic control facility not operated by the FAA or the U.S. military (hereinafter *employer*) must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No employer shall use any person who meets the definition of *covered employee* in appendix J to part 121 to perform a safety-sensitive function

listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

9. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355, 1359, 1357, 1401, 1421-1430, 1485, and 1502 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

10. Section 121.458 is added to read as follows:

§ 121.458 Misuse of alcohol.

(a) *General.* This section applies to employees who perform a function listed in appendix J to this part for a certificate holder (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No certificate holder having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *Under the influence of alcohol.* Notwithstanding the absence of a reasonable suspicion alcohol test under appendix J to this part, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No certificate holder having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder 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.

(e) *Pre-duty use.* (1) No employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No employee shall perform safety-sensitive duties other than those specified in paragraph (e)(1) of this section within 4 hours after using alcohol. No certificate holder having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(f) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of this part, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to this part. No certificate holder shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

11. Section 121.459 is added to read as follows:

§ 121.459 Testing for alcohol.

(a) Each certificate holder must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to this part.

(b) No certificate holder shall use any person who meets the definition of *covered employee* in appendix J to this part to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

12. Appendix J to part 121 is added to read as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

This appendix contains the standards and components that must be included in an alcohol misuse prevention program required by this chapter.

I. General.

A. Purpose. The purpose of this appendix is to establish programs designed to help

prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in aviation.

B. Alcohol testing procedures. Each employer shall ensure that all alcohol testing conducted pursuant to this appendix complies with the procedures set forth in 49 CFR part 40. The provisions of 49 CFR part 40 that address alcohol testing are incorporated by reference into and are made applicable to employers by this appendix.

C. Definitions. As used in this appendix—
Accident means an occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight and the time all such persons have disembarked, and in which any person suffers death or serious injury or in which the aircraft receives substantial damage.

Administrator means the Administrator of the Federal Aviation Administration or his or her designated representative.

Alcohol means ethyl alcohol (ethanol).

Alcohol concentration (or content) means the alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test performed under this appendix. When the indicated alcohol concentration of a covered employee on an initial alcohol test is different from an indicated alcohol concentration on a confirmatory test, and the consequences of the two results would differ under the provisions of this appendix, the lower result shall be considered the final result on which action under this appendix shall be based.

Alcohol use means the use of alcohol include consumption of any beverage, mixture, or preparation, including any medication, containing alcohol.

Confirmatory test means a second analytical procedure, separate from the screening test, to determine the concentration of alcohol in a covered employee's system. The confirmatory test may or may not use a different chemical principle from that of the screening test, but shall employ a scientifically recognized method of testing capable of providing quantitative data regarding alcohol concentration. For specific requirements concerning evidential breath testing devices see 49 CFR part 40.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this appendix and that acts on behalf of such employers or contractors, provided that it has an alcohol misuse prevention plan approved by the FAA in accordance with this appendix.

Contractor company means a company that has employees who perform safety-sensitive functions by contract for an employer.

Covered employee means a person who performs, either directly or by contract, a safety-sensitive function listed in section II of this appendix for an employer (as defined below). For purposes of pre-employment/pre-duty testing only, the term "covered employee" includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or "operating administration") of the United

States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 199, 219, and 382) in accordance with 49 CFR part 40.

Employer means a part 121 certificate holder; a part 135 certificate holder; an air traffic control facility not operated by the FAA or the U.S. military; and an operator as defined in 14 CFR 135.1(c).

Initial alcohol test (or screening test) means an analytical procedure to determine whether a covered employee may have a prohibited concentration of alcohol in his or her system.

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

Refuse to submit (to an alcohol test) means that a covered employee fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement to be tested in accordance with this appendix, or engages in conduct that clearly obstructs the collection process.

Safety-sensitive function means a function listed in section II of this appendix.

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, or employee assistance professional with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

D. Preemption of State and local laws. 1. Except as provided in subparagraph 2 of this paragraph, these regulations preempt any State or local law, rule, regulation, or order to the extent that:

(a) Compliance with both the State or local requirement and this appendix is not possible; or

(b) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this appendix.

2. The alcohol misuse requirements of this title shall not be construed to preempt provisions of State criminal law that impose sanctions for reckless conduct 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.

E. Other requirements imposed by employers. Except as expressly provided in these alcohol misuse requirements, nothing in these requirements shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcohol, including any authority and rights with respect to alcohol testing and rehabilitation.

F. Requirement for notice. Before performing an alcohol test under this appendix, each employer shall notify a covered employee that the alcohol test is required by this appendix. No employer shall falsely represent that a test is administered under this appendix.

II. Covered Employees

Each employee who performs a function listed in this section directly or by contract

for an employer as defined in this appendix must be subject to alcohol testing under an FAA-approved alcohol misuse prevention program implemented in accordance with this appendix. The covered safety-sensitive functions are:

1. Flight crewmember duties.
2. Flight attendant duties.
3. Flight instruction duties.
4. Aircraft dispatcher duties.
5. Aircraft maintenance duties.
6. Ground security coordinator duties.
7. Aviation screening duties.
8. Air traffic control duties.

III. Tests Required

A. Pre-employment/pre-duty. 1. Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employee shall undergo testing for alcohol. No employer shall allow a covered employee to perform safety-sensitive functions unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04. If a pre-employment/pre-duty test result under this paragraph indicates an alcohol concentration of .02 or greater but less than .04, the provisions of paragraph F of section V of this appendix apply.

2. An employer is not required to administer an alcohol test as required by this paragraph if:

(a) the employee has undergone an alcohol test required by this appendix or the alcohol misuse rule of another DOT agency within the previous 6 months, with a result indicating an alcohol concentration lower than .04; and

(b) the employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of §§ 65.46a, 121.458, or 135.253 of this chapter or the alcohol misuse rule of another DOT agency within the previous 6 months.

B. Post-accident. 1. As soon as practicable following an accident, an employer shall test each surviving covered employee for alcohol if that employee's performance of a safety-sensitive function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a 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.

2. If a test required by this section is not administered within 2 hours following the accident, the employer shall submit a report to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC 20590, stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the accident, the employer shall cease attempts to administer an alcohol test and shall submit the same report.

3. A covered employee who is subject to post-accident testing who leaves the scene of an accident without a valid reason prior to submission to such test may be deemed by the employer to have refused to submit to

testing. Nothing in this section shall be construed to require the delay of necessary medical attention for injured people 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.

C. Random testing. 1. Each employer shall, at various times, randomly select covered employees for unannounced alcohol testing. The selection of employees shall be made by use of 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. Each covered employee shall have an equal chance of being tested under the selection process used.

2. During each 12 month period following the start of random alcohol testing by the employer, the employer shall meet the following conditions:

(a) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the 12-month period; and

(b) The number of employees randomly selected for testing during the 12-month period shall equal an annual rate of not less than [10-50] percent of the total number of employees subject to alcohol testing under this appendix or the alcohol misuse rule of another DOT agency. If the employer conducts random testing through a consortium, the annual rate may be calculated for each individual employer or for the total number of covered employees subject to random testing by the consortium.

3. A covered employee shall only be tested 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.

4. Each employer shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately. However, 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 as soon as possible.

D. Reasonable suspicion testing. 1. Each employer shall require any covered employee to submit to an alcohol test when the employer has reasonable suspicion to believe that the employee has violated the alcohol misuse prohibitions in §§ 65.46a, 121.458, or 135.253 of this chapter.

2. The employer's determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. The required observations shall be made by a supervisor who is trained in detecting the symptoms of alcohol misuse. The supervisor who makes the determination that reasonable suspicion exists shall not

conduct the breath alcohol test on that employee.

3. Alcohol testing is authorized by this section only if the observations required by paragraph 2 are made during or just preceding the period of the work day that the covered employee is required to be in compliance with this rule. A covered employee may be required to undergo reasonable suspicion testing for alcohol 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.

E. Return to duty testing. Each employer shall ensure that before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in §§ 65.46a, 121.458, or 135.253 of this chapter, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than .02.

F. Follow-up testing. Following a determination under section VI, paragraph C.2 of this appendix that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each employer shall ensure that the employee is subject to unannounced follow-up alcohol testing as directed by a substance abuse professional in accordance with the provisions of section VI, paragraph C.3(b)(2) of this appendix.

G. Retesting of covered employees with an alcohol concentration of .02 or greater but less than .04. Each employer shall retest a covered employee to ensure compliance with the provisions of section V, paragraph F of this appendix, if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of .02 or greater but less than .04.

IV. Handling of Test Results, Record Retention, and Confidentiality

A. Retention of records. 1. **General Requirement.** Each employer shall maintain records of its alcohol misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

2. **Period of Retention.** Each employer shall maintain the records in accordance with the following schedule:

(a) **Five years.** Records of employee alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluations and referrals, shall be maintained for a minimum of 5 years.

(b) **Two years.** Records related to the collection process (except calibration of evidential breath testing devices) and training shall be maintained for a minimum of 2 years.

(c) **One year.** Records of negative test results (as defined in 49 CFR part 40) shall be maintained for a minimum of 1 year.

3. **Types of Records.** The following specific records shall be maintained.

(a) Records related to the collection process:

- (1) Collection logbooks, if used.
- (2) Documents relating to the random selection process.
- (3) Calibration documentation for evidential breath testing devices.
- (4) Verification of breath alcohol technician training.
- (5) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.
- (6) Documents generated in connection with decisions on post-accident tests.
- (7) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.
- (b) Records related to test results:
 - (1) The employer's copy of the alcohol test form, including the results of the test;
 - (2) Documents related to the refusal of any covered employee to submit to an alcohol test required by this appendix.
 - (3) Documents presented by a covered employee to dispute the result of an alcohol test administered under this appendix.
 - (c) Documents related to other violations of § 65.46a, § 121.248, or § 135.253 of this chapter.
 - (d) Records related to evaluations:
 - (1) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for assistance.
 - (2) Records concerning a covered employee's compliance with the recommendations of the substance abuse professional.
 - (3) Records of notifications to the Federal Air Surgeon of violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.
 - (e) Records related to education and training:
 - (1) Materials on alcohol misuse awareness, including a copy of the employer's policy on alcohol misuse.
 - (2) Documentation of compliance with the requirements of section VI, paragraph A of this appendix.
 - (3) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol testing based on reasonable suspicion.
 - (4) Certification that any training conducted under this appendix complies with the requirements for such training.
 - B. *Reporting of results in a management information system.* 1. Each employer shall submit to the FAA an annual report covering the calendar year, summarizing the results of its alcohol misuse prevention program.
 2. Each employer that is subject to more than one DOT agency alcohol rule shall identify each employee covered by the regulations of more than one DOT agency. The identification will be by the total number and category of covered function. Prior to conducting any alcohol test on a covered employee subject to the rules of more than one DOT agency, the employer shall determine which DOT agency rule or rules authorizes or requires the test. The test result information shall be directed to the appropriate DOT agency or agencies.

3. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or by a consortium.

4. Each employer shall submit the required annual report no later than February 15 of each year. The report shall be submitted on the form specified by the FAA. Each report shall contain:

- (a) Number of covered employees by employee category.
- (b) Number of covered employees in each category subject to alcohol testing under the alcohol misuse rule of another DOT agency, identified by each agency.
- (c)(1) Number of initial tests by type of test and employee category.
- (2) Number of confirmatory tests, by type of test and employee category.
- (d) Number of confirmatory alcohol tests indicating an alcohol concentration of .04 or greater, by type of test and employee category.
- (e) Number of confirmatory alcohol tests indicating an alcohol concentration of .02 or greater but less than .04.
- (f) Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of .04 or greater.
- (g) Number of covered employees with a confirmatory alcohol test indicating an alcohol concentration of .04 or greater who were returned to duty in covered positions (having complied with the recommendations of a substance abuse professional as described in section V, paragraph E, and section VI, paragraph C of this appendix).
- (h) Number of covered employees who were administered alcohol and drug tests at the same time, with both a positive drug test result and an alcohol test result indicating an alcohol concentration of .04 or greater.
- (i) Number of covered employees who were found to have violated other alcohol misuse provisions of §§ 65.46a, 121.458, or 135.253 of this chapter, and the action taken in response to the violation.
- (j) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to each refusal.
- (k) Number of supervisors who have received training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
- (l) Direct costs of the program during the reporting period:

- (1) Breath collection
- (2) Breath analysis (equipment/service)
- (3) Substance abuse professional evaluation (if appropriate)
- (4) Education and training.

C. *Access to facilities and records.* 1. Except as required by law or expressly authorized or required in this appendix, no employer shall release covered employee information that is contained in records required to be maintained under this appendix.

2. A covered employee is entitled, upon written request, to obtain copies of any records pertaining to the employee's use of alcohol, including any records pertaining to his or her alcohol tests. The employer shall promptly provide the records requested by the employee. Access to an employee's

records shall not be contingent upon payment for records other than those specifically requested.

3. Each employer shall permit access to all facilities utilized in complying with the requirements of this appendix to the Secretary of Transportation or any DOT agency with regulatory authority over the employer or any of its covered employees.

4. Each employer shall make available copies of all results of alcohol testing conducted under this appendix and any other information pertaining to the employer's alcohol misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee.

5. When requested by the National Transportation Safety Board as part of an accident investigation, each employer shall disclose information related to the employer's administration of a post-accident alcohol test administered following the accident under investigation.

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

7. An employer may disclose information required to be maintained under this appendix pertaining to a covered employee to the employee or to the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual and arising from the results of an alcohol test administered under this appendix or from the employer's determination that the employee engaged in conduct prohibited under § 65.46a, § 121.458, or § 135.253 of this chapter (including, but not limited to, a worker's compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

8. An employer shall release information regarding a covered employee's records as directed by the specific, written consent of the employee authorizing release of the information to an identified person. Release of such information by the person receiving the information is permitted only in accordance with the terms of the employee's consent.

V. *Consequences for Employees Engaging in Alcohol-Related Conduct*

A. *Removal from safety-sensitive function.*

1. Except as provided in section VI of this appendix, no covered employee shall perform safety-sensitive functions if the employee has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter or an alcohol misuse rule of another DOT agency.

2. No employer shall permit any covered employee to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.

B. *Permanent disqualification for service.*

An employee is permanently precluded from performing safety-sensitive duties for an employer if the employee has used alcohol in violation of § 65.46a(d), § 121.458(d), or

§ 135.253(d) or if the employee engages in other alcohol misuse in violation of § 65.46a, § 121.458, or § 135.253 of this chapter and had previously engaged in conduct that violated the provisions of § 65.46a, § 121.458, or § 135.253 of this chapter after [the effective date of the final rule].

