Briefings on How To Use the Federal Register
For information on briefings in Washington, DC, Tucson, AZ, and Oakland, CA, see announcement on the inside cover of this issue.
THE FEDERAL REGISTER

WHAT IT IS AND HOW TO USE IT


WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public’s role in the development of regulations.
3. The important elements of typical Federal Register documents.
4. An Introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

WASHINGTON, DC
(TWO BRIEFINGS)

WHEN: February 17 at 9:00 am and 1:30 pm
WHERE: Office of the Federal Register, 7th Floor Conference Room, 800 North Capitol Street NW, Washington, DC (3 blocks north of Union Station Metro)
RESERVATIONS: 202-523-4538

TUCSON, AZ

WHEN: March 23 at 9:00 am
WHERE: University of Arizona Medical School, DuVal Auditorium, 1501 N. Campbell Avenue, Tucson, AZ
RESERVATIONS: Federal Information Center 1-800-359-3997 or in the Tucson area, call 602-290-1616

OAKLAND, CA

WHEN: March 30 at 9:00 am
WHERE: Oakland Federal Building, 1301 Clay Street, Conference Rooms A, B, and C, 2nd Floor, Oakland, CA
RESERVATIONS: Federal Information Center

For other telephone numbers, see the Reader Aids section at the end of this issue.
Committee for the Implementation of Textile Agreements
NOTICES
Cotton, wool, and man-made textiles:
Myanmar, 7245–7246

Customs Service
NOTICES
Camera lenses imported in same shipment with camera bodies; tariff classification, 7297

Defense Department
See Army Department
See Engineers Corps
See Navy Department
RULES
Teacher and teacher's aide placement assistance program, 7213–7216
NOTICES
Meetings:
National Security Telecommunications Advisory Committee, 7246
Science Board task forces, 7246–7247
Total asset visibility; Government-industry conference, 7247

Education Department
See Federal Energy Regulatory Commission
NOTICES
Meetings:
International Energy Agency Industry Advisory Board, 7249–7250

Engineers Corps
NOTICES
Patent licenses; non-exclusive, exclusive, or partially exclusive:
Facility space data logging device, etc., 7247–7248

Environmental Protection Agency
RULES
Air pollution; standards of performance for new stationary sources:
Early reductions of hazardous air pollutants; compliance extensions, 7224–7226
Air quality implementation plans; approval and promulgation; various States:
Indiana, 7223–7224
Minnesota, 7218–7222
Oregon, 7222–7223
NOTICES
Air quality; prevention of significant deterioration (PSD):
Permit determinations, etc.— Region IX, 7252
Water pollution control:
Lake Superior lakewide management plan; binational program; document availability, 7252–7257

Farmers Home Administration
RULES
Program regulations:
Organizations eligible to receive technical and supervisory assistance grants; definition expansion, 7193
NOTICES
Grants and cooperative agreements; availability, etc.:
Technical and supervisory assistance grant programs, 7240–7241

Federal Aviation Administration
RULES
Airworthiness directives:
Airbus Industrie, 7208–7210
Airworthiness standards:
Special conditions—
Cessna model 560 block point change, S.N. 560–0260 and on, airplanes, 7199–7202
Cessna model 750 (Citation X) airplane, 7202–7208
Omnibus Transportation Employee Testing Act of 1991:
Alcohol misuse prevention program for personnel engaged in specified aviation activities, 7380–7411
PROPOSED RULES
Air carrier certification and operations:
Omnibus Transportation Employee Testing Act of 1991—Antidrug program and alcohol misuse prevention program for employees of foreign air carriers engaged in specified aviation activities, 7412–7423
Random drug testing program, 7614–7625
Airworthiness directives:
Airbus Industrie, 7228–7231
Boeing, 7231–7233
McDonnell Douglas, 7233–7235
Omnibus Transportation Employee Testing Act of 1991:
Antidrug program for personnel engaged in specified aviation activities, 7412–7423
NOTICES
Airport noise compatibility program:
Kalamazoo/Battle Creek International Airport, MI, 7291–7292
Noise exposure map—Mansfield Lahm Municipal Airport, OH, 7291
Meetings:
Research, Engineering, and Development Advisory Committee, 7292
Omnibus Transportation Employee Testing Act of 1991:
Alcohol use by transportation workers, limitation, 7302–7338

Federal Communications Commission
PROPOSED RULES
Radio services, special:
Private land mobile services—Automatic vehicle monitoring systems, 7239
Radio stations; table of assignments:
Colorado, 7237–7238
Minnesota, 7238
Mississippi, 7238

Federal Deposit Insurance Corporation
RULES
Practice and procedure:
Mutual-to-stock conversion notices, 7194–7199

Federal Energy Regulatory Commission
NOTICES
Applications, hearings, determinations, etc.:
Newark Bay Cogeneration Partnership, L.P., 7251
KN Wattenberg Transmission Limited Liability Co., 7250–7251
Sabine Pipe Line Co., 7251
Transwestern Pipeline Co., 7251
Williston Basin Interstate Pipeline Co., 7251–7252

Federal Highway Administration
RULES
Motor carrier safety standards:
Omnibus Transportation Employee Testing Act of 1991—Controlled substances and alcohol use and testing, 7484–7527
PROPOSED RULES
Motor carrier safety standards:
Omnibus Transportation Employee Testing Act of 1991—Controlled substances and alcohol use and testing; foreign-based motor carriers and drivers, 7528–7530
Random drug testing program, 7614–7625
NOTICES
Intelligent vehicle-highway systems (IVHS):
National program plan development; public participation, 7292–7293
Omnibus Transportation Employee Testing Act of 1991:
Alcohol use by transportation workers, limitation, 7302–7338

Federal Law Enforcement Training Center
NOTICES
Meetings:
National Center for State and Local Law Enforcement Training Advisory Committee, 7297–7298