C. Notice to the Federal Air Surgeon. 1. An employer who determines that a covered employee who holds a medical certificate issued under part 67 of this chapter has violated the provisions of § 65.46a, § 121.458, or § 135.253 of this chapter shall notify the Federal Air Surgeon within 2 working days.

2. Each such employer shall forward to the Federal Air Surgeon a copy of the report of any evaluation performed under the provisions of section VI of this appendix within 2 working days of the employer's receipt of the report.

3. All documents shall be sent to the Federal Air Surgeon, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC 20590.

4. No covered employee who holds a part 67 medical certificate shall perform safety-sensitive duties for an employer following a violation until and unless the Federal Air Surgeon has recommended that the employee be permitted to perform such duties.

D. Notice of refusals. 1. Except as provided in subparagraph 2 of this paragraph, each employer shall notify the FAA of any covered employee who holds a certificate issued under part 61, part 63, or part 65 who has refused to submit to an alcohol test required under this appendix. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airmen Certification Branch, AVN-460, P.O. Box 25082, Oklahoma City, OK 73125.

2. An employer is not required to notify the FAA of refusals to submit to pre-employment/pre-duty alcohol tests or refusals to submit to return to duty tests.

E. Required evaluation and testing. No covered employee who has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter shall perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. No employer shall permit a covered employee to perform safety-sensitive functions unless the employee has met the requirements of section VI, paragraph C of this appendix. Nothing in this paragraph shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

F. Other alcohol-related conduct. 1. No covered employee tested under the provisions of section III of this appendix who is found to have an alcohol concentration of .02 or greater but less than .04 shall perform or continue to perform safety-sensitive functions for an employer, nor shall an employer permit the employee to perform or continue to perform safety-sensitive functions, until:

(a) The employee's alcohol concentration measures less than .02; or

(b) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following administration of the test.

2. Except as provided in subparagraph 1 of this paragraph, no employer shall take any action under this rule against an employee based solely on test results showing an alcohol concentration less than .04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with this law.

3. Nothing in this paragraph shall be construed to prohibit the continued performance of safety-sensitive functions necessary to respond to an emergency.

VI. Alcohol Misuse Information, Training, and Referral

A. Employer obligation to promulgate a policy on the misuse of alcohol. 1. **General requirements.** Each employer shall provide educational materials that explain these alcohol misuse requirements and the employer's policies and procedures with respect to meeting those requirements. Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

2. **Required content.** The materials to be made available to employees shall include detailed discussion of at least the following:

(a) The identity of the person designated by the employer to answer employee questions about the materials.

(b) The categories of employees who are subject to the provisions of these alcohol misuse requirements.

(c) Sufficient information about the safety-sensitive functions performed by those employees to make clear what period of the work day the covered employee is required to be in compliance with these alcohol misuse requirements.

(d) Specific information concerning employee conduct that is prohibited by this chapter.

(e) The circumstances under which a covered employee will be tested for alcohol under this appendix.

(f) The procedures that will be used to test for the presence of alcohol, protect the employee and the integrity of the breath testing process, safeguard the validity of the test results, and ensure that those results are attributed to the correct employee.

(g) The requirement that a covered employee submit to alcohol tests administered in accordance with this appendix.

(h) An explanation of what constitutes a refusal to submit to an alcohol test and the attendant consequences.

(i) The consequences for covered employees found to have violated the prohibitions in this chapter, including the requirement that the employee be removed immediately from performing safety-sensitive functions, and the procedures under section VI of this appendix.

(j) The consequences for covered employees found to have an alcohol concentration of .02 or greater but less than .04.

(k) Optional provisions. The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for

an employee found to have a specified alcohol level, that are based on the employer's authority independent of this appendix. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

B. Training for supervisors. Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under section II of this appendix receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

C. Referral, evaluation, and treatment. 1. Each covered employee who has engaged in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter shall be advised by the employer of the resources available to the employee in evaluating and resolving problems associated with the misuse of alcohol, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

2. Each covered employee who engages in conduct prohibited under § 65.46a, § 121.458, or § 135.253 of this chapter shall be evaluated by a substance abuse professional who must determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

3. (a) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by § 65.46a, § 121.458, or § 135.253 of this chapter, the employee shall undergo an alcohol test with a result indicating an alcohol concentration of less than .02.

(b) In addition, each covered employee identified as needing assistance in resolving problems associated with alcohol misuse—

(i) Shall be evaluated by a substance abuse professional to determine whether the employee has properly followed any rehabilitation program prescribed under subparagraph 2 of this paragraph, and,

(ii) Shall be subject to unannounced follow-up tests administered by the employer following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional, but shall consist of at least six tests in the first 12 months following the employee's return to duty. Follow-up testing shall not exceed 60 months from the date of the employee's return to duty. The substance abuse professional may terminate the requirement for follow-up testing at any time after the first six tests have been administered, if the substance abuse professional determines that such testing is no longer necessary.

4. Evaluation and rehabilitation may be provided by the employer, by a substance abuse professional under contract with the employer, or by a substance abuse professional not affiliated with the employer. The choice of substance abuse professional and assignment of costs shall be made in accordance with employer/employee agreements and employer policies.

5. The requirements of this paragraph with respect to referral, evaluation, and

rehabilitation do not apply to applicants who refuse to submit to or have a pre-employment/pre-duty test with a result indicating an alcohol concentration of .04 or greater.

VII. Employer's Alcohol Misuse Prevention Program Plan

A. Schedule for submission of plans and implementation. 1. Each employer shall submit an alcohol misuse prevention program (AMPP) plan to the FAA on a form and in a manner prescribed by the Administrator. Plans should be submitted to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC 20590, by certified U.S. mail, return receipt requested, in accordance with the schedule below.

(a) Each employer who holds a part 121 certificate, each employer who holds a part 135 certificate and directly employs more than 50 covered employees, and each air traffic control facility affected by this rule shall submit an AMPP plan to the FAA by [6 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [12 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [14 months after the effective date of the final rule].

(b) Each employer who holds a part 135 certificate and directly employs from 11 to 50 covered employees shall submit an AMPP plan to the FAA by [12 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [18 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [20 months after the effective date of the final rule].

(c) Each employer who holds a part 135 certificate and directly employs ten or fewer covered employees, and each operator as defined in 14 CFR 135.1(c) shall submit an AMPP plan to the FAA by [18 months after the effective date of the final rule]. Each employer must implement an approved AMPP by [24 months after the effective date of the final rule]. Contractor employees to these employers must be subject to an FAA-approved AMPP by [26 months after the effective date of the final rule].

2. A company providing covered employees by contract to employers may submit an AMPP plan directly to the FAA for approval on a form and in a manner prescribed by the Administrator. Each contractor company shall implement its approved AMPP in accordance with its terms and the provisions of this appendix.

(a) The FAA may revoke its approval in the case of any contractor company that fails to properly implement its AMPP.

(b) No employer shall use a contractor company's employee who is not subject to the employer's AMPP unless the employer has first determined that the employee is subject to another FAA-approved AMPP.

3. A consortium may submit a core AMPP plan directly to the FAA for approval on a form and in a manner prescribed by the Administrator. Each consortium shall

implement its approved plan in accordance with its terms and the provisions of this appendix.

(a) The FAA may revoke its approval in the case of any consortium that fails to properly implement its AMPP.

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with the provisions of these alcohol misuse requirements and must maintain all records required under section IV of this appendix.

(c) Each consortium shall notify the FAA of any membership termination within 10 days of such termination.

4. Any person who applies for a certificate under the provisions of part 121 or 135 of this chapter after [the effective date of the final rule] shall submit an alcohol misuse prevention program (AMPP) plan to the FAA for approval and must obtain such approval prior to beginning operations pursuant to the certificate. The AMPP shall be implemented concurrently with beginning such operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new certificate holder must be subject to an FAA-approved AMPP within 60 days of the implementation of the employer's AMPP.

5. Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after [the effective date of the final rule] shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program (AMPP) plan to the FAA for approval. No operator may begin conducting sightseeing flights prior to receipt of the FAA's approval of the AMPP plan; the AMPP shall be implemented concurrently with the inception of operations or by the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new operator must be subject to an FAA-approved AMPP within 60 days of the implementation of the employer's AMPP.

7. Each employer or contractor company that submits an AMPP plan to the FAA shall consider its plan to be approved unless notified to the contrary by the FAA within 60 days of the date the plan was received at the FAA as reflected on the certified mail receipt.

8. Each consortium that submits a core AMPP plan to the FAA for approval must receive the express written approval of the plan from the FAA prior to submitting rider plans or performing services under the plan.

9. Each employer, and each contractor company that submits a plan directly to the FAA, shall notify the FAA of any proposed change in status (e.g., join a consortium or another carrier's program, change consortium, etc.) and must receive FAA approval prior to the effective date of such change. The employer or contractor company must ensure that it is continuously covered by an FAA-approved alcohol misuse prevention program.

B. Required content of AMPP plans. 1.

Each AMPP plan, including a consortium core plan to the extent the consortium will be providing services required under this appendix, shall provide the following information:

(a) The name, address, and telephone number of the plan submitter's AMPP manager;

(b) The evidential breath testing (EBT) device that will be used to conduct alcohol testing under this appendix;

(c) The person(s) or company that will be collecting breath specimens;

(d) The person(s) or company that will be providing EBT training and maintenance;

(e) The name, address, and telephone number of the substance abuse professional who will conduct evaluations under this appendix; and

(f) The name, address, and telephone number of the rehabilitation provider if chosen by the employer.

2. Consortium rider plans shall provide the following information:

(a) The identity of the consortium;

(b) The name, address, and telephone number of the consortium member's AMPP manager; and

(c) Any information otherwise required under paragraph 1., above, that will not be covered by the consortium.

3. Each plan and rider submitter shall provide certification of understanding of and agreement to comply with the provisions of the FAA's alcohol misuse prevention regulations.

4. Any amendments to the information required in paragraphs 1 and 2 above shall be submitted to the FAA for review and approval prior to implementation of the changes. The FAA reserves the right to require employers, consortia, and/or contractor companies to amend previously-approved plans as deemed necessary by the FAA for compliance with this appendix.

VIII. Employees Located Outside the U.S.

A. Each covered employee located outside the territory of the United States who is directly employed by an employer will become subject to the provisions of these alcohol misuse requirements on January 2, 1995; provided, however, that no such employee shall be tested for alcohol misuse while located outside the territory of the United States if the Federal Aviation Administration receives written documentation from an employer that such testing is inconsistent with the laws and regulations of the country in which the employee is located. Employers shall submit copies, in English, of any applicable laws and regulations to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM-800), 400 7th Street SW., Washington, DC 20590.

B. The provisions of this appendix shall not apply to any person located outside the territory of the United States who performs a safety-sensitive function by contract for an employer.

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

13. The authority citation for part 135 is revised to read as follows:

Authority: 49 U.S.C. 1354(a), 1355(a), 1421-1431, and 1502 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

14. In § 135.1 paragraphs (c) and (d) are revised to read as follows:

§ 135.1 Applicability.

(c) For the purpose of §§ 135.249, 135.251, 135.253, 135.255, and 135.353, *operator* means any person or entity conducting non-stop sightseeing flights for compensation or hire in an airplane or rotorcraft that begin and end at the same airport and are conducted within a 25 statute mile radius of that airport.

(d) Notwithstanding the provisions of this part and appendices I and J to part 121 of this chapter, an operator who does not hold a part 121 or part 135 certificate is permitted to use a person who is otherwise authorized to perform aircraft maintenance or preventive maintenance duties and who is not subject to FAA-approved anti-drug and alcohol misuse prevention programs to perform—

(1) Aircraft maintenance or preventive maintenance on the operator's aircraft if the operator would otherwise be required to transport the aircraft more than 50 nautical miles further than the repair point closest to operator's principal place of operation to obtain these services; or

(2) Emergency repairs on the operator's aircraft if the aircraft cannot be safely operated to a location where an employee subject to FAA-approved programs can perform the repairs.

15. Section 135.253 is added to read as follows

§ 135.253 Misuse of alcohol

(a) This section applies to employees who perform a function listed in appendix J to part 121 of this chapter for a certificate holder or operator (*covered employees*). For the purpose of this section, a person who meets the definition of covered employee in appendix J is considered to be performing the function for the certificate holder or operator.

(b) *Alcohol concentration.* No covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of .04 or greater. No certificate holder or operator having actual knowledge that an employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) *Under the influence of alcohol.* Notwithstanding the absence of a reasonable suspicion alcohol test under appendix J to part 121 of this chapter, no covered employee shall report for duty or remain on duty requiring the performance of safety-sensitive

functions while the employee is under the influence of or impaired by alcohol, as shown by behavior or appearance characteristic of alcohol misuse or by an adverse effect on the employee's ability to perform his or her assigned functions. No certificate holder or operator having actual knowledge that the employee is in violation of this provision shall permit a covered employee to perform or continue to perform safety-sensitive functions.

(d) *On-duty use.* No covered employee shall use alcohol while performing safety-sensitive functions. No certificate holder or operator 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.

(e) *Pre-duty use.* (1) No employee shall perform flight crewmember or flight attendant duties within 8 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform the specified duties.

(2) No employee shall perform safety-sensitive duties other than those specified in paragraph (e)(1) of this section within 4 hours after using alcohol. No certificate holder or operator having actual knowledge that such an employee has used alcohol within 4 hours shall permit the employee to perform or continue to perform safety-sensitive functions.

(f) *Use following an accident.* No covered employee who has actual knowledge of an accident involving an aircraft for which he or she performed a safety-sensitive function at or near the time of the accident shall use alcohol for 8 hours following the accident, unless he or she has been given a post-accident test under appendix J of part 121 of this chapter, or the employer has determined that the employee's performance could not have contributed to the accident.

(g) *Refusal to submit to a required alcohol test.* No covered employee shall refuse to submit to a post-accident, random, reasonable suspicion, or follow-up alcohol test required under appendix J to part 121 of this chapter.

16. Section 135.255 is added to read as follows:

§ 135.255 Testing for alcohol.

(a) Each certificate holder and operator must establish an alcohol misuse prevention program in accordance with the provisions of appendix J to part 121 of this chapter.

(b) No certificate holder or operator shall use any person who meets the

definition of "covered employee" in appendix J to part 121 to perform a safety-sensitive function listed in that appendix unless such person is subject to testing for alcohol misuse in accordance with the provisions of appendix J.

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,
Secretary of Transportation.

Thomas C. Richards,
Administrator.

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Federal Aviation Administration

14 CFR Parts 121 and 129

[Docket No. 27066; Notice No. 92-18]
RIN 2120-AE79

Anti-Drug Program and Alcohol Misuse Prevention Program for Employees of Foreign Air Carriers Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the FAA Administrator to prescribe regulations that require foreign air carriers to establish drug and alcohol testing programs for employees performing safety-sensitive aviation functions. The regulations must be consistent with the international obligations of the United States and take into consideration any applicable laws and regulations of foreign countries. This notice invites comments on a variety of issues related to the application of drug and alcohol testing requirements to safety-sensitive employees of foreign air carriers operating within the territory of the United States.

DATES: Comments must be received on or before February 16, 1993.

ADDRESSES: Comments on this notice should be mailed, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), Docket No. 27066, 800 Independence Avenue, SW., Washington, DC 20591. Comments that are delivered to this address must be marked "Docket No. 27066." Comments may be examined in Room 915G between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ms. Julie B. Murdoch, Office of Aviation

Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590; telephone (202) 366-6710.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of a proposed rule by submitting such written data, views, suggestions, or arguments as they may desire. Communications should identify the regulatory docket or notice number and be submitted in triplicate to the address above. All communications received on or before the closing date for comments will be considered by the Administrator before rulemaking action is taken. Persons wishing the FAA to acknowledge receipt of their comments must submit with those comments a self-addressed stamped postcard on which the following statement is made: "Comments to Docket No. 27086." The postcard will be dated and time stamped and returned to the commenter. All comments submitted will be available for review in the Rules Docket, both before and after the comment closing date. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will also be filed in the docket.

Availability of ANPRM

Any person may obtain a copy of this ANPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number of this ANPRM.

Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Current Laws and Regulations

The FAA has general statutory authority to regulate safety in civil aviation under the Federal Aviation Act of 1958 (the FAA Act), as amended. As provided in section 1108 of the FAA Act, the United States of America has complete and exclusive national sovereignty in the airspace of the United States (49 App. U.S.C. 1508(a)). However, as a signatory to the Convention on International Civil Aviation (December 7, 1944, 61 Stat. 1180, T.I.A.S. No 1591; hereinafter the Chicago Convention), the United States

must exercise that sovereignty with respect to foreign civil aircraft in a manner consistent with the Chicago Convention.

The Chicago Convention stipulates that a member State has complete and exclusive sovereignty as to regulating the operation and navigation of foreign-registered aircraft within its territory. *Id.* arts. 1-2, 12. Regulation of aviation activity that takes place wholly or substantially within the territory of the United States, so long as the regulation is reasonable and takes into consideration applicable foreign laws that may affect the foreign air carriers or their employees, is therefore clearly within the scope of the FAA's authority. The FAA has, for example, prescribed regulations requiring foreign air carrier pilots to be familiar with applicable air traffic and other rules, and directing foreign air carriers to establish procedures to verify such knowledge. (14 CFR 129.19.)

The Chicago Convention does not explicitly permit the extraterritorial application of one State's laws to non-citizens outside the territory of that State; however, States may promulgate regulations regarding entrance into or departure from their territorial boundaries by aircraft. The United States has used this authority, together with the supporting provisions of the Chicago Convention and its Annexes, to regulate foreign air carriers operating into the United States in a number of areas, including airplane security. (14 CFR 129.25.)

In addition to establishing the general rights, privileges, and obligations of the member States engaging in international aviation, the Chicago Convention established the International Civil Aviation Organization (ICAO). An adjunct of the United Nations, the ICAO includes all of the signatories to the Chicago Convention (over 170 countries) and operates through a standing Council comprised of 33 elected States and a General Assembly that meets every three years. ICAO has responsibility for establishing international Standards and Recommended Practices to promote aviation safety. Every member State must adhere to the established Standards, unless the State files a difference with ICAO. States are encouraged, but not required, to comply with Recommended Practices.

As a signatory to the Chicago Convention, the U.S. is bound by its Annex 2 (Rules of the Air), which provides in paragraph 2.5 that

No person shall pilot an aircraft, or act as a flight crew member of an aircraft, while

under the influence of intoxicating liquor or any narcotic or drug, by reason of which that person's capacity so to act is impaired.

Consistent with this standard, the FAA's regulations prohibit any person from acting or attempting to act as a crewmember within 8 hours after consuming any alcoholic beverage, while under the influence of alcohol, while using any drug that affects the person's faculties in a manner contrary to safety, or while having .04 percent by weight or more alcohol in the blood. (14 CFR 91.17(a).) This regulation covers all operations within the territory of the United States, including foreign air carrier operations.

Under Federal criminal law, no person may operate or direct the operation of a common carrier (which includes foreign air carriers operating within the territory of the United States) while under the influence of a controlled substance or alcohol. (18 U.S.C. 342.) An individual with a blood alcohol content of .10 percent or more is presumed to be under the influence of alcohol (18 U.S.C. 343(1)), as is an individual with a quantity of drug in his or her system that would be sufficient to impair the perception, mental processes, or motor functions of the average individual (18 U.S.C. 343(2)).

Many states have similar criminal laws that prohibit any person from operating an aircraft while under the influence of alcohol and/or drugs. Under limited circumstances, the FAA's regulations require persons who are being investigated for violation of these State or local laws to submit to alcohol tests when requested by authorized State or local law enforcement officers, and, upon request, to furnish the test results to the Administrator. (14 CFR 91.17(c).)

On November 21, 1988, the FAA published regulations that require certain employers to establish anti-drug programs for their employees who perform specified safety-sensitive functions (e.g., pilots, flight attendants, and mechanics). In addition to requiring employers to educate employees about the detrimental effects of drug abuse, the FAA's anti-drug rule requires pre-employment, random, post-accident, reasonable cause, and return to duty drug testing. Individuals required to hold airman medical certificates under 14 CFR part 67 are also subject to periodic drug testing. The anti-drug rule is limited in its application, however, to the employees (whether direct or contract) of U.S. employers. Similarly, the proposed alcohol misuse prevention program (which lists the employees who would be subject to alcohol testing), published elsewhere in today's Federal

Register, currently only proposes application to U.S. employers and not to foreign air carriers.

Omnibus Transportation Employee Testing Act

The Omnibus Transportation Employee Testing Act of 1991 (the Act (Pub. L. 102-143, title V)) was enacted on October 28, 1991. Among other things, the Act adds a new section 614 to the FAA Act, which requires the FAA Administrator to prescribe regulations under which air carriers and foreign air carriers must establish alcohol and drug testing programs for safety-sensitive employees. The Act specifically provides that the regulations must establish a program which requires air carriers and foreign air carriers to conduct drug and alcohol testing of safety-sensitive employees. (Section 3 of the Act, amending title VI of the FAA Act (49 App. U.S.C. 1434(a)(1)).) The Act also provides that the requirements applicable to foreign air carriers must be consistent with the international obligations of the United States, and must take into consideration any applicable laws and regulations of foreign countries. (Section 3 of the Act, amending title VI of the FAA Act (49 App. U.S.C. 1434(e)(3)).)

As discussed above, the FAA has jurisdiction over the navigation and operations of foreign air carriers within the territory of the United States. The FAA would not propose, for example, to apply its drug and alcohol rules to the performance of safety-sensitive functions by foreign air carrier employees outside the territory of the United States. However, in determining whether and how to impose drug and alcohol testing requirements on such carriers, the FAA must, under the Act, take into consideration not only international obligations of the U.S. such as the Chicago Convention, but also any applicable foreign laws and regulations.

We also recognize the concerns of foreign countries, and are aware of the practical considerations that may arise as we implement the provisions of the Act with respect to foreign air carriers. For these reasons, the FAA is issuing this ANPRM, rather than a notice of proposed rulemaking, to seek the public's views on a variety of issues and responses to questions that may arise in addressing drug and alcohol testing by foreign air carriers. The Act similarly amended the statutes applicable to the Federal Railroad Administration (FRA) and the Federal Highway Administration (FHWA). These amendments, and the possible implications for the rail and commercial

motor vehicle industries, are addressed in ANPRMs specific to each industry published elsewhere in today's *Federal Register*. It is the intent of the Department to foster consistency to the extent possible in prescribing regulations implementing these similar statutory provisions.

In a provision specific to the FAA, the Act directed the Secretaries of State and Transportation to call on the member countries of the ICAO to strengthen and enforce existing standards to prohibit the use, in violation of law or Federal regulation, of alcohol or a controlled substance by crew members in international civil aviation. *Id.* On September 30, 1992, a resolution offered by the United States and co-sponsored by a number of other countries was introduced at the 29th General Assembly of ICAO in furtherance of this legislative directive (ICAO Document A29-WP/67; EX/17; 3/9/92). The resolution was approved by the Assembly and states that the Assembly:

1. Declares its strong support for making and maintaining civil aviation workplaces free of substance abuse and encourages cooperative efforts throughout the international civil aviation community to educate employees on the dangers of substance abuse, and to take steps, when deemed necessary, to detect and deter such use, and through such efforts, to ensure that substance abuse never becomes prevalent or tolerated within civil aviation;

2. Urges the Council to accord a high degree of priority * * * to expediting the development and publication of guidance material containing measures which may be implemented by Contracting States * * *;

3. Requests the Council to continue its effort to monitor:

(a) the existence and growth of the threat to the safety of international civil aviation posed by substance abuse; and

(b) efforts by Contracting States to implement preventive measures; and

4. Requests the Council to present a report on the implementation of this Resolution to the next ordinary session of the Assembly.

The willingness of the member States of ICAO to adopt this resolution indicates the degree to which substance abuse is recognized as a threat to international civil aviation safety. Although the methods chosen to address substance abuse problems will inevitably vary by State, the United States has at present identified substance abuse testing as a useful tool for detecting and deterring use of illegal drugs and misuse of alcohol.

General Problems and Issues

The following general problems and issues have been identified in assessing the implications of the Act's testing provisions. In responding to the questions and requests for comment

below, we ask that commenters distinguish responses relating to alcohol testing from those relating to drug testing, where the same response is not appropriate for both.

1. International Agreements and Foreign Laws

We have set forth above the FAA's interpretation of the international law pertaining to the imposition of substance abuse testing requirements on foreign air carriers under U.S. regulations. We are aware, however, that commenters may have different perspectives. We seek further information on any bilateral or multilateral obligations of the U.S., or principles of customary international law, that may affect our implementation of the Act. If there are any international agreements under development that would affect drug and alcohol testing of foreign air carriers, we also seek information on them. In commenting on international obligations of the U.S., we request that commenters focus on any provisions that affect the ability of the United States to require testing of employees conducting operations in the U.S., with the testing to take place in the United States.

In addition to international obligations, we seek comment on any laws or regulations of foreign countries that we should take into account in implementing the Act. We would like to obtain information on any laws or rules, with English-language translations, of specific foreign countries whose foreign air carriers conduct operations within the territory of the U.S. that we should consider.

2. Pre-employment and Follow-Up Testing

Often, employees of foreign air carriers are recruited and hired in the foreign country involved. For example, a Canadian employer may hire Canadian nationals in Canada, some of whom will subsequently conduct operations in the United States. The employer may not know, at the time of hire, which of its employees will perform safety-sensitive functions within the territory of the United States.

In such a situation, should the employer be required to conduct any pre-employment testing? If so, how, when, and where would the foreign air carrier conduct pre-employment testing of the employees who were to perform safety-sensitive functions in the United States? Should all pre-employment testing be conducted in the U.S., or should any proposed rules permit the employer to conduct tests in its own country?

If an employee tests positive on any type of alcohol or drug test, the FAA's existing and proposed rules generally require a return to duty test and follow-up tests, over a period of time. For an employee based outside of the territory of the United States who comes into the U.S. occasionally, questions similar to those mentioned above for pre-employment testing may arise. If the foreign air carrier does not conduct the tests in its own country, should we require the foreign air carrier to arrange for the required tests to take place in the United States?

3. Random Testing

Under the FAA's current anti-drug rule, to meet random testing rate requirements, employers have to conduct a certain number of tests per year (e.g., under a 50 percent random testing rate, a number of tests each year equivalent to half the number of the employees in the random pool). Should all of a foreign air carrier's covered employees who perform safety-sensitive functions within the territory of the U.S. at any time have to be part of a random testing pool? Could a true random testing program be developed that would provide for testing only within the territory of the United States? How would foreign air carriers arrange for the unannounced, random testing of their employees only in U.S. territory?

Are there circumstances in which foreign air carriers should not be subject to a random testing requirement at all?

4. Requirement for All Types of Tests

The Act specifically requires four types of substance abuse testing by covered employers: Pre-employment, random, reasonable suspicion, and post-accident. Periodic testing associated with an airman medical examination is discretionary on the part of the Administrator. Should the FAA refrain from requiring foreign air carriers to conduct certain kinds of tests? The FAA anticipates little problem with requiring a post-accident or reasonable suspicion test in the U.S., following an accident or basis for reasonable suspicion that occurred in this country. At the 29th General Assembly of ICAO, the only organization to oppose the U.S.-sponsored substance abuse resolution—the International Federation of Air Line Pilots' Associations—recognized the usefulness of both types of tests.

However, as discussed above, there may be problems with requiring foreign air carriers to conduct other forms of testing (e.g., random). Should the FAA exclude foreign air carriers from some or all types of alcohol or drug testing? Why or why not? Should the legal authority

of the foreign air carrier to conduct a certain kind of testing in its own country be considered in deciding whether to exclude foreign air carriers from a certain country from a requirement to conduct testing within the United States? If some exclusions are desirable, how could such exclusions be reconciled with the testing requirements of the Act? Should the FAA consider requiring different types of tests depending on where the foreign air carrier employees were based (e.g., impose all types of tests on U.S.-based employees, but only reasonable suspicion and post-accident on employees based outside the U.S. when they are performing safety-sensitive functions within the territory of the U.S.)?

5. Other Compliance Activities

The FAA's current anti-drug rule and proposed alcohol misuse rule have a variety of other program requirements in addition to testing. These requirements pertain to employee assistance and training programs, substance abuse professionals, record retention, data reporting, plan submission, and others. Some of these activities or functions could be accomplished most conveniently in the foreign air carrier's country. Should some or all of the foreign air carrier's program activities be required or permitted to take place outside the territory of the United States?