Federal Railroad Administration
RULES
Omnibus Transportation Employee Testing Act of 1991:
Control of alcohol and drug use; alcohol testing, 7448–7481
PROPOSED RULES
Alcohol and drug use control:
Random drug testing program, 7613–7625
Omnibus Transportation Employee Testing Act of 1991:
Control of alcohol and drug use; international application; withdrawn, 7482
NOTICES
Omnibus Transportation Employee Testing Act of 1991:
Alcohol use by transportation workers, limitation, 7302–7338

Federal Transit Administration
RULES
Omnibus Transportation Employee Testing Act of 1991:
Alcohol misuse prevention in transit operations, 7532–7572
Prohibited drug use prevention in transit operations, 7572–7611
PROPOSED RULES
Prohibited drug use prevention in transit operations:
Random drug testing program, 7614–7625
NOTICES
Omnibus Transportation Employee Testing Act of 1991:
Alcohol use by transportation workers, limitation, 7302–7338
Financial Management Service
See Fiscal Service

Fine Arts Commission
See Commission of Fine Arts

Fiscal Service
NOTICES
Surety companies acceptable on Federal bonds:
Great Lakes Reinsurance Co., 7298
Mutual Service Casualty Insurance Co., 7298
Signet Star Reinsurance Corp., 7298

Fish and Wildlife Service
NOTICES
Endangered and threatened species:
Recovery plans—
Arizona cliffrose, 7264

Food and Drug Administration
PROPOSED RULES
Hazard Analysis Critical Control Point (HACCP) principles:
Fish and fishery products, safe processing and importing:
procedures, 7235–7237

Forest Service
NOTICES
Environmental statements; availability, etc.:
Bitterroot National Forest, MT, 7241–7242

General Accounting Office
NOTICES
Meetings:
Federal Accounting Standards Advisory Board, 7257

Health and Human Services Department
See Food and Drug Administration
See National Institutes of Health

Immigration and Naturalization Service
PROPOSED RULES
Immigration:
Immigration user fee; remittance requirements, 7227–7228

Indian Affairs Bureau
NOTICES
Tribal-State Compacts approval; Class III (casino) gambling:
Confederated Tribes of Umatilla Indian Reservation, OR, 7628

Interior Department
See Fish and Wildlife Service
See Indian Affairs Bureau
See Land Management Bureau
See National Park Service
NOTICES
Privacy Act:
Systems of records, 7260–7261

Internal Revenue Service
NOTICES
Committees; establishment, renewal, termination, etc.:
Art Advisory Panel, 7298–7299

Interstate Commerce Commission
NOTICES
Rail carriers:
Non-coal proceedings; rate guidelines, 7266–7267

Justice Department
See Antitrust Division
See Immigration and Naturalization Service
NOTICES
Pollution control; consent judgments:
Apache Nitrogen Products, Inc., 7267
Kurdziel Industries, Inc., 7267
Vertac Chemical Corp. et al., 7267–7268

Land Management Bureau
RULES
Public land orders:
Washington, 7226

NOTICES
Coal leases, exploration licenses, etc.:
Colorado, 7261–7262
Environmental statements; availability, etc.:
Western Energy Co., MT; coal lease application, 7262–7263
Realty actions; sales, leases, etc.:
California, 7263
Recreation management restrictions, etc.:
Caliente Resource Area, CA; vehicle use restriction, 7263–7264

National Foundation on the Arts and the Humanities
NOTICES
Meetings:
Arts in Education Advisory Panel; correction, 7268
Music Advisory Panel, 7268
Senior Executive Service:
Performance Review Board; membership, 7268–7269

National Highway Traffic Safety Administration
NOTICES
Highway safety program; breath alcohol testing devices:
Model specifications and conforming products list—
Screening devices, 7372–7378

National Institute of Standards and Technology
NOTICES
Information processing standards, Federal:
Cryptographic modules security requirements; correction, 7245
Meetings:
Computer System Security and Privacy Advisory Board, 7244

National Institutes of Health
NOTICES
Meetings:
National Cancer Institute, 7257
National Institute of Diabetes and Digestive and Kidney Diseases, 7257–7258
National Institute of General Medical Sciences, 7258
National Institute of Mental Health, 7258–7259
Research Grants Division Behavioral and Neurosciences Special Emphasis Panel, 7259
Patent licenses; non-exclusive, exclusive, or partially exclusive:
Targeted Genetics Corp., 7259–7260

National Park Service
NOTICES
National Register of Historic Places:
Pending nominations, 7264–7266
VI

Federal Register / Vol. 59, No. 31 / Tuesday, February 15, 1994 / Contents

Navy Department
RULES
Navigation, COLREGS compliance exemptions:
USS Laboon, 7216–7217
USS Stout, 7217–7218
NOTICES
Meetings:
Chief of Naval Operations Executive Panel, 7248

Nuclear Regulatory Commission
NOTICES
Regulatory guides; issuance, availability, and withdrawal, 7271
Applications, hearings, determinations, etc.:
Wolf Creek Nuclear Operating Corp., 7269–7271

Packers and Stockyards Administration
NOTICES
Stockyards; posting and deposting:
Avoyelles Cattle Co., Inc., LA, et al., 7242–7243
Ramona Auction, CA, et al., 7243

Pension Benefit Guaranty Corporation
RULES
Single-employer and multiemployer plans:
Valuation of plan benefits, etc.—
Interest rates, etc., 7210–7213

Postal Service
NOTICES
Meetings; Sunshine Act, 7300

Public Health Service
See National Institutes of Health

Research and Special Programs Administration
RULES
Pipeline safety:
Omnibus Transportation Employee Testing Act of 1991—
Alcohol misuse prevention program, 7426–7445
PROPOSED RULES
Pipeline safety:
Random drug testing program, 7614–7625
NOTICES
Hazardous materials:
Applications, exemptions, renewals, etc., 7293–7295
Omnibus Transportation Employee Testing Act of 1991:
Alcohol use by transportation workers, limitation, 7302–7338
Safety advisories:
Composite cylinders used in self-contained breathing apparatus or in other services; service life; correction, 7295–7296