How would the FAA monitor and enforce compliance with anti-drug or alcohol program activities that take place outside the United States? What problems are possible in gaining access by FAA personnel to information about the foreign air carriers' implementation of program and testing requirements?

6. Testing Procedures

Under the FAA's anti-drug rule, all testing must be conducted in accordance with the procedures established by the Office of the Secretary of Transportation (OST) in 49 CFR part 40. The proposed alcohol misuse rule would include a similar requirement to conduct alcohol testing in accordance with the procedures proposed by OST. Ensuring compliance with these procedures could raise a number of problems if any testing or collection is performed outside the territory of the United States. Should there be a method of accepting evidence of compliance with a foreign country's testing procedures in lieu of some or all of the 49 CFR part 40 procedures, if testing is permitted to be conducted outside of U.S. territory?

All urine specimens collected under the FAA's anti-drug rule must be analyzed at a laboratory certified by the National Institute on Drug Abuse (NIDA), all of which are in the United States. Unless this requirement is changed, specimens collected outside the U.S. for drug testing under the FAA's rule would have to be sent to these laboratories for analysis. This poses some obvious practical problems (e.g., timeliness of transmission of specimens and associated paperwork, possible difficulties with U.S. Customs). Are there other such problems? We seek comment on how the practical problems could be solved. If specimen collection for drug testing or alcohol testing is permitted to be conducted outside the U.S., how could the possible language or training problems be overcome (e.g., translations of DOT requirements or forms)?

In FAA-mandated drug testing, there is a requirement for medical review officers to verify positive tests and perform other functions. Should MROs (who, under current rules, must be physicians licensed in the U.S.) have to perform these functions, or should physicians licensed in the foreign countries involved be able to serve as MROs? Could the requirements for MROs pose particular problems in countries with scarce medical resources? The same questions can be asked for substance abuse professionals who would evaluate people who test positive for drugs or who misuse alcohol. If personnel licensed in the U.S. were required for this function, would this create difficult logistical problems for the program?

As proposed, alcohol testing would have to be conducted using evidential breath testing devices (EBTs) on the National Highway Transportation Safety Administration's Conforming Products List. Would there be problems in obtaining or using such EBTs in other countries, if testing is permitted to be conducted outside the territory of the United States?

The FAA seeks comment on any other problems related to the testing procedures that may occur in the context of testing by foreign air carriers. We are aware, for example, that there may be cultural impediments in some countries to the provision of urine for testing. Other countries may regulate forensic testing in a way that could affect the ability of foreign air carriers to comply with the provisions of 49 CFR part 40.

7. Required Consequences

Under the FAA's anti-drug rule the consequence of refusing to submit to a

drug test or failing a drug test is removal from a safety-sensitive position, until the employee follows the rule's procedures for returning to the performance of safety-sensitive duties. The alcohol misuse NPRM proposes similar consequences. However, the application of the anti-drug and alcohol misuse rules to foreign air carriers would be intended only to affect operations within the United States. Therefore, the FAA would not propose to prohibit the performance of safety-sensitive functions outside the territory of the U.S. by a foreign air carrier employee who, for example, failed a drug test. Such an employee would, however, be prohibited from conducting any safety-sensitive functions in the U.S. until the employee met the FAA's return to duty requirements. How would foreign air carriers ensure that an employee who failed or refused a drug or alcohol test or engaged in other alcohol misuse did not engage in operations in the U.S., until return to duty requirements had been met? How would the FAA monitor compliance with this requirement?

8. Costs

We are specifically seeking information from foreign air carriers on the number of employees who would be affected by a requirement to test persons performing safety-sensitive functions within the territory of the U.S. for foreign air carriers. Do commenters anticipate that foreign air carriers' positive test rates for the employees who would be subject to any proposed rules (which can affect costs significantly) would be higher, lower, or about the same as the positive test rates of comparable U.S. employers? What would be the costs of the anti-drug and alcohol misuse program activities that could occur outside the U.S. that the FAA should consider in estimating the costs of the rule? Are there any costs that would be unique to such program activities? Are there any positive or negative trade or competitive effects of testing (or not testing) employees of foreign air carriers, for either U.S. or foreign companies?

Regulatory Process Matters

Economic Impact

The FAA is unable to determine at this point what the likely costs of implementing the Act with respect to foreign air carriers might be, nor the annual effect on the economy. Following a review of the comments submitted to this ANPRM, the FAA will determine what regulatory requirements will be proposed. At that time the FAA

will review the potential costs and benefits, as required by Executive Order 12291. As discussed above, we are seeking relevant cost data to facilitate the FAA's determinations.

Significance

This anticipated rulemaking is not "major" as defined in Executive Order 12291. It does involve issues of substantial interest to the public, however, and the FAA has therefore determined that the ANPRM is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

Other Regulatory Matters

At this preliminary stage, it is not yet possible to determine whether there will be a significant economic impact on a number of small entities, what the paperwork burden might be, or whether there will be any federalism implications. Each of these regulatory matters will be addressed fully at the time of publication of any notice of proposed rulemaking on this subject.

List of Subjects

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

14 CFR Part 129

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Alcohol, Alcoholism, Aviation safety, Drug abuse, Drugs, Foreign air carriers, Narcotics, Pilots, Safety, Transportation.

Authority: 49 U.S.C. 1346, 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1485, 1502, 1511, and 1522 (revised, Pub. L. 102-143, October 28, 1991); 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

Issued in Washington, DC, on December 2, 1992.

Andrew H. Card, Jr.,
Secretary of Transportation.

Thomas C. Richards,
Administrator.

[FR Doc. 92-29676 Filed 12-10-92; 10:00 am]

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14 CFR Part 121

[Docket No. 25148; Notice No. 92-19]

RIN 2120-AC33

Anti-Drug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On November 21, 1988, the Federal Aviation Administration (FAA) published a final rule requiring specified aviation employers to implement anti-drug programs for personnel performing sensitive safety- and security-related functions. That final rule includes recordkeeping and reporting requirements. In response to a Department of Transportation (DOT) Notice of Proposed Rulemaking (NPRM), published elsewhere in today's *Federal Register*, that would establish a standard Management Information System for the Department's drug testing programs, this NPRM proposes modifications to the FAA's record-keeping and reporting requirements. The amendments proposed here would conform the FAA's requirements to those in the DOT NPRM and provide the FAA with needed additional data for use in monitoring the anti-drug program.

DATES: Send or deliver comments by April 14, 1993.

ADDRESSES: Send or deliver comments on this notice, in triplicate, to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rules Docket (AGC-10), room 915G, Docket No. 25148, 800 Independence Avenue, SW., Washington, DC 20591. Persons wishing the FAA to acknowledge receipt of their comments should submit with those comments a pre-addressed, stamped postcard on which the following statement is made: "Comments to Docket No. 25148." The postcard will be dated and time stamped and returned to the person submitting the comment. Comments may be examined in the Rules Docket between 8:30 a.m. and 5 p.m. on weekdays, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Carol Daugherty, Office of Aviation Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 Seventh Street, SW., Washington, DC 20590; telephone: (202) 366-6710.

SUPPLEMENTARY INFORMATION:

General

Interested persons are invited to participate in the development of the proposed rule by submitting such written information, views, or arguments as they may desire. Comments relating to the environmental, energy, federalism, or economic impact that might result from adopting the proposals in this notice are invited. Substantive comments should be accompanied by cost estimates. Comments should identify the regulatory docket or notice number and should be submitted in triplicate to the Rules Docket address specified above. All comments received on or before the closing date for comments specified will be considered by the Administrator before taking action on this proposed rulemaking. Comments filed late will be considered to the extent practicable. The proposals contained in this notice may be changed in light of comments received. All comments received will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM

Any person may obtain a copy of this NPRM by submitting a request to the Federal Aviation Administration, Office of Public Affairs, Attn: Public Inquiry Center (APA-230), 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267-3484. Requests must include the notice number identified in this NPRM. Persons interested in being placed on a mailing list for future rulemaking actions should request a copy of Advisory Circular 11-2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedures.

Background

Definitions

The following definitions apply to terms used throughout this notice of proposed rulemaking (NPRM):

FAA's current rule (or the *FAA final rule*) is the FAA's anti-drug rule, as amended, now in effect. This rule, entitled "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities," was published in 53 FR 47024 (November 21, 1988), and amended 14 CFR parts 61, 63, 65, 121 and 135.

Employee category means a category of employees who must be subject to drug testing under the final rule (14 CFR

part 121, appendix I, section III). The employee categories in the final rule (and this NPRM) are employees who perform the following functions: Flight crewmembers; flight attendants; flight or ground instructors; flight testing personnel; aircraft dispatchers; maintenance or preventive maintenance personnel; security or screening personnel; and air traffic control personnel.

Test category or type of test are synonymous and refer to the types of drug testing required by the FAA final rule: pre-employment, periodic, random, post-accident, reasonable cause, and return-to-duty. For further information regarding the types of tests, refer to 14 CFR part 121, appendix I, section V.

The Department Of Transportation NPRM

This NPRM responds to a Department of Transportation (DOT) NPRM which proposes that employers in all segments of the transportation industry maintain and submit standardized drug program information as specified in the rules of the appropriate DOT operating administration (OA). Information compiled by the FAA would be incorporated into a comprehensive, DOT-wide anti-drug program Management Information System (MIS). The proposed changes to the FAA's current reporting requirements would support the DOT's goal of establishing a systematic, standardized program to collect, analyze, and interpret anti-drug program information. The data provided through the MIS is intended to be the basis for monitoring implementation of and compliance with the anti-drug rule, and for evaluating the effectiveness of the OAs' anti-drug programs as well as the overall effectiveness of the DOT's program.

Today's *Federal Register* also contains related NPRMs issued pursuant to DOT's NPRM by each of the other DOT operating administrations that have drug testing rules [Federal Railroad Administration (FRA), United States Coast Guard (USCG), Research and Special Programs Administration (RSPA), Federal Highway Administration (FHWA)], as well as the DOT NPRM.

The FAA NPRM (Anti-Drug Management Information System)

The FAA final rule requires aviation employers to submit drug testing reports as specified in section X of appendix I to 14 CFR part 121. In accordance with the DOT's NPRM, the FAA proposes to modify the reporting requirements for aviation employers in this NPRM. These

employers receive information from forensic laboratories, medical review officers, and specimen collection agents/facilities and therefore can provide the necessary cumulative data for the DOT's MIS program.

Issues Relating to Record Keeping and Reporting Procedures

In the following sections, the FAA has compared the record keeping and reporting procedures of the final rule, the DOT NPRM, and the FAA's proposals in this NPRM.

1. Reporting by a Representative Sample of Employers. The FAA final rule requires all affected aviation employers to submit semiannual and annual reports. Under the DOT NPRM, although each employer or employer's representative must maintain the data required by each OA's rule, the OAs could select a representative sample of employers who must submit reports to the OA. The FAA does not propose to adopt a representative sample reporting technique at this time. Confirmation of actual drug testing levels and other program elements through official reports from the aviation employer is an important aspect of compliance monitoring. Therefore, the FAA proposes to continue to require submission of reports from all affected aviation employers, unless an employer is otherwise expressly authorized by the FAA not to submit a report.

2. Reporting by Employee Category. The FAA final rule requires aviation employers to conduct drug testing and report to the FAA the results regarding specific employee categories or positions tested. The DOT NPRM proposes to permit each OA to require that drug testing information be reported either by employee categories or by other categories established for reporting purposes. The FAA NPRM proposes to continue to require reporting by employee categories, as established in the final rule. The possible addition or deletion of covered employee positions or categories would be deferred.

3. Reporting by Consortia. The FAA final rule requires all covered employers, even those that belong to a consortium, to submit required reports directly to the FAA. Under the DOT NPRM, the FAA could permit consortia to submit reports for their member companies directly to the FAA. The FAA proposes to adopt this procedure; however, even if a consortium prepares and submits a report for an employer, the employer would remain responsible for the accuracy and timeliness of the submission.

4. *Employers Affected by More than One OA.* An aviation employer subject to the FAA anti-drug rule whose employees are also subject to the anti-drug rule of another OA must submit data to each regulating OA for those employees covered by that OA rule. This could occur in a number of ways, for example:

a. The employer may have one group of employees who only perform functions covered by the FAA and other employees who only perform functions covered by another OA; or

b. The employer may have individual employees who perform functions covered by two or more OAs.

In the first situation, the groups of employees are independent and distinct. The employer is subject to the requirements of separate OAs, but the individual employee is subject to the requirements of only one OA. Under the current rule, the employer must implement an FAA-approved anti-drug program for the employees performing FAA covered functions. A separate anti-drug program covers those employees who are subject to the requirements of another OA rule. With respect to reporting to the FAA, employers may not include information about employees who do not perform a covered aviation function. The reporting of information pertaining to employees covered by the FAA's rule would not be affected by the reporting requirements of this NPRM. Reports pertaining to aviation employees are directed to the FAA; reports pertaining to employees affected by another OA are directed to that OA.

In the second situation, the individual employee is subject to the requirements of different OAs during the performance of duty. The current rule requires that employees who perform functions covered by the FAA rule be subject to an FAA-approved anti-drug program, regardless of whether the affected employees might be subject to the requirements of another OA's rule. This NPRM proposes to make the following change: for employees who perform functions covered by more than one OA, employers would identify the covered position under which the employee would be categorized, and to which OA the results would be reported. The identification would be accomplished on the new FAA annual reporting form.

Employers would continue to report information pertaining to drug tests conducted under the auspices of the FAA anti-drug rule only to the FAA. The employer would have to determine whether the test is conducted pursuant to FAA requirements or the requirements of another OA. Based on

that determination, the report would be directed to the appropriate OA.

For employees subject to the requirements of more than one OA, employers would notify employees that a single drug test (for example, a pre-employment test) may be administered to satisfy the requirements of more than one OA.

5. *Alternative Reporting Methods.* The FAA final rule requires that all drug tests conducted under the FAA anti-drug program be included in the semiannual and annual reports. The DOT NPRM proposes to allow an OA to elect to acquire any of the MIS information elements through alternative methodology (for example, through separately-required post-accident reports). The FAA does not propose to acquire information through alternative means at this time. Although the FAA reporting system is still being developed, it has proven to be both practical and efficient. The FAA seeks to avoid the significant possibility that error may be introduced through the use of alternative reporting methods.