Securities and Exchange Commission
NOTICES
Agency information collection activities under OMB review, 7271–7272
Self-regulatory organizations:
Clearing agency registration applications—
Participants Trust Co., 7285–7286
Self-regulatory organizations; proposed rule changes:
Depository Trust Co., 7272–7274
Midwest Clearing Corp., 7274–7276
National Association of Securities Dealers, Inc., 7276–7284
National Securities Clearing Corp., 7276
Options Clearing Corp., 7284–7285
Stock Clearing Corp. of Philadelphia, 7286–7287
Applications, hearings, determinations, etc.:
Dynamic America Growth Fund, Inc., 7287–7288

State Department
NOTICES
Agency information collection activities under OMB review, 7288–7290
Meetings:
Shipping Coordinating Committee, 7289–7290

Textile Agreements Implementation Committee
See Committee for the Implementation of Textile Agreements

Transportation Department
See Coast Guard
See Federal Aviation Administration
See Federal Highway Administration
See Federal Railroad Administration
See Federal Transit Administration
See National Highway Traffic Safety Administration
See Research and Special Programs Administration
RULES
Omnibus Transportation Employee Testing Act of 1991:
Workplace drug and alcohol testing programs, procedures, 7340–7366
PROPOSED RULES
Omnibus Transportation Employee Testing Act of 1991:
Workplace drug and alcohol testing programs, procedures, 7366–7371
NOTICES
Aviation proceedings:
Agreements filed; weekly receipts, 7290
Certificates of public convenience and necessity and foreign air carrier permits; weekly applications, 7290
Foreign air carriers; wet lease approval requirements, 7290–7291

Treasury Department
See Customs Service
See Federal Law Enforcement Training Center
See Fiscal Service
See Internal Revenue Service
NOTICES
Agency information collection activities under OMB review, 7296–7297

Separate Parts In This Issue
Part II
Department of Transportation, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, and Research and Special Programs Administration, 7302–7338

Part III
Department of Transportation; Department of Transportation, National Highway Traffic Safety Administration, 7340–7378

Part IV
Department of Transportation, Federal Aviation Administration, 7380–7423
Part V
Department of Transportation, Research and Special Programs Administration, 7426-7445

Part VI
Department of Transportation, Federal Railroad Administration, 7448-7482

Part VII
Department of Transportation, Federal Highway Administration, 7484-7530

Part VIII
Department of Transportation, Federal Transit Administration, 7532-7611

Part IX
Department of Transportation, Coast Guard, Federal Aviation Administration, Federal Highway Administration, Federal Railroad Administration, Federal Transit Administration, and Research and Special Programs Administration, 7614-7625

Part X
Department of the Interior, Bureau of Indian Affairs, 7628

Reader Aids
Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

Electronic Bulletin Board
Free Electronic Bulletin Board service for Public Law numbers and Federal Register finding aids is available on
### CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

<table>
<thead>
<tr>
<th>CFR</th>
<th>Proposed Rules:</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 CFR</td>
<td></td>
</tr>
<tr>
<td>1944</td>
<td>7193</td>
</tr>
<tr>
<td>8 CFR</td>
<td></td>
</tr>
<tr>
<td>Proposed Rules:</td>
<td>7227</td>
</tr>
<tr>
<td>12 CFR</td>
<td>7194</td>
</tr>
<tr>
<td>25 (2 documents)</td>
<td>7199, 7202</td>
</tr>
<tr>
<td>39</td>
<td>7208</td>
</tr>
<tr>
<td>61</td>
<td>7380</td>
</tr>
<tr>
<td>63</td>
<td>7380</td>
</tr>
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<td>65</td>
<td>7380</td>
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<td>121</td>
<td>7380</td>
</tr>
<tr>
<td>135</td>
<td>7380</td>
</tr>
<tr>
<td>Proposed Rules:</td>
<td>7228, 7231, 7233</td>
</tr>
<tr>
<td>65</td>
<td>7412</td>
</tr>
<tr>
<td>121 (2 documents)</td>
<td>7412, 7614</td>
</tr>
<tr>
<td>135</td>
<td>7412</td>
</tr>
<tr>
<td>21 CFR</td>
<td></td>
</tr>
<tr>
<td>Proposed Rules:</td>
<td>7235</td>
</tr>
<tr>
<td>123</td>
<td>7235</td>
</tr>
<tr>
<td>1240</td>
<td></td>
</tr>
<tr>
<td>29 CFR</td>
<td>7210</td>
</tr>
<tr>
<td>2619</td>
<td></td>
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<tr>
<td>2676</td>
<td>7210</td>
</tr>
<tr>
<td>32 CFR</td>
<td>7213</td>
</tr>
<tr>
<td>254</td>
<td></td>
</tr>
<tr>
<td>706 (2 documents)</td>
<td>7216, 7217</td>
</tr>
<tr>
<td>33 CFR</td>
<td></td>
</tr>
<tr>
<td>Proposed Rules:</td>
<td>7237</td>
</tr>
<tr>
<td>151</td>
<td>7237</td>
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<td>154</td>
<td></td>
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<tr>
<td>155</td>
<td>7237</td>
</tr>
<tr>
<td>40 CFR</td>
<td></td>
</tr>
<tr>
<td>52 (3 documents)</td>
<td>7218, 7222, 7223</td>
</tr>
<tr>
<td>63</td>
<td>7224</td>
</tr>
<tr>
<td>43 CFR</td>
<td></td>
</tr>
<tr>
<td>Public Land Orders:</td>
<td>7226</td>
</tr>
<tr>
<td>7028</td>
<td></td>
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<tr>
<td>48 CFR</td>
<td></td>
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<tr>
<td>Proposed Rules:</td>
<td>7614</td>
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<tr>
<td>16</td>
<td></td>
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<td>47 CFR</td>
<td></td>
</tr>
<tr>
<td>Proposed Rules:</td>
<td>7237, 7238</td>
</tr>
<tr>
<td>73 (3 documents)</td>
<td>7237, 7238</td>
</tr>
<tr>
<td>90</td>
<td>7239</td>
</tr>
<tr>
<td>49 CFR</td>
<td></td>
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<td>40</td>
<td>7340</td>
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<td>7426</td>
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<td>7448</td>
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<td>362</td>
<td>7484</td>
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<td>653</td>
<td>7572</td>
</tr>
<tr>
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<td>7532</td>
</tr>
</tbody>
</table>
This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE
Farmers Home Administration
7 CFR Part 1944

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule.