6. *Annual Reporting.* The FAA final rule requires aviation employers to submit semiannual and annual reports. The DOT NPRM proposes that program information be submitted on an annual basis, or more frequently if required by the OA's rules. The FAA proposes to eliminate the semiannual reporting requirement and require aviation employers to submit an annual report only. The report would cover the calendar year January 1 through December 31 and would be submitted by February 15 following the reporting period.

7. *Transmission of Reports Electronically.* The DOT NPRM requests comments on the usefulness of transmitting reporting data electronically through the Anti-Drug Information Center (ADIC). The FAA is interested in employers' comments on the use of the ADIC for this purpose.

Proposed Recordkeeping and Reporting Requirements

The DOT NPRM requires each operating administration to submit consolidated industry data, which must include the data elements specified in the NPRM. Therefore, the FAA proposes to require that employers provide the following data to the FAA:

1. Number of covered employees by employee category. This information is necessary to assess the scope of the rule's application and provide a basis for determining the level of random testing being conducted.

2. Employees covered by more than one OA. The employer would identify,

and report upon the employees who were affected by the provisions of the FAA's and at least one other OA's anti-drug rule due to the multiple functions performed by the employee. Through employer disclosure of this information, the FAA and DOT would be able to ascertain the size of the dual covered population.

3. Number of specimens collected by type of test and employee category. This information would provide the scope of drug testing in the categories specified by the anti-drug rule and is necessary for reviewing the collection, testing, and review process.

4. Number of positive drug test results verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category. This information, along with the number of tests performed, would permit the calculation of positive rates necessary to determine the extent of drug use and the specific drugs detected in the various categories of employees. Further, analysis of this information over time would provide a measure of the effectiveness of the anti-drug rule in deterring drug abuse.

5. Number of negative tests verified by a MRO by type of test, and employee category. This data is needed to check compliance with the rules by category and to review the application of the components of the programs.

6. Number of persons denied a position as a covered employee based on verified positive tests. This information would provide an assessment of whether the testing program is being implemented as required, provide a measure of the impact of the FAA anti-drug rule on the aviation industry, and yield information on the prevalence of drug abuse in the applicant pool.

7. Number of employees with tests verified positive by a MRO, who were returned to duty in covered positions (currently in or having completed rehabilitation or otherwise qualified for duty during the reporting period). This information would show employer policies regarding rehabilitation of identified drug abusers.

8. Number of employees with tests verified positive by a MRO for more than one drug. This information would show the extent of multiple drug abuse in the aviation industry.

9. Number of covered employees who refused to submit to a drug test and the action taken in response to the refusal(s). This information would help determine appropriate certificate action on individuals who refuse to submit to testing.

10. Number of covered employees and supervisors who have received required training during the reporting period. This information would provide a cumulative count of covered employees and supervisory personnel who have received the required drug abuse education and training as of December 31st of each year.

The FAA has developed a standard form for use by employers to provide to the FAA the information required by this proposed regulation. The FAA standard form and a detailed set of instructions for correctly completing the form are attached to this NPRM. Although the proposed standard DOT format would make each OA form similar, there could be differences from one OA to the next. Therefore, aviation employers would use only the FAA standard form. As of the publication of the FAA final rule resulting from this NPRM with the attached FAA standard form, no other form would be accepted by the FAA unless expressly authorized by the FAA.

Regulatory Analyses and Notices

Executive Order 12291 and DOT Regulatory Policies and Procedures

This proposal is not "major" under Executive Order 12291. It is significant under the Department of Transportation's Regulatory Policy and Procedures.

Economic Evaluation

Executive Order 12291, dated February 17, 1981, directs Federal agencies to promulgate new regulations or modify existing regulations only if the potential benefits to society for the regulatory change outweigh the potential costs to society. In accordance with the requirements of Executive Order 12291, the FAA reviewed the costs and benefits of the final anti-drug rule issued on November 14, 1988. At that time, the FAA prepared a comprehensive Regulatory Evaluation of the final anti-drug rule. The FAA also summarized and analyzed the comments submitted by interested persons on the economic issues in the final rulemaking document published in the *Federal Register* on November 21, 1988.

The original analysis of the anti-drug rule considered the costs and benefits for all affected employers and concluded that the overall rule, which included much of the information required under this proposed change, had a positive cost-benefit ratio.

This proposed rulemaking would conform the FAA's anti-drug program reporting requirements to standardized

reporting requirements proposed for each of the other OA's by the DOT NPRM. The purpose is to provide DOT and the FAA with critical program information in order to make necessary procedure and program evaluations. These evaluations could lead to policy changes to make the rule more effective, which would in turn enhance public safety. The information would provide valuable detail to evaluate the cost/benefit effect of the anti-drug program.

This proposed action could result in a modest increase in the recordkeeping cost of the final rule because the aviation employer would be required to compile and submit information in greater detail than required previously. However the elimination of a reporting requirement (semiannual report) would result in a decreased cost to the employer. In addition, once the aviation employer becomes familiar with the reporting format, preparation of successive reports would become less time-consuming. Finally, the DOT has developed a format, and the FAA has developed a specific form, with instructions that can be used to reduce the costs of compliance. Therefore, the FAA has tentatively concluded any potential effect on costs would be minimal. However, comments addressing potential increased costs are invited from the industry. A revision of the comprehensive Regulatory Evaluation and the preparation of a separate economic evaluation for this amendment is not warranted.

Paperwork Reduction Act Approval

The recordkeeping and reporting requirements of the final anti-drug rule, issued on November 14, 1988, were previously submitted to the Office of Management and Budget (OMB) for approval in accordance with the Paperwork Reduction Act of 1980, and assigned OMB control number 2120-0535.

The paperwork clearance package, 2120-0535, will be amended to reflect the burden associated with this NPRM, and submitted to OMB for approval. Following is a synopsis of the paperwork/recordkeeping burden associated with this NPRM:

DOT No.:

OMB No.: 2120-0535.

Title: Anti-Drug Program for Personnel Engaged in Specified Aviation Activities.

Need For Information: The information is needed to respond to a DOT NPRM which proposes that employers in all segments of the transportation industry maintain and submit standardized anti-drug program information.

Proposed Use of Information: The information submitted is intended to be the basis for monitoring aviation industry implementation of and compliance with the anti-drug rule, and for evaluating the effectiveness of the FAA anti-drug program.

Frequency: Annually.

Burden Estimate: 32,742 hours.

Respondents: Specified aviation employers.

Average Burden Hours Per Respondent: 2.5 hours.

Trade Impact Statement

This proposed rulemaking would affect only domestic aviation operations performed under the provisions of the Federal Aviation Regulations (FAR); therefore, it would have no impact on trade opportunities for United States firms doing business overseas or foreign firms doing business in the United States.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small business entities are not unnecessarily or disproportionately burdened by Government regulations. The FAA certifies that this proposal would not have a significant economic impact, positive or negative, on a substantial number of small entities.

Federalism Implications

The proposed rulemaking action would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the FAA has determined that this notice does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Conclusion

In this action the FAA proposes to amend the requirements imposed upon aviation employers for the maintenance and submission of specific anti-drug program information. It is undertaken in response to a DOT NPRM that would establish a standard Management Information System (MIS) for the Department's drug-testing programs. This MIS will provide the basis for monitoring anti-drug rule implementation and compliance, and for evaluating the effectiveness of the FAA's and DOT's anti-drug programs. Pursuant to the terms of the Regulatory Flexibility Act of 1980, the FAA certifies that the provisions contained in this proposal would not have a

significant economic impact, positive or negative, on a substantial number of small entities. In addition, the proposal would not result in an annual effect on the economy of \$100 million or more and would not result in a significant increase in consumer prices; thus, the proposal is not a major one pursuant to the criteria of Executive Order 12291. However, because the proposal involves issues of substantial interest to the public, the FAA has determined that the proposal is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

List of Subjects

14 CFR Part 121

Air carriers, Air transportation, Aircraft, Aircraft pilots, Airmen, Airplanes, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

In consideration of the foregoing, the Federal Aviation Administration proposes to amend title 14, Code of Federal Regulations, part 121, appendix I, as follows:

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

1. The authority citation for part 121 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1472, 1485, and 1502; 49 U.S.C. 106(g) (revised, Pub. L. 97-449, January 12, 1983).

2. Section X of appendix I to part 121 is revised to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

X. Reporting of anti-drug program results.

A. Each employer shall maintain records of the anti-drug program information identified in this section.

B. Each employer or consortium shall submit annual reports of anti-drug program results on the FAA standard form to the FAA by February 15 for the prior calendar year January 1 through December 31.

C. An FAA-approved consortium may submit reports on behalf of individual aviation employers for purposes of compliance with this reporting requirement. However, the aviation employer shall remain responsible for ensuring the accuracy and timeliness of each report submitted on its behalf by a consortium.

D. Each report shall be submitted on the form specified by the FAA. No other DOT Operating Administration form, or the DOT form, is acceptable for submission to the FAA.

E. Each report shall be signed by the employer's or consortium's anti-drug program manager or designated representative.

F. Each report shall include each of the following informational elements:

1. Number of covered employees by employee category.

2. Number of covered employees affected by the anti-drug rule of another OA identified and reported by number and employee category.

3. Number of specimens collected by type of test and employee category.

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

5. Number of negative tests verified by a MRO by type of test and employee category.

6. Number of persons denied a position as a covered employee based on a verified positive drug test verified by a MRO.

7. Number of employees with a test verified positive by a MRO who were returned to duty in covered positions (currently in or having completed rehabilitation or otherwise qualified to return to duty during the reporting period).

8. Number of employees with tests verified positive for multiple drugs by a MRO.

9. Number of covered employees who refused to submit to a drug test and the action taken in response to the refusal(s).

10. Number of covered employees and supervisory personnel who have received required initial training. Number of supervisors who have received required recurrent or refresher training.

3. Appendix K to part 121 is added to read as follows:

Note: This appendix will not appear in the Code of Federal Regulations.

Appendix K to Part 121—Drug and Alcohol Testing Management Information System Data Collection Form

BILLING CODE 4910-17-00

GENERAL INSTRUCTIONS

This reporting form includes three parts. Collectively, these parts address the data elements required in the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) drug and alcohol testing regulations. Each part of the form is preceded by instructions which outline and explain the information requested and indicate the probable sources for this information. The three parts of the form are:

<u>Section</u>	<u>Instructions Pages</u>	<u>Reporting Form Pages</u>
I. ORGANIZATIONAL INFORMATION	i-ii	1-2
II. DRUG TESTING INFORMATION	iii-vii	3-11
III. ALCOHOL TESTING INFORMATION	viii-xii	12-19

I. ORGANIZATIONAL INFORMATION**INSTRUCTIONS**

This part of the reporting form includes two sections. These sections, the page number for the instructions, and the page location on the reporting form are:

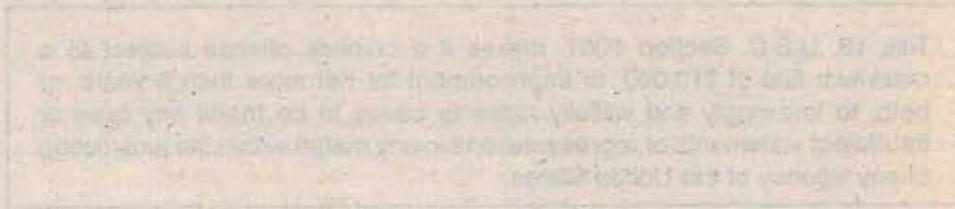
<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. EMPLOYER INFORMATION	i	1
B. COVERED EMPLOYEES	ii	2

Page 1 **EMPLOYER INFORMATION** (Section A) requires the company name for which the report is done and a current address. Below the company names, list any other names the company uses ("Doing Business As") and the company's FAA Anti-drug Plan Identification Number. Indicate which FAA Certificate(s) are held by the company. Below this, a signature and date are required certifying the correctness and completeness of this form, and a current telephone number (including the area code). Finally, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary.

Page 2

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under FAA/DOT regulations. For the FAA, the covered employees are "Flight Crew Members" which includes pilots, flight engineers, and navigators; "Flight Attendants", "Flight or Ground Instructors"; "Aircraft Dispatchers"; "Flight Testing Personnel"; "Maintenance or Preventive Maintenance Personnel"; "Security or Screener Personnel"; and "Air Traffic Control Personnel." The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the reported year. The **TOTAL** is a count of all covered employees for all categories combined, i.e. the sum of the columns.

Additional information must be completed if your company employs personnel who perform duties covered by the drug and alcohol rules of more than one DOT operating administration. **NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION**, requires that you identify the number of employees in each employee category under the appropriate additional operating administration(s).



For Office Use Only

FAA DRUG AND ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19__

A. AVIATION EMPLOYER INFORMATION

Company _____

Address _____

Other Names the Company Uses ("Doing Business As")

FAA Anti-drug Plan Identification Number: _____

FAA Certificate(s) held (check all that apply):
 121 145 135 Other (specify)

I, the undersigned, certify the attached Federal Aviation Administration Annual Anti-Drug Program Report, is to the best of my knowledge and belief, a true, correct, and complete form for the period stated.

Signature

Title

Date of Signature

Phone Number

Title 18, U.S.C. Section 1001, makes it a criminal offense subject to a maximum fine of \$10,000, or imprisonment for not more than 5 years, or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

Other aviation employers reported on this form (e.g., subsidiary companies, contractors, etc.). Attach additional sheets if necessary.

Company _____

Address _____

Phone _____ FAA Certificate (as applicable) _____

Company _____

Address _____

Phone _____ FAA Certificate (as applicable) _____

B. COVERED EMPLOYEES

COVERED EMPLOYEES						
EMPLOYEE CATEGORY	NUMBER OF COVERED EMPLOYEES	NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION				
		FHWA	FRA	FTA	RSPA	USCG
Flight Crew Members						
Flight Attendants						
Flight or Ground Instructors						
Aircraft Dispatchers						
Flight Testing Personnel						
Maintenance or Preventive Maintenance Personnel						
Security or Screener Personnel						
Air Traffic Control Personnel						
TOTAL						

Mail the completed form to: Drug Abatement Division (AAM-800)
 Federal Aviation Administration
 U.S. Department of Transportation
 400 7th Street, S.W., Room 2336
 Washington, D.C. 20590

II. DRUG TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the FAA and DOT Drug and Alcohol Testing Management Information System Data Collection Form. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages v-vi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. JOB APPLICANT TESTING INFORMATION	iv	4
B. EMPLOYEE TESTING	vi	5-9
C. OTHER TESTING/PROGRAM INFORMATION	vii	10
D. TRAINING/EDUCATION	vii	11

Sections A and B are used to summarize the drug testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment testing. The five tables in Section B are for entering drug testing data on periodic, random, post-accident, reasonable cause, and return to duty testing, respectively. Items necessary to complete these tables include:

- 1) the number of specimens collected in each employee category;
- 2) the number of specimens tested which were verified negative and verified positive for any drug(s); and
- 3) individual counts of those specimens which were verified positive for each of the five drugs.

Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the tables.

A sample table with detailed instructions is provided for Section A, **JOB APPLICANT TESTING INFORMATION**. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons testing positive is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 4

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page vi.

Three types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF SPECIMENS COLLECTED**," requires a count for all collected specimens by employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF SPECIMENS VERIFIED NEGATIVE**," requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO).

The third blank column with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS**," refers to the number of specimens provided by job applicants that were verified positive. "Verified positive" means the results were verified by your MRO.

The right hand portion of this table, with the heading "**NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG**," requires counts of positive tests for each of the five drugs for which tests were done, i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines. The number of specimens positive for each drug should be entered in the appropriate column for that drug type. Again, "verified positive" refers to test results verified by your MRO.

If an applicant tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results would be included once in each of the appropriate columns (marijuana and cocaine).

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page vi with example numbers.

Page

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a verified positive drug test**". This is simply a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the first two FAA categories "Flight Crew Members" and "Flight Attendants" to illustrate the procedures for completing the form.

A Urine specimens were collected for 157 job applicants for flight crew positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Flight Crew Members".

B The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for flight crew positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Flight Crew Members".

C The MRO for your company reported that 4 of those 157 specimens from applicants for flight crew positions were positive (i.e., a drug or drugs were detected). Enter this information in the third blank column of the table in the row marked "Flight Crew Members".

D With the 4 specimens that tested positive, the following drugs were detected:

<u>Specimen</u>	<u>Drugs</u>
#1	Marijuana
#2	Amphetamines
#3	Marijuana and Cocaine (Multi-drug specimen)
#4	Marijuana

Marijuana was detected in three (3) specimens, cocaine in one (1), and amphetamines in one (1). This information is entered in the columns on the right hand side of the table under each of these drugs. Since two different drugs were detected in specimen #3 (multi-drug), entries are made in both the marijuana and the cocaine columns for this specimen. Information on multi-drug specimens must also be entered in Section C, **OTHER TESTING/PROGRAM INFORMATION**, on page 10 of the reporting form.

Please note that the sample data collection form below also has information for flight attendant positions on line two of our data collection form. The same procedures outlined for flight crew positions should be followed for entering the data on flight attendant positions. With applicants for flight attendant positions, 107 specimens were collected resulting in 105 verified negatives and 2 verified positives -- 1 for marijuana and 1 for opiates. This information is entered in the row marked "Flight Attendants".

E The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for flight crew positions were collected and 107 for applicants for flight attendant positions. The total for that column would be 264 (i.e., 157+107). The same procedure should

be used for each column, i.e., add all the numbers in that column and place the answer in the last row.

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (TRC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members	157	153	4	3	1	0	0	1
Flight Attendants	107	105	2	1	0	0	1	0
TOTAL	264	258	6	4	1	0	1	1

A
B
C
D
E

Note that adding up the numbers for each type of drug in a row ("NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG") will not always match the number entered in the third column, "NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS". The total for the numbers on the right hand side of the table may differ from the number of specimens testing positive since some specimens may contain more than one drug.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B.

Pages 5-9 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) periodic, (2) random, (3) post-accident, (4) reasonable cause, and (5) return to duty testing. These tables are to be filled out like the sample table above. Again, these numbers do not include refusals for testing.

Page 9 Following these tables that summarize **EMPLOYEE TESTING**, you must provide counts for employees who have tested positive and are currently in, or have completed rehabilitation, and have returned to work in a covered position. Report this information only for employees who tested positive during this reporting period. This information should be available from the personnel office and/or drug program manager.

Page 10 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you complete a table dealing with specimens positive for more than one drug and a table dealing with employees who refused to submit to a drug test.

Page 10 **SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG** requires information on specimens that contained more than one drug. Indicate the **EMPLOYEE CATEGORY** and the **NUMBER OF VERIFIED POSITIVES**, then check the appropriate columns indicating the combination of drugs reported as positive. For example, if marijuana and cocaine were detected in 3 flight crew members specimens, then you would write "Flight Crew Members" as the employee category, "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 flight crew members specimens, then you would write "Flight Crew Members" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 10 **EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to a drug test required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal. An example of an action taken would be "removed from covered duties pending termination".

Page 11 **TRAINING/EDUCATION** (Section D) requires information on the number of covered employees and supervisory personnel who have received the required drug training during the current reporting period.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

- 1 All items refer to the **current** reporting period **only** (for example, January 1, 1993 - December 31, 1993).
- 2 This report is only for testing **REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
 - Results should be reported only for employees in **COVERED POSITIONS** as defined by FAA/DOT drug testing regulations.
 - The information requested should only include testing for marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines using the standard procedures required by DOT regulation 49 CFR Part 40.
- 3 Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this report.
- 4 Do not include the results of any quality control (QC) samples submitted to the testing laboratory in any of the tables.
- 5 Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

This part of the form requires information on VERIFIED POSITIVE and VERIFIED NEGATIVE drug tests. These are the results that are reported to you by your Medical Review Officer (MRO).

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

Number of persons denied a position as a covered employee following a verified positive drug test:

B. EMPLOYEE TESTING

PERIODIC TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

REASONABLE CAUSE TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING								
EMPLOYEE CATEGORY	NUMBER OF SPECIMENS COLLECTED	NUMBER OF SPECIMENS VERIFIED NEGATIVE	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS	NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG				
				Marijuana (THC)	Cocaine	Phencyclidine (PCP)	Opiates	Amphetamines
Flight Crew Members								
Flight Attendants								
Flight or Ground Instructors								
Aircraft Dispatchers								
Flight Testing Personnel								
Maintenance or Preventive Maintenance Personnel								
Security or Screener Personnel								
Air Traffic Control Personnel								
TOTAL								

Number of employees, currently in or having completed rehabilitation or otherwise qualified to return to duty, who have returned to work in a covered position during this reporting period:

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of covered employees who have received initial training on the consequences, manifestations, and behavioral cues of drug use as required by FAA drug testing regulations:

Number of supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FAA drug testing regulations:

Number of supervisory personnel who have received recurrent or refresher training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use:

III. ALCOHOL TESTING INFORMATION

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information for the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) Drug and Alcohol Testing Management Information System Data Collection Form. These instructions outline and explain the information requested and indicate probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ix-xi as an example to facilitate the process of completing the form correctly.

This part of the reporting form includes four sections. These sections address the data elements required in the regulations. These sections, the page number for the instructions, and the page location on the reporting form are:

<u>Section</u>	<u>Instructions Page</u>	<u>Reporting Form Page</u>
A. JOB APPLICANT TESTING INFORMATION	ix	13
B. EMPLOYEE TESTING	xi	14-18
C. OTHER TESTING/PROGRAM INFORMATION	xi	19
D. TRAINING/EDUCATION	xii	19

Sections A and B are used to summarize the alcohol testing results for covered employees. There are six tables to be completed (one in Section A and five in Section B). The first table (Section A) is where you enter the data on pre-employment/pre-duty testing. The five tables in Section B are for entering alcohol testing data for random, post-accident, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

- 1) the number of initial alcohol tests performed for each employee category;
- 2) the number of confirmatory alcohol tests performed for each employee category;
- 3) the number of confirmatory test results which were equal to or greater than 0.04; and
- 4) the number of confirmatory test results which were equal to or greater than 0.02, but less than 0.04.

A sample table with detailed instructions is provided for Section A, JOB APPLICANT TESTING INFORMATION. The format and explanations used for the sample table apply to all six of the tables in Sections A and B.

Information on actions taken with those persons whose alcohol test results were 0.04 or greater is required at the end of both Sections A and B. Specific instructions for providing this latter information are given after the instructions for completing the tables in Sections A and B.

Page 13

JOB APPLICANT TESTING INFORMATION (Section A) requires information for pre-employment/pre-duty testing. All numbers entered into this table should be separated into the category of employment for which the applicant was applying. A sample table with example numbers is presented on page x.

Four types of information are necessary to complete the left side of this table. The first blank column with the heading "**NUMBER OF INITIAL TESTS**" requires a count of all initial alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading "**NUMBER OF CONFIRMATORY TESTS**" requires a count of all confirmatory alcohol tests performed for each employee category.

The third blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04**" requires a count for each employee category.

The fourth blank column with the heading "**NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**" requires a count for each employee category.

Each column in the table should be added and the answer entered in the row marked "**TOTAL**".

A sample table is provided on page x with example numbers.

Page 13

Below the table for pre-employment testing information is a box with the heading "**Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater**". Enter the appropriate number in the box provided.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section A, **JOB APPLICANT TESTING INFORMATION**, which summarizes pre-employment/pre-duty testing results. The procedures detailed here also apply to the tables in Section B which require you to summarize testing results for employees. This example will use the categories "Flight Crew Members" and "Flight Attendants" to illustrate the procedures for completing the form.

A

Initial tests were performed on 157 job applicants for flight crew positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Flight Crew Members".

B

Confirmatory tests were necessary for 6 of the 157 applicants for flight crew positions. Enter this information in the second blank column of the table in the

row marked "Flight Crew Members". The confirmatory test results for these 6 applicants were the following:

Applicant	Confirmation Result
#1	0.06
#2	0.01
#3	0.11
#4	0.04
#5	0.03
#6	0.02

C

The confirmatory test results for 3 of the applicants for flight crew positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Flight Crew Members".

D

The confirmatory test results for 2 of the applicants for flight crew positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the fourth blank column of the table in the row marked "Flight Crew Members"

E

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for flight crew positions and 107 applicants for flight attendant positions were subjected to initial tests. The total for that column would be 264 (i.e., 157 + 107). The same procedure should be used for each column (i.e., add all the numbers in that column and place the answer in the last row).

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members	157	5	3	2
Flight Attendants	107	3	1	0
TOTAL	264	8	4	2

A
B
C
D
E

Please note that the sample data collection form also has information for flight attendants workers on line two. The same procedures outlined for flight crew members should be followed

for entering the data on flight attendant workers. With applicants for flight attendant positions, 107 initial tests were conducted resulting in 3 confirmatory tests. The confirmatory test result for 1 of the flight attendant applicants was equal to or greater than 0.04; no results were equal to or greater than 0.02, but less than 0.04. This information is entered in the row marked "Flight Attendants".

Note that adding up the numbers for confirmation results in columns three and four will not always match the number entered in the second column, "NUMBER OF CONFIRMATORY TESTS". These numbers may differ since some confirmatory test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the tables in Sections A and B

Pages 14-18 **EMPLOYEE TESTING** (Section B), as indicated, requires information for company employees in **covered positions** only. A separate table must be completed for each category of test. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These tables are to be filled out like the sample table above. Again, these numbers **do not include refusals for testing**.

Page 18 Following these tables that summarize **EMPLOYEE TESTING**, you must provide a count of the **"Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA/DOT regulations)".** Report this information only for employees who were tested during this reporting period. This information should be available from the personnel office and/or alcohol program manager.

Page 19 **OTHER TESTING/PROGRAM INFORMATION** (Section C) requires that you provide information on employees who tested positive for drugs and alcohol (at the same time), information on violations of other alcohol provisions (not necessarily resulting in positive alcohol tests), and information on employees who refused to submit to an alcohol test.

Page 19 **Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater,** requires that a count of all such employees be entered in the indicated box.

Page 19 **VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION,** requires information on the **NUMBER OF COVERED EMPLOYEES** committing such a violation, a description of the **VIOLATION** committed (e.g., pre-duty alcohol use, on duty alcohol use, on duty alcohol possession), and a description of the **ACTION TAKEN** in response to the violation.

Page 19 **EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST** requires information on the **NUMBER OF COVERED EMPLOYEES** who refused to submit to an alcohol test as required under this regulation, and a description of the **ACTION TAKEN** in response to the refusal

Page 19 **TRAINING/EDUCATION** (Section D) requires information on the number of supervisory personnel who have received the required alcohol training during the **current reporting period**.

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1993 - December 31, 1993).
2. This report is only for testing **REQUIRED BY THE FEDERAL AVIATION ADMINISTRATION (FAA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)**:
 - Results should be reported only for employees in **COVERED POSITIONS** as defined by FAA/DOT alcohol testing regulations.
 - The information requested should only include testing for alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in Section C ("OTHER TESTING/PROGRAM INFORMATION"). Do not include refusals for testing in other sections of this part of the report.
4. Complete all items; **DO NOT LEAVE ANY ITEM BLANK**. If the value for an item is zero (0), place a zero (0) on the form.

A. JOB APPLICANT TESTING INFORMATION

PRE-EMPLOYMENT/PRE-DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

Number of persons denied a position as a covered employee following a pre-employment/pre-duty alcohol test indicating an alcohol concentration of 0.04 or greater:

B. EMPLOYEE TESTING

RANDOM TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

POST-ACCIDENT TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

REASONABLE SUSPICION TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

B. EMPLOYEE TESTING (continued)

RETURN TO DUTY TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

Number of employees with a confirmatory alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations):

B. EMPLOYEE TESTING (continued)

FOLLOW-UP TESTING				
EMPLOYEE CATEGORY	NUMBER OF INITIAL TESTS	NUMBER OF CONFIRMATORY TESTS	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.04	NUMBER OF CONFIRMATORY TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04
Flight Crew Members				
Flight Attendants				
Flight or Ground Instructors				
Aircraft Dispatchers				
Flight Testing Personnel				
Maintenance or Preventive Maintenance Personnel				
Security or Screener Personnel				
Air Traffic Control Personnel				
TOTAL				

C. OTHER TESTING/ PROGRAM INFORMATION

Number of employees administered drug and alcohol tests at the same time resulting in a verified positive drug test and an alcohol test indicating an alcohol concentration of 0.04 or greater:

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION		
NUMBER OF COVERED EMPLOYEES	VIOLATION	ACTION TAKEN

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST	
NUMBER OF COVERED EMPLOYEES	ACTION TAKEN

D. TRAINING/EDUCATION

Training During Current Reporting Period

Number of supervisors who have received the required training in determining the existence of reasonable suspicion of alcohol misuse:

Issued in Washington, DC, on December 2,
1992.