SUMMARY: The Farmers Home Administration (FmHA) is amending the Agency’s policies and procedures governing the administering of Technical and Supervisory Assistance (TSA) Grants to expand the definition of organizations eligible to receive grants. This action is necessary to comply with Section 525(a) of the Housing Act of 1949, 42 U.S.C. 1490e(a), which provides funds to eligible applicants to conduct programs of TSA for low-income rural residents to obtain and/or maintain occupancy of adequate housing. The intended effect of this action is to expand FmHA regulations to incorporate language which expands the definition of organizations eligible to receive a TSA grant.


FOR FURTHER INFORMATION CONTACT: Walter B. Patton, Senior Loan Specialist, Single Family Housing Processing Division, FmHA, USDA, room 5338, South Agriculture Building, Washington, DC 20250, Telephone: (202) 720-6099.

SUPPLEMENTARY INFORMATION: This action is not subject to the provisions of Executive Order 12866 since it involves only internal Agency management. It is the policy of this Department to publish, for comments, rules relating to public property, loans, grants, benefits, or contracts notwithstanding the exemption in 5 U.S.C. 553 with respect to such rules. This action, however, is clearly defined in the law; therefore, it has been determined that this change should be implemented as a final rule. This action is not expected to affect the budget outlay or affect more than one Agency or be controversial. The net effect is to comply with Section 525(a) of the Housing Act of 1949 as amended.

Intergovernmental Consultation
This activity is not listed in the Catalog of Federal Domestic Assistance but is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials.

Environmental Impact Statement
This document has been reviewed in accordance with FmHA Instruction 1940-G, “Environmental Program.” It is the determination of FmHA that this action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Public Law 91-190, an Environmental Impact Statement is not needed.

Civil Justice Reform
This document has been reviewed in accordance with EO 12778. It is the determination of FmHA that this action does not unduly burden the Federal Court Systems in that it meets all applicable standards provided in section 2 of the EO.

Programs Affected
The Catalog of Federal Domestic Assistance programs affected by this action are:

10.405 Farm Labor Housing Loans and Grants
10.410 Low-Income Housing Loans
10.411 Rural Housing Site Loans
10.415 Rural Rental Housing Loans
10.417 Very Low-Income Housing Repair
Loan and Grants
10.433 Housing Preservation Grants

Background
Presently, FmHA has defined only those organizations that are (1) A State or political subdivision or public nonprofit corporation (including Indian Tribes or tribal corporations), or (2) A private nonprofit corporation with local representation from the area being served that is owned and controlled by private persons or interests and is organized and operated by private persons or interests for purposes other than making gains or profits for the corporation and is legally precluded from distributing any gains or profits to its members as authorized to receive and administer TSA funds. However, Section 525(a) of the Housing Act of 1949, as amended, authorizes the Secretary of Agriculture to make grants with public or private nonprofit corporations, agencies, institutions, organizations, Indian tribes, and other associations approved by him, to pay part or all of the cost of developing, conducting, administering or coordinating effective and comprehensive programs of Technical and Supervisory Assistance which will aid needy low-income individuals and families in benefiting from Federal, State, and local housing programs in rural areas.

List of Subjects in 7 CFR Part 1944
Grant programs—Housing and community development, Nonprofit organizations, Reporting requirements, Rural Housing.

Therefore, part 1944, Chapter XVIII, Title 7, Code of Federal Regulations is amended as follows:

PART 1944—HOUSING

1. The authority citation for part 1944 is revised to read as follows:

Subpart K—Technical and Supervisory Assistance Grants

2. Section 1944.506 is amended by revising paragraph (e)(1) to read as follows:

§ 1944.506 Definitions.

(e) * * *

(1) Public or private nonprofit corporations, agencies, institutions, Indian tribes, and other associations.


Bob J. Nash,
Under Secretary for Small Community and Rural Development.

[FR Doc. 94-3118 Filed 2-14-94; 8:45 am]
BILLING CODE 3410-07-U
FEDERAL DEPOSIT INSURANCE CORPORATION
12 CFR Part 303
RIN 3064-AB34

Notice of Mutual-to-Stock Conversions

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Interim rule with request for comment.

SUMMARY: The interim rule requires FDIC-insured state-chartered savings banks that are not members of the Federal Reserve System (State Savings Banks) that apply to their applicable state banking regulator to convert from the mutual to stock form of ownership to provide the FDIC with a notice of the proposed conversion and a copy of the application and related disclosure materials. The interim rule also requires that State Savings Banks not finalize a mutual-to-stock conversion until either they receive a notice of the FDIC's intention not to object to the proposed conversion or 60 days pass after a complete notice and copy of the application materials are filed with the FDIC. A conversion may not be completed if the FDIC objects to the proposed conversion. The intended effect of the interim rule is to provide the FDIC with the opportunity to review proposed mutual-to-stock conversions of FDIC-regulated mutual savings banks to determine whether the proposed conversion would engender concerns about the safety and soundness of the institution, the institution's compliance with applicable law, and/or insider abuse.

DATES: Effective date: The interim rule is effective February 15, 1994. Written comments must be received by the FDIC on or before March 17, 1994.