Andrew H. Card, Jr.,
Secretary of Transportation.

Thomas C. Richards,
Administrator.

[FR Doc. 92-29677 Filed 12-10-92; 10:00
am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

Federal Highway Administration

49 CFR Parts 382 and 391

Federal Railroad Administration

49 CFR Part 219

Federal Transit Administration

49 CFR Part 653

Research and Special Programs Administration

49 CFR Part 199

Coast Guard

46 CFR Part 16

[OST Docket No. 48498, Notice 92-29]

RIN 2105-AB94

Random Drug Testing Program

AGENCY: Office of the Secretary, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, Research and Special Programs Administration, and the United States Coast Guard, DOT.

ACTION: Advance notice of proposed rulemaking (ANPRM).

SUMMARY: In response to public comments received during the President's regulatory moratorium, petitions submitted by industry, and on their own initiative, the five operating administrations that currently require random drug testing—the Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Research and Special Programs Administration (RSPA) and the United States Coast Guard (USCG) (collectively referred to as "DOT" or "the agencies")—are considering modifying the random drug testing program. [The Federal Transit Administration (FTA)—also a part of DOT—published elsewhere in today's *Federal Register* a drug testing NPRM that proposes to adopt, among other things, the 50 percent random testing rate that is currently used by the other operating administrations. This ANPRM is not intended to affect the random drug testing program to be established by that rulemaking. Rather, this ANPRM will review the general issue. FTA joins the other operating administrations in

issuing this random drug testing program notice requesting public comment and data concerning whether there are less costly alternatives to the current random testing program that can maintain an adequate level of deterrence and detection of illegal drug use.

DATES: Comments are due February 16, 1993. A public meeting on technical and scientific issues will be held on February 1, 1992, from 8:30 a.m. to 5 p.m. and on February 2, 1992, from 8:30 a.m. to 12:30 p.m. Seating is limited to 150, which will be offered on a first-come, first-served basis.

ADDRESSES: Comments should be sent to Docket 48498, Office of Documentary Services (C-55), U.S. Department of Transportation, room 4107, 400 Seventh Street, SW., Washington, DC 20590-0001. To provide a copy for each operating administration's docket and to facilitate the Department's review, we request that an original and seven additional copies of each comment be submitted.

The technical meeting will be held at the Holiday Inn—Capitol, 550 C St., SW., Washington, DC 20024. (202) 479-4000. The hotel is offering participants a special rate, if they mention the meeting when they reserve their room.

FOR FURTHER INFORMATION CONTACT: Dr. Donna Smith, Acting Director, Office of Drug Enforcement and Program Compliance, (202) 366-3784.

SUPPLEMENTARY INFORMATION: The Department of Transportation seeks comment on the effectiveness of the current random drug testing program for transportation industry employees. In the April 1992 "Report to the President: Review of Regulations," DOT Secretary Card committed to review this issue and determine whether adequate deterrence and detection of illegal drug use could be achieved at a lower rate of random testing and at a lower cost. In addition, several petitions have been filed with various operating administrations seeking to simply lower the rate of random drug testing.

The purpose of this notice is to seek data and ideas on additional strategies that would ensure the continued effectiveness of the Department's anti-drug program while reducing its cost. The Department is reluctant to propose a specific change in random testing requirements at this time because of the lack of data for transportation industry workers and because most of the operating administration programs have only been in place for a short time. Other than the experience of the military services that was relied on when the operating administrations originally set their random testing rates

at 50 percent, we are unaware of any long-term reliable data indicating the relative deterrent effectiveness of different random testing rates. However, as described later in this document, DOT is gathering data that may help on this issue. Although the anti-drug regulations have been promulgated by various DOT agencies, we are issuing a Departmental ANPRM because of the commonality of the issues. We invite comment and supporting data on whether different programs for different industries would be appropriate. We have numbered specific questions within brackets throughout the ANPRM, and would appreciate it if commenters would reference those numbers in their responses.

Regulatory Background

DOT agencies have been involved in drug testing since the mid-1980s. The USCG has tested its uniformed personnel for drug use since 1982. DOT began testing certain of its civilian employees in September 1987.

The Department's civilian employee program is tightly controlled, centrally administered by headquarters staff, and monitored daily. Employee awareness and the visibility of the program are maintained through training programs conducted by regional drug program coordinators. Specimens are collected by a single contractor service, which operates under a uniform standard of procedures that provides for consistent and reliable collections.

The random testing program was phased-in and, by September 1988, DOT was testing a population of nearly 33,000 employees (primarily air traffic controllers, safety inspectors and individuals with high security clearances) at a testing rate of at least 50 percent each year for illegal drug use. The annual rate of positive random tests has declined from about 0.83 percent to as low as 0.21 percent over the last five years. Over the past three years, the rate consistently stayed well below 0.5 percent. The reports indicated that in this homogeneous, skilled, and stable population, there was no distinction in the percentage of positive testing results based on geography, age, etc. As a result of the apparent deterrent effect of the testing program as demonstrated by carefully-maintained recordkeeping, long experience, and the decreasing number of positive results, the Department lowered its federal employee random testing rate this year. Effective March 1, 1992, the Department has been conducting random testing at a rate of at least 25 percent annually. The positive rate continues to remain at a similarly low level. The Department

will continue to evaluate the data and may adjust the random testing rate, if necessary, back to 50 percent. The Department estimates that the reduction in the testing rate will save approximately 20 percent of the annual collection and laboratory testing costs.

The Federal Railroad Administration (FRA) has the longest experience with drug testing programs applicable to transportation industry workers. In 1986, railroads began pre-employment, post-accident, and reasonable cause/suspicion testing, as required by the FRA.

In 1988, the Department of Transportation issued six final rules mandating anti-drug programs for certain transportation workers in the aviation, interstate motor carrier, pipeline, maritime, rail and transit industries. The rules included requirements for education, training, testing and sanctions. The testing component of each program included pre-employment, post-accident, reasonable cause, periodic (for those subject to periodic medical examinations) and random drug testing for approximately four million workers in safety-sensitive positions. Based on extensive experience and success in testing military and other populations, the Department imposed widescale random testing requirements because unannounced random drug testing is generally regarded as the best method of deterring illegal drug use.

The operating administrations' rules imposed a random testing rate of at least 50 percent per year. This means that if an employer has 400 covered employees, the employer must conduct at least 200 tests per year. Selection for testing must be random, with every employee in the random pool having an equal chance of being chosen each time a selection is made. Because of the randomness, some employees could be tested more than once in a given year, while others might not be tested for years. However, every covered employee would know that he or she had one chance in two of being tested each year. Employers were allowed to phase-in random testing at a rate of 25 percent for the first year, but had to increase to at least a 50 percent rate after one year.

After the final rules were issued, lawsuits delayed implementation of the rules for three of the six DOT agencies. As of today, only transit workers are not covered by the testing regulations. The 1988 final rule adopted by the Federal Transit Administration (formerly called the Urban Mass Transportation Administration) was vacated by the United States Court of Appeals for the

District of Columbia Circuit because of a lack of statutory authority. Legislation (the FTA provisions of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, Title V, October 28, 1991) was subsequently enacted to remedy this problem as well as address other significant concerns with alcohol abuse and illegal drug use by individuals in various transportation industries who perform safety-sensitive duties. An NPRM proposing to cover transit employees is published elsewhere in today's *Federal Register*. As proposed, transit employees would be subject to a random testing rate of at least 50 percent. As noted above, this ANPRM involves a longer-term review of random testing program issues and is not intended to affect the random rate decision that must be made as part of FTA's proposed rulemaking. Several other DOT agency-regulated industries or industry sectors only recently began random testing at a 50 percent rate per year.

The Federal Railroad Administration phased-in random testing in three groups: Large railroads, medium-size railroads, and short line railroads. In January 1990, large railroads began testing at 25 percent, medium-size railroads began testing at 25 percent in July 1990 and short line railroads began testing at 25 percent in November 1990. Random testing at a 50 percent rate began one year after these dates for each of the three categories.

In the aviation industry, the 25 percent rate was instituted for large air carriers in December 1989, for medium-size carriers in April 1990, and for the smallest carriers in August of 1990. Testing at 50 percent began one year after the initial phase-in. Testing of contractor employees (such as repair station personnel or security screeners) began one year after the carriers that they worked for or supported.

Testing of pipeline personnel began next. Phase-in (25 percent testing) began in April 1990 for large operators and in August 1990 for small operators, with the 50 percent rate implemented one year later by each group.

Random and non-suspicion-based post-accident drug testing in the motor carrier industry were enjoined by court order, although the other types of testing were implemented on December 21, 1989. After the injunction was lifted, random testing by large motor carriers began in November 1991 at a 25 percent rate and testing by small motor carriers began in January 1992 at a 25 percent rate. One year after these dates, the rate increases to 50 percent. (The current rule covers just interstate motor carriers, but a proposed rule in today's *Federal*

Register would extend coverage to all holders of commercial driver's licenses, including employees of intrastate motor carriers and school bus drivers.)

The USCG rule regarding random testing of merchant seamen was enjoined by court order in December 1989. Other types of testing were phased-in commencing in June 1989. In July 1991, the USCG issued a revised rule addressing the court's concerns and justifying the categories of employees subject to random testing. In October of 1991, the maritime industry began testing at a 25 percent random rate with a requirement to increase to a 50 percent rate one year after implementation. There was no distinction between large and small maritime employers for this implementation of random testing.

Only the Federal Aviation Administration and the Federal Railroad Administration require their regulated employers to report testing statistics to them. The Federal Highway Administration, the U.S. Coast Guard and the Research and Special Programs Administration review records maintained by covered employers, but do not have composite data for all positive test results in their industries. Separate NPRMs published in today's *Federal Register* would require that the employers (or industries) regulated by all six operating administrations submit uniform data concerning drug testing on an annual basis to those administrations. (Data from the motor carrier industry would be gathered on a survey basis.)

Purpose of Random Testing

The primary purpose of the Department's anti-drug rules is to ensure safety by deterring drug use, with detection an important collateral benefit. The integrity of the random selection process, the timing of the collection, the use of correct collection procedures, and the credibility of the MRO (medical review officer) verification actions must be considered when assessing the effectiveness of any random testing program in deterring drug use and detecting drug users. When drug users go undetected because of errors in the selection, collection, or review processes, the deterrent value for that employee and others is strongly diminished.

Random testing to achieve deterrence is a form of drug use prevention. Prevention generally is carried out using one or more of four strategies: Education, persuasion, motivation, or facilitation. Many companies have an existing drug education program. Employer policies, supervisor training, and peer-identification programs are

examples of a persuasion strategy. Drug testing is usually considered a tool for a motivational strategy in drug use prevention. Comprehensive Employee Assistance Programs are a major component of a facilitation model. In our view, workplace drug use prevention programs should consist of a mix of the four prevention strategies. These strategies must maintain or increase the visibility of the program and, therefore, the employees' awareness of it. Different employers and different industries may find different mixes of education, persuasion, motivation, and facilitation more effective and efficient in deterring drug use.

As the Department noted during the drug testing rulemakings and as FRA found when it added random testing to an existing testing program, random testing does deter use. FRA and the military services noted reductions in the positive rates for other types of drug testing after starting random testing. The Department seeks comment and data on the minimum effective random testing rate.

[1] Does increasing or decreasing the testing rate affect an individual's perception of the chances of being "caught" and increase or decrease deterrence? Why?

[2] Is there a mathematical relationship between the testing rate and deterrence, e.g., does doubling the rate double the deterrence?

[3] How does the increase or decrease in the rate affect the costs of testing, considering constant costs that exist regardless of the testing rate?

[4] To the extent the rate of positive tests is not expected to increase with a random testing rate reduction, please explain why.

[5] What is the lowest testing rate at which the rate of positive tests will not increase over the current positive test rate and how is it determined?

Random testing also helps to identify and remove drug users from safety-sensitive positions. Sanctions against detected drug users serve as effective deterrents for others. With any given prevalence of drug use, the higher the random testing rate, the higher the number of drug users who will be detected. At present, DOT's regulations call for each covered employee to be subject to random testing at the same rate as all other covered employees of that employer. Testing must be based on random selection, and employers are not permitted to target individuals or

employee groups for selection for ostensibly "random" testing.

To the extent that detection is an important goal, lowering the random testing rate reduces the percentage of the workers tested over a given period and, therefore, reduces the number of drug users that would be identified. For example, if one assumes four testing periods per year and testing takes place over three years, then the following fractions of a workforce would be tested at least once during the three years at the following different annual testing rates.

Annual testing rate (percent)	Percent of workforce tested in 3 years
100	96.8
75	91.7
50	79.9
25	53.9
10	26.2

Available Data

The Department would appreciate public comment in identifying data concerning the effectiveness of random testing rates. The following summarizes the data currently available to the Department concerning the results of random testing in the regulated industries, the Department's civilian workforce, and the U.S. Coast Guard uniformed service.

AVIATION

	1990	1991
Total number of random tests	84,481	169,240
Number of positives	446	1,232
Percent positive	0.53	0.73

Data on 1991 reflects the inclusion of contractors and some testing at a 50 percent rate.

RAILROADS

	1990	1991
Total number of random tests	35,228	50,436
Number of positives	365	447
Percent positive	1.04	0.88

FRA's random testing regulations were issued in November 1988, with the first testing, as noted earlier, starting in January 1990. FRA has kept records of post-accident drug testing for the last five years. For purposes of analyzing any effect from the issuance of the requirement or the implementation of the testing, the positive rates for post-accident testing are provided; they are as follows:

Percent				
1987	1988	1989	1990	1991
5.1	5.6	3.0	3.0	1.1

For similar purposes, the positive rates for reasonable cause testing are provided; they are as follows:

Percent				
1987	1988	1989	1990	1991
5.4	4.7	3.6	1.8	1.9

FRA is currently conducting an experimental study of eight railroads, comparing testing results at the 25 percent and 50 percent random testing rates. The study began in July 1991 and is expected to be completed in July 1993. Data from the first year of the study are now being analyzed and will be released to the public shortly. Initial indications are that the FRA data do not show an increase in positive rates for the railroads conducting random testing at the 25 percent rate. However, all of these railroads had implemented testing at a 50 percent rate for some period and then lowered it for the experimental program.