ADDRESSES: Written comments shall be addressed to the Office of the Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, DC 20429. Comments may be hand-delivered to room F-400, 1776 F Street, NW., Washington, DC, on business days between 8:30 a.m. and 5 p.m. (FAX number: (202) 898-3838). Comments will be available for inspection in room 711B, 550 17th Street, NW., Washington, DC between 9 a.m. and 4:30 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: Robert F. Mialovich, Associate Director, Division of Supervision (202/898-6918), Garfield Gimber, III, Examination Specialist, Division of Supervision (202/898-6913), Claude A. Rollin, Senior Counsel, Legal Division (202/898-3985), or Joseph A. DiNuzzo, Counsel, Legal Division (202/898-7349), Federal Deposit Insurance Corporation, Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this interim final rule has been submitted to the Office of Management and Budget (OMB) for review and approval pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.). Comments regarding the accuracy of the burden estimate, and suggestions for reducing the burden, should be addressed to the Office of Management and Budget, Paperwork Reduction Project (3064-AB34), Washington, DC 20503, with copies of such comments sent to Steven F. Hanft, Assistant Executive Secretary (Administration), room F-400, FDIC, 550 17th St. NW., Washington, DC 20429.

The collection of information in this interim final rule is found in § 303.15 and takes the form of copies of preexisting materials and other materials related to a State Savings Bank's proposed conversion from the mutual to stock form of ownership. The information will be used to enable the FDIC to identify and address issues involved in the proposed conversion relating to the safety and soundness of the bank, any abusive management practices and potential violations of applicable law.

The annual reporting burden for the collection of information requirement in this interim final rule is summarized as follows:

Number of Respondents: 50.
Number of Responses per Respondent: 1.
Total Annual Responses: 50.
Hours per Response: 2.
Total Annual Burden Hours: 100.

Regulatory Flexibility Act

Because no notice of proposed rulemaking was required in connection with the adoption of this interim rule, no regulatory flexibility analysis is required under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

Background

The Proposed Policy Statement

Recently, the FDIC issued for public comment a proposed policy statement on the conversions of State Savings Banks from mutual to stock ownership (Proposed Policy Statement). 59 FR 4712 (February 1, 1994). As explained in the proposal, in recent years a number of mutually owned State Savings Banks have converted to stockholder-owned State Savings Banks. In some cases, the conversion results in an acquisition by or merger into another institution (generally known as merger/conversions), with depositors/members obtaining the right to purchase stock in the acquiring institution and not the converting savings bank. Many of the institutions that converted from mutual to stock form first converted from federal or state mutual savings associations regulated by the Office of Thrift Supervision (OTS) to State Savings Banks.

One consequence of these conversions to State Savings Banks is that the FDIC replaces the OTS as the institution's primary federal regulator. The mutual-to-stock conversion process is subject to the rules and protections of state law.

Conversion rules under state law are not identical to and in some cases are less stringent than OTS regulations. The absence of consistent treatment under state laws or some federal oversight may lead to conflict in the process of reviewing the adequacy of its own regulations and policies.

The areas of particular concern for potential abuse in conversions are: (1) Properly appraising the institution to be sold; (2) Pricing the stock sold in the conversion; (3) Apportioning the stock subscription rights; (4) Disclosure of information needed to make an informed investment decision; and (5) Compensation and benefits provided to insiders.

The improper valuation of the institution and/or under-pricing of conversion stock, among other things, may unjustly enrich the purchasers; increase the temptation by insiders to acquire more shares than they are fairly entitled to, and deny the institution the additional capital it should receive to protect depositors and the insurance fund. The over-pricing of conversion stock, among other things, may result in poor investment decisions by depositors/members who may lack investment expertise.

In some conversions transactions insiders may appear to have received (and, in some cases, have received) preferential treatment over the interests of depositors/members. In addition, mutual savings banks that convert to stock form undertake a major restructuring that possibly can lead to significant changes in the nature or

volume of business conducted. In the recent past, some institutions, in leveraging capital raised through a conversion and reaching for a return on equity, have vigorously competed for loans and liberalized underwriting standards—activities which led to loan losses that in many instances depleted more capital than was raised through the mutual-to-stock conversion and, in some cases during the past ten years, resulted in failure of the converted thrift.

The general purpose of the Proposed Policy Statement is to solicit public comment on the issues involved in mutual-to-stock conversions and whether and how the FDIC should regulate this activity.

Need for the Interim Rule

The Board of Directors of the FDIC (Board) has subsequently determined that during the pendency of the Proposed Policy Statement it is necessary for the FDIC to review applications filed by State Savings Banks with their respective state banking regulator and any other applicable state and federal banking and/or securities regulators to determine whether the proposed conversions contain any safety and soundness issues and/or issues of insider abuse that reflect on the integrity and competence of the management of the converting institution. The Board's concerns are caused by several recent and pending mutual-to-stock conversions of State Savings Banks that (as discussed below) have given rise to questions related to management abuse and excessive enrichment of insiders, fairness to depositors and general safety and soundness concerns. These conversions have been and currently are the subject of congressional hearings and numerous news articles and reports. The FDIC also has received (and continues to receive) direct complaints from depositors of State Savings Banks about unfair treatment and insider abuse in mutual-to-stock conversions.

On January 26, 1994, Senator Riegle (the Chairman of the Senate Banking Committee) and Senator D'Amato (the ranking minority member of the Senate Banking Committee) introduced a bill (S. 1801, the "Mutual Depository Institution Conversion Protection Act of 1994") to "combat abuses by management and insiders" in mutual-to-stock conversions of depository institutions. In his statement accompanying the introduction of the bill, Senator Riegle noted that, "[t]his self-dealing should stop, and stop now. These outrageous conversions are not victimless crimes. To the extent that management and insiders are skimming off the net worth of the institution through a conversion they are doing so at the expense of the institution and its account holders. Significantly, such transactions also siphon capital that ultimately protects the deposit insurance system".

In January 1994, the Financial Institutions Subcommittee of the House Banking Committee held two hearings on mutual-to-stock conversions. At the first hearing, held in Winston-Salem, North Carolina, several depositors of recently converted State Savings Banks testified. One group of depositors characterized the conversion of their bank as providing "astronomical benefits" to officers and directors of the bank and accused such insiders of treating the assets of the bank as their "own personal property". They also contended that "fraudulent intent" had been involved in determining the value of the institution. A depositor of another converted State Savings Bank stated that he has done business with the bank since 1951 and had retirement deposits in the bank over the insured limit. He said that he "will receive no compensation for my ownership interest in [the bank]. On the other hand, the officers and directors—who are not at risk and have no ownership interest by reason of their offices—will be paid millions of dollars * * * [S]omebody who is not at risk is getting rich—and quite rich." A depositor of another recently converted State Savings Bank stated at the hearing that the applicable state mutual-to-stock conversion rules are a "legalized formula to abscend with the assets of a mutual savings bank".

A spokesman for the Consumer Federation of America testified at the Subcommittee's second hearing, held in Washington, D.C. He stated that "[t]he Banking Committee can take justifiable pride in the work it performed in 1989 to reform the regulation of the savings and loan industry * * * [b]ut the job is not complete. One area of abuse—the conversion of mutual institutions into stock companies—was left untouched by reforms and this oversight—however accidental—has turned into a wonderful, fur-lined play pen for S&L insiders, conversion law firms and stock manipulating Wall Street fast-buck artists. And, once again, it is the depositor-consumer who is left out in the cold". He also emphasized the immediacy of the situation in noting that "[w]e are in the middle of a feeding frenzy".

A law school professor also submitted a written statement to the Subcommittee. He wrote that "[i]nly converting the institutions to the stock form of ownership, and granting themselves generous stock and option awards, trustees and managers can make millions of dollars in conversions. While the conversion form is beneficial, because it will infuse new capital and subject these institutions to market discipline, the decision about whether to convert is left solely in the hands of incumbent management. It is not uncommon for employees and trustees to own as much as 30 percent of the stock after the offering and the exercise of stock options. The stock is free, and—by pricing the options very low, with the help of cooperative regulators and appraisal firms—management can buy stock options at the offering price, secure in the knowledge that pervasive underpricing will enable them to make millions when share prices adjust to true market value".

Moreover, the primary federal regulator of state-chartered and federally chartered savings and loan associations has felt the need to take immediate action to stop abuses. On January 31, 1994, the OTS suspended the acceptance of applications involving merger conversions of mutual savings associations under its supervision. The press release announcing the moratorium noted that "[t]he OTS has grown increasingly troubled over the apparent advantages management of the mutual and the acquirer have in a merger conversion to the detriment of the depositors of the mutual. The moratorium * * * will provide an opportunity for the OTS to re-examine the conversion process".

In light of these frequent expressions of public and governmental concern, and the numerous reports of abusive insider practices, the Board has determined that, until the FDIC completes the "rulemaking" process in relation to the Proposed Policy Statement, there is a need to review all pending and new mutual-to-stock conversion applications. The Board believes that, without the immediate implementation of the interim rule, additional conversions will be completed that may entail abusive management action and unsafe and unsound practices. In order to properly fulfill its supervisory role over State Savings Banks, it is necessary that the FDIC have an early opportunity to review banks' conversion plans. As discussed below, if the FDIC identifies a safety-and-soundness concern, a breach of fiduciary duty by an institution's management or possible violation under applicable law, the FDIC will issue a notice of objection which, among other things, will advise the institution that the conversion shall...
management becomes susceptible to market discipline for the first time with shareholders who demand and expect a reasonable return on their investment—factors which also can lead to additional risks in investing funds.

Because of the safety and soundness concerns inherent in the potential for new risks, a comprehensive and realistic business plan is needed for post-conversion operations. That information typically is provided in conversion applications required by the state regulators. In the past, certain State Savings Banks that raised substantial capital in mutual-to-stock conversions either failed or became financially troubled because of imprudent use of funds raised through the sale of stock. The Board believes it is necessary for the FDIC to obtain information, as soon as possible, on an institution's intended use of funds generated by the conversion.

In one proposed conversion transaction, a state mutual savings bank applied to convert to stock form via a mutual holding company reorganization in which all the non-holding company shares would be obtained only by bank insiders. In that situation, not only would the depositors be denied the opportunity to purchase any shares, but the institution would lose the capital in mutual-to-stock conversions thereby propping up the stock-based compensation awarded to management. The Board and the FDIC believe that the issuance of stock to insiders would be less than the cost of the conversion. This particular contemplated transaction not only appears to be unfair to depositors but also raises safety and soundness concerns since capitalization would decline.

Section 8(e) of the FDI Act also empowers the FDIC to bring an enforcement action against bank insiders who have committed or are engaged in any act, omission or practice that constitutes a breach of fiduciary duty. In a recent highly publicized case, the Superintendent of Banks of the State of New York (Superintendent) found that a bank's board of trustees breached its fiduciary duty by failing to assure themselves that the bank was properly valued prior to the initiation of the proxy solicitation process. Specifically, the Superintendent determined that the board of trustees did not, prior to the solicitation of proxies: "(i) Inform or seek to inform itself about the factors that would be significant in valuing the Bank; (ii) inform or seek to inform itself about the methods by which the appraiser determined the value of the Bank; (iii) seek or receive any in-depth analysis of the Appraisal". Consequently, the Superintendent found that the trustees violated a provision of New York Banking Law requiring them to exercise a duty of care to ensure the fairness of the conversion by informing themselves about the appraisal and exercising their judgment to determine the reasonableness of the appraisal.