Motor Carriers

In audits of 8,384 motor carrier drug testing programs by FHWA in FY 1992, records indicated that 13,612 random tests were conducted. There were 289 verified positive results (2.12 percent). The audits represent less than 5 percent of motor carriers subject to the FHWA rule. The FHWA selects motor carriers for these general compliance investigations by determining factors such as a safety rating or prior compliance problem. These compliance investigations do not offer scientific, statistically unbiased sampling methods.

U.S. DOT Employees

In the Department's Federal employee testing program, the random testing rate of at least 50 percent was phased-in over the first year of the program and achieved at the end of FY 1988. A testing rate of at least 50 percent was maintained in FY 1989-1991. In FY 1992, the figures reflect testing over the first five months with a rate of at least 50 percent, followed by seven months of testing with a rate of at least 25 percent. (As noted earlier, DOT decided to lower its testing rate in 1992.) The following table summarizes DOT Federal employee random testing data.

	FY88	FY89	FY90	FY91	FY92
Total number of random tests	5,047	17,926	19,103	18,671	12,454
Number of positives	42	92	43	40	39
Percent positive	0.83	0.51	0.23	0.21	0.31

As noted earlier, the USCG has been conducting random drug tests on its active duty and reserve uniformed personnel. Rather than setting a specific

testing rate as a requirement at the beginning of the fiscal year, the USCG conducts the maximum number of tests possible from the funds that are

appropriated. The percentage of positive results for random tests in each fiscal year and the approximate testing rate was as follows:

Percent	1987	1988	1989	1990	1991	1992
Percent positive	1.57	1.31	0.68	0.41	0.41	0.78
Testing rate	120	95	95	95	85	85

Testing Rates in Various Federal Agencies

Executive Order 12564, "Drug-Free Federal Workplace", signed by President Reagan in September 1986, required random drug testing of safety- and security-related Federal employees in 135 Federal executive branch agencies. According to a 1991 report of the General Accounting Office ("Employee Drug Testing: Status of Federal Agencies' Programs: Report to the Chairman, Committee on Governmental Affairs," U.S. Senate, (May 1991), GAO/FFD-91-70, 14-19,) there is a wide variation in the random drug testing rates at the 18 agencies that GAO reviewed.

Alternatives

There are a number of alternatives to the current 50 percent random testing rate that DOT could consider. They include:

- (1) Making an across-the-board modification of the rate for all DOT anti-drug programs;
- (2) Modifying how the random testing rate is implemented (e.g., frequency of testing, etc.)
- (3) Making a selective modification of the rate by
 - (a) Operating administration (e.g., FAA or FRA could modify its rate);
 - (b) Job category (e.g., pilots, train engineers);
 - (c) Any other category that warranted a different rate based on drug use prevalence or other factors (e.g., age or geographic region);
- (4) Establishing a performance standard program (as discussed later);
- (5) Permitting employers who take specified additional steps to deter drug use to reduce their random testing rate;
- (6) Modifying the random testing rate for all operating administration rules for a specific time period, subject to reconsideration after the results are analyzed;

(7) Conducting demonstration programs in each operating administration before further action is taken; or

(8) Combining some of the alternatives.

[6] DOT requests comment on these alternatives and information on any other possible alternatives.

Modifying the random testing rate across-the-board in each operating administration would result in the simplest rule and program changes and would be the easiest to enforce. Lowering the rate could reduce costs significantly with an undetermined impact on deterrence, but it would unavoidably result in less detection of drug users. Some argue that what data DOT has show very low positive rates and, therefore, the random testing rate can be reduced.

[7] Is the rate of positive test results low because the 50 percent testing rate is the minimum effective deterrent?

[8] Does a low rate of positives alone warrant a change? Does this make the rate "acceptable" for safety purposes?

[9] Is detecting fewer users acceptable even though the positive rate is the same?

Changes in how random testing is implemented in the workplace may be another approach to maintaining deterrence at a lower testing rate. For example, increasing the number of times random testing is conducted during the year may serve to increase awareness and visibility of the testing program, thus maintaining effective deterrence even though the actual number of employees tested is decreased. Procedures that ensure each person randomly selected is actually tested (e.g., if a selected employee is not available, the name would be kept confidential until the employee is available for testing), as opposed to random testing procedures that allow selected individuals to "be excused" because of temporary unavailability,

may also serve to maintain effective deterrence by making it more difficult for drug users to avoid detection. A policy that requires a re-collection of a specimen from a selected individual when a random test has been cancelled or the results invalidated would help deter individuals from adulterating their specimens or otherwise obstructing the testing process.

Authorizing variable random rates among operating administrations or within a workplace is another option to consider in improving deterrence and detection while reducing the overall random rate. Employers could test certain categories of employees at higher rates based on prevalence or incidence differences in the population. For example, if prevalence of drug use is greater among mechanics than among flight attendants, the employer could test mechanics at a 50 percent rate and flight attendants at a 20 percent rate. Variable rates enable deterrence and detection efforts to be targeted where drug use is most likely. A variable rate strategy, however, should be based on prevalence and incidence data, not individualized suspicion or personal characteristics. Such an approach would require employers to maintain several random pools and systematically determine drug use prevalence and incidence data, something especially difficult for small firms. This approach may present compliance and enforcement difficulties.

Another of the options DOT is exploring is use of a "performance standard" for establishing random testing rates for a specified group such as an industry, a job category, or an individual employer. The group's overall rate of testing would be determined by the success of the group in deterring drug use as measured by its rate of positive random tests. For example, if a group's positive rate is less than one percent over a given period of time, the group could be permitted to

reduce the random testing rate (e.g., to 25 percent or 10 percent.) If the positive rate increased under a reduced random testing rate, the group would be required to return to a higher random testing rate. The advantage of this approach is that it could lower costs to large segments of the transportation industry, if groups could maintain low positive rates. It would also provide an incentive to achieve low positive rates, the ultimate objective of DOT's program, and would reward those groups with effective programs. Such an approach would also encourage such groups to use whatever additional steps other than testing that are appropriate in their situation, perhaps resulting in more effective programs. For example, some groups may find increased education helpful in increasing the effectiveness of their anti-drug programs.

There are many potential obstacles to implementing such an approach. It would require collection of additional testing data from each group that might offset savings in testing costs. Although this may not be a difficulty for some operating administrations, it may be more problematic in others. In the motor carrier industry, for example, even if the reports could be submitted, it is not clear that FHWA could effectively review and respond to reports from hundreds of thousands of motor carriers on millions of employees. From the Department's point of view, a performance standard program would be harder to administer because the operating administrations would have to monitor both positive rates and random testing rates for every affected group to ensure proper compliance. In addition, it may be difficult to effectively apply a low random testing rate in small companies. (For example, if a company with one or two employees had to test at only 10 percent, employees might not be deterred if they knew the next test might not be for five or six years—and DOT would not get any reports to determine whether the rate of positive test results was being kept low.) Finally, there would be less detection of drug users at a lower rate. The Department is also concerned with whether this type of performance standard would be an incentive to cheating. Employers might be tempted to falsify test results that were positive in order to maintain a reduced random testing rate.

As another approach, the Department could consider reducing the random testing rate but requiring additional steps such as increased education. Or, it could offer a lower rate to those employers that took extra steps to increase deterrence.

Another approach would be to conduct a demonstration program in each operating administration. FRA is currently in the middle of such a program. These studies could include pilot projects that explore positive rates in relationship to different random testing rates. Demonstration programs that include other deterrent or prevention initiatives in addition to random testing could explore the relationship among education, training and awareness strategies and the random testing rate. Pilot studies have the advantage of examining specific variables in relationship to deterrence and detection outcomes in a controlled study environment.

As discussed earlier, there are many alternative methods in addition to testing to deter illegal drug use, including education.

[10] Which methods do commenters believe to be the most effective? What is the basis for your belief?

[11] Should the Department mandate use of one or more of these methods in addition to current requirements in the anti-drug rules, or should it leave it up to the discretion of employers as a supplement to a testing program? Why?

In an attempt to explore the relevant research, random testing implementation strategies, and drug deterrence methodologies, to help it in this rulemaking, the Department will convene a conference on workplace random testing and drug deterrence. The conference will be open to the public. Details on the conference agenda, date and location will be offered in a subsequent announcement. Information gathered from the conference will be considered along with comments received on this ANPRM in determining the next appropriate action.

Additional Questions

The Department would appreciate commenters responding to the following additional questions and providing whatever data or studies might support their position.

[12] Should other factors apply to any decision to adjust the random testing rate besides deterrence, detection, and costs? What are they and why are they relevant?

[13] What data would justify a change? Are low positive rates alone sufficient? How do we determine if positive rates are low because the 50 percent testing rate is acting as a deterrent?

[14] What is the effect of the quality of the selection and collection process on the positive rates that are currently being produced? As the selection and

collection processes improve with experience or enforcement, will the positive rates be higher? How should any potential for increased detection with improved collection affect any decision concerning the random testing rate?

[15] Can performance-based programs be developed, operated, and audited within the currently operating consortia programs? If so, how? Does participation in a consortium exacerbate the problems associated with implementation and enforcement of a performance standard for random rates?

[16] If analysis of positive rates is necessary before a decision can be made to reduce the random testing rate, for how long a period must DOT have data? What should DOT do about those industries for which it currently has little or no data? Should operating administrations that have reliable, accurate data consider taking action now? Elsewhere in today's **Federal Register** we are proposing extensive data collection for all six operating administrations. This data would not, however, be available for some time.

[17] What if positive rates were to increase after DOT lowered the random testing rate? Is some increase in the rate of positive tests acceptable? How much and why? Are there other reasons the rate could rise beside the lower random test rate?

[18] What cost reductions could be expected if the random testing rate is reduced to 25 percent? 10 percent? What is the basis for these estimates? Even if some increase in positive rates is expected with a lower random testing rate, is a reduction in the random testing rate nevertheless justified based on reduced costs? Please explain.

[19] Are there offsetting cost increases that could occur at a reduced random testing rate (e.g., consortium cost per test, more accidents)?

[20] If a change is made, should it apply equally to all of the DOT operating administrations' programs, or only as justified by operating administration specific data? If particular industries, segments of industries or particular employers achieve very low positive rates, should they be allowed to have different testing rates? Could this be effectively implemented? Should random testing rates be linked to drug use in particular groups based on prevalence or incidence data available for such groups (i.e., age groups, occupational categories, specific types of worksites)?

[21] What additional means of increasing deterrence are available to the government and industry to supplement random drug testing? How

would these strategies work? What would they cost? What is the evidence they work?

[22] How might DOT restructure its requirements for drug use prevention programs to maximize the efficiency and effectiveness of prevention within the transportation industry?

[23] Could a "performance standard" work? Would there be too much incentive for some groups to cheat? How could DOT effectively implement or enforce such a standard, especially for motor carriers? Is the data collection that would be required more trouble and expense than conducting a higher rate of random tests? Would the trouble and expense vary by operating administration? Please comment on the difficulties in administering such a program and the increase in enforcement oversight that would be required. How could it effectively be implemented for small companies? Would it work if implemented industry-by-industry or among segments of a given industry? Could it be effectively implemented and enforced employer-by-employer?

[24] Any reduction in the random testing rate will result in less detection. The lower the rate, the less the detection. Are there alternative approaches apart from random testing that could offset potential reductions in detection? What is their projected efficiency and effectiveness, compared with current programs? What would they cost? What is the basis of the numbers? Are there safety implications?

[25] Are there any additional data or studies concerning rates of drug testing and deterrence that may be relevant to the Department's consideration?

[26] Should each operating administration conduct a demonstration program to gather data on the relative effectiveness of different rates specific to its regulated industry? What outcome measures would be appropriate in such pilot programs?

[27] Should one or more operating administrations reduce the random testing rate for a specific time period and then analyze the results? What period of time is adequate for determining the impact on deterrence?

Regulatory Analyses and Notice

DOT Regulatory Policies and Procedures

The ANPRM is considered to be a significant rulemaking under DOT Regulatory Policies and Procedures, 44 FR 11034, because of the substantial public and Congressional interest in this subject. It is difficult to estimate potential costs or benefits at this time because the Department is not proposing specific options.

Executive Order 12612

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that it does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12630

This ANPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that any potential modification in the random drug testing program does not pose the risk of a taking of constitutionally protected private property.

Regulatory Flexibility Act

Depending on what, if any, action is ultimately proposed and adopted, a potential modification in the random drug testing program could have a significant economic impact on a substantial number of small entities. The Department specifically seeks public comment on the effect, if any, of potential changes in the program on small entities as well as any suggested alternative approaches. Further review will be conducted based on comments received on this notice and when, and if, a notice of proposed rulemaking is issued.

Paperwork Reduction Act

There are a number of reporting or recordkeeping requirements associated with DOT-mandated drug testing. Because the purpose of this notice is to solicit information, no specific changes are being proposed at this time. The Department notes that effective implementation of possible alternatives

and the gathering of data necessary to justify any changes, compare alternatives, or permit the implementation of some approaches may require recordkeeping and reporting by the affected industries. We are proposing substantial data collection concerning drug testing elsewhere in today's Federal Register.

National Environmental Policy Act

The Department has determined that this rulemaking is not a major Federal action significantly affecting the quality of the human environment and that an environmental impact statement is not required.

Authority: FAA—49 U.S.C. App. 1354(a), 1355, 1356, 1357, 1401, 1421-1430, 1472, 1485, 1502; 49 U.S.C. 106(g) revised, Pub. L. 97-449, January 12, 1983.

FHWA—49 U.S.C. 504 and 3102; 49 CFR 1.48.

FRA—45 U.S.C. 431, 437, 438, as amended; Pub. L. 100-342, Pub. L. 102-143; and 49 CFR 1.49(m).

FTA—49 CFR 1.51, Pub. L. 102-143.

RSPA—49 App. U.S.C. 1672, 1674a, 1681, 1804, 1808, 2002, 2040; 49 CFR 1.53.

USCG—46 U.S.C. 2103, 3306, 7101, 7301, 7701; 49 CFR 1.46.

Multi-modal ANPRM on Random Drug Testing Program.

Issued on December 2, 1992, in Washington, DC.

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