The Superintendent also determined that the adequacy of certain disclosures in the original proxy statement issued by the bank was questionable. For example, the Superintendent found that the proxy statement contained no disclosures regarding another bank's interest in a merger conversion transaction, the trustees' response to that interest, or whether the reported disclosures were sufficient for the depositors to understand the reasons for the trustees' response. The Superintendent concluded that "failure to provide depositors with such information about alternate proposals in the Proxy could deprive depositors of the information necessary to evaluate the Trustee's decision to convert, and therefore was misleading". The Superintendent also found that the disclosures in the proxy statement concerning certain stock awards to management and the trustees failed to state the actual dollar value of those benefits and thus were inadequate. In addition, the Superintendent found that the proxy materials did not contain an adequate discussion of the reasons for the conversion and that depositors should have been provided with all of the material factors which led to the trustees' decision to pursue the conversion transaction.

Finally, the Superintendent sought and obtained a "substantial reduction in the stock-based compensation awarded to management and the trustees in connection with the conversion and cancellation of all stock subscriptions at the initial offering price by such individuals and related parties". As further stated in that Order, those modifications served "to reduce the opportunities for self-enrichment that could influence the Board's review of the valuation of the Bank".

In this situation, the Superintendent interceded to ensure that the board of the bank's trustees considered and reviewed the reasonableness of the bank's appraisal, provided adequate disclosure to the depositors via supplemental proxy statement and limited the stock-based compensation awarded to management and the trustees in connection with the conversion transaction. Although state regulation worked in this case to prevent insider windfalls, the FDIC
cannot assume that such intervention will occur in every state and in every conversion transaction involving possible insider abuses.

The duties and obligations of trustees and officers of mutual savings banks, as illustrated in the foregoing case, are identical to the responsibilities the FDIC has historically associated and enforced concerning directors and officers of commercial banks. The two principal duties of care and loyalty that directors and officers of commercial banks must exercise on behalf of the institution and its constituencies (i.e., depositors, creditors and shareholders) also obligate trustees of depositors-owne mutual savings banks. Both duties have long antecedents in the common law of corporations and financial institutions.

Trustees (as well as officers) of mutual savings institutions are held to the same standard of care and loyalty as directors and officers of commercial banks. Thus the trustees must fulfill their duty of loyalty to the institution by administering its affairs with utmost candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests or those of others at the expense of the bank. This general fiduciary duty has been frequently interpreted to include an element of fairness and good faith which, in the context of mutual-to-stock conversions, affords protection to the depositors/owners of mutual savings banks. Through this interim rule, the FDIC seeks to protect these depositor/owners in a consistent manner.

The FDIC, through the interim rule, also requires the trustees of mutual savings banks to adhere to the same standards of loyalty and care that are required of directors and officers of commercial banks in order to prevent insider abuse. Publicized insider abuse (and the lawsuits that such abuses may engender) may have a sufficiently significant impact upon the reputation of a bank to affect its continued viability and, thus, its safety and soundness, resulting in a regulatory violation.

In addition, section 39 of the FDI Act (12 U.S.C. 1831p-1(c)(1)) provides that excessive compensation, or compensation that could lead to a material financial loss for an institution, is an unsafe and unsound practice. As noted above, excessive profits to insiders is a troubling aspect of some recent State Savings Bank conversions to stock form.

Explanation of the Interim Rule

The interim rule adds a new section to part 303 of the FDIC's regulations (12 CFR 303.15) prohibiting State Savings Banks from converting to stock form without complying with the requirements of the section. The interim rule requires State Savings Banks that propose to convert to stock ownership to file with the FDIC a notice of intent to convert to stock form consisting of a description of the proposed conversion accompanied by a copy of all documentation and application materials filed with the applicable state and federal regulators. The notice may be in letter form and must be provided to the FDIC (along with copies of the application materials) at the same time the application materials are filed with the institution's primary state regulator.

State Savings Banks that already have filed conversion applications and disclosure materials with the applicable state and federal banking and/or securities regulators (or otherwise have initiated a proposed mutual to stock conversion) prior to the effective date of the interim rule should contact their applicable FDIC Regional Office as soon as possible and provide that office with the conversion notice and application and disclosure materials as soon as practicable. The FDIC intends to review such materials expeditiously so as not to interfere with the completion of proposed conversions to which the interim rule would not object.

The FDIC will review all conversion materials with a special interest in: The use of the proceeds from the sale of stock, as described in the business plan; the adequacy of the disclosure materials; the participation of depositors in approving the transaction; the form of the proxy statement required for the vote of the depositors/members on the conversion; any increased compensation and other remuneration (including stock grants, stock option rights and other similar benefits) to be obtained by officers and directors/trustees of the bank in connection with the conversion; the adequacy and independence of the appraisal of the value of the mutual savings bank for purposes of determining the price of the shares of stock to be sold; the process by which the bank's trustees approved the appraisal, the pricing of the stock and the compensation arrangements for insiders; the nature and apportionment of stock subscription rights; and the extent of any existing and planned contributions to or investments in the community. In a merger/conversion, the FDIC will pay particular attention to the value offered to depositors of the converting institution and the compensation packages offered to management.

The FDIC generally expects proposed conversions to substantially satisfy the standards found in the mutual-to-stock conversions regulations of the OTS (12 CFR part 563b). Any variance from those regulations will be closely scrutinized. Compliance with OTS requirements will not, however, necessarily be sufficient for FDIC regulatory purposes.

In imposing the requirements of the interim rule the Board does not intend to discourage State Savings Banks from converting to stock form for legitimate business purposes. The FDIC recognizes that stock conversions can be very effective and beneficial in raising capital, particularly for banks whose capital does not meet regulatory standards. In particular, the FDIC does not intend to impede the completion of supervisory conversions, which entail the capitalization of undercapitalized institutions and thereby minimize costs to the FDIC insurance funds. In such situations, the FDIC intends to act as quickly as reasonable in reviewing the proposed conversion materials and might not object to a conversion transaction that does not come within the parameters of the OTS' regulations, provided that the transaction likely would prevent a loss to the applicable deposit insurance fund.

Under the interim rule, a bank's notice to the FDIC will not be deemed complete until the State Savings Bank provides the materials required by the interim rule, including any materials specifically requested by the FDIC after the bank's initial submission. The FDIC will notify the institution when the notice is complete. The FDIC will issue to the converting bank a notice of intent not to object to the proposed conversion, if the FDIC determines that the proposed conversion would not pose a risk to the safety and soundness of the bank, violate any law or regulation or present a breach of fiduciary duty. Such notice of non-objection shall be provided within 60 days.
days after the FDIC receives a complete notice of the proposed conversion and a copy of all documentation and application materials. If the FDIC does not provide a nonobjection letter within 60 days after the FDIC receives a complete notice of the proposed conversion, the bank may consummate the conversion; however, the FDIC has the discretion to extend the initial 60-day period an additional 60 days.

In situations where the FDIC identifies a safety and concern, violation of any law or regulation or breach of fiduciary duty, the FDIC will issue to the institution a letter of objection to the proposed conversion. Under the interim rule, the State Savings Bank may not consummate the conversion until the FDIC has rescinded such a letter. The FDIC intends to use its administrative authority, if necessary, to correct the concerns expressed in the letter of objection and to enforce compliance with the interim rule.

Violations of regulations can result in, among other things, the FDIC’s issuance of a cease and desist order and/or temporary cease and desist order under 12 U.S.C. 1818(b) and/or (c). The order could not only prohibit conduct, but also require affirmative action. In addition, the FDIC could remove and/or prohibit a party from participating in the conduct of the affairs of a bank under section 8(e) of the FDI Act (12 U.S.C. 1818(e)). Moreover, anyone involved in a conversion transaction, not just the officers, directors and employees of the bank, could be subject to a cease and desist order under section 8(b) and/or (c) of the FDI Act (12 U.S.C. 1818(b), (c)), or a removal and prohibition order under section 8(e) of the FDI Act (12 U.S.C. 1816(e)). In addition, the FDIC could impose civil money penalties under section 8(f) of the FDI Act (12 U.S.C. 1818(f)). The FDIC also could terminate the deposit insurance of the bank under section 8(a)(2) of the FDI Act (12 U.S.C. 1818(a)(2)). Finally, the FDIC also could issue a directive based on noncompliance with section 39 of the FDI Act.

Request for Public Comment

The FDIC is issuing this interim rule in response to the immediate need to review proposed mutual-to-stock conversions of State Savings Banks. The FDIC is, however, hereby requesting comment during a 30-day comment period on all aspects of the interim rule.

List of Subjects in 12 CFR Part 303

Administrative practice and procedure, Authority delegations (Government agencies), Bank deposit insurance, Banks, Banking, Reporting and recordkeeping requirements, Savings associations.

For the reasons set out in the preamble, part 303 of chapter III of title 12 of the Code of Federal Regulations is amended as follows:

PART 303—APPLICATIONS, REQUESTS, SUBMITTALS, DELEGATIONS OF AUTHORITY, AND NOTICES REQUIRED TO BE FILED BY STATUTE OR REGULATION

1. The authority citation for part 303 is revised to read as follows:


2. A new §303.15 is added to read as follows:

§303.15 Mutual-to-stock conversions of mutually owned state-chartered savings banks.

(a) Requirement for mutual-to-stock conversion. An insured state-chartered mutually owned savings bank shall not convert to stock form, except as provided for in this section.

(b) Prior notice requirement. An insured state-chartered mutually owned savings bank that proposes to convert from mutual to stock form shall file with the FDIC a notice of intent to convert to stock form and copies of all documents filed with state and federal banking and/or securities regulators in connection with the proposed conversion. An institution that is in the process of converting to stock form that has filed a proposed stock conversion application with the applicable state and federal regulators (or otherwise has initiated a stock conversion) prior to the effective date of this section shall file the required materials with the FDIC as soon as practicable. An insured mutual savings bank chartered by a state that does not require the filing of application materials to convert from mutual to stock form that proposes to convert to the stock form shall notify the FDIC of the proposed conversion and provide the materials requested by the FDIC.

(c) Content and filing of notice—(1) Content of notice. The notice required to be filed under paragraph (b) of this section shall provide a description of the proposed conversion and include a copy of all notices or applications concerning the proposed conversion, including all attachments or appendices thereto, that have been filed with any state and federal banking and/or securities regulators. Copies of all agreements entered into as part of the mutual-to-stock conversion between the institution, its officers, directors/trustees and any other institution and/or its successors also must be provided. (2) Filing of notice. Notices shall be filed with the regional director (Division of Supervision) in the region in which the institution seeking to convert is headquartered at the same time as the conversion application materials are filed with the institution’s primary state regulator.

(d) Review by FDIC. (1) The FDIC shall review the materials submitted by the institution seeking to convert from mutual to stock form. The FDIC, in its discretion, may request any additional information it deems necessary to evaluate the proposed conversion and the institution shall provide such information to the FDIC expeditiously. Among the factors to be reviewed by the FDIC are:

(i) The use of the proceeds from the sale of stock, as described in the business plan;

(ii) The adequacy of the disclosure materials;

(iii) The participation of depositors in approving the transaction;

(iv) The form of the proxy statement required for the vote of the depositors/members on the conversion;

(v) Any increased compensation and other remuneration (including stock grants, stock option rights and other similar benefits) to be obtained by officers and directors/trustees of the bank in connection with the conversion;

(vi) The adequacy and independence of the appraisal of the value of the mutual savings bank for purposes of determining the price of the shares of stock to be sold;

(vii) The process by which the bank’s trustees approved the appraisal, the pricing of the stock and the compensation arrangements for insiders;

(viii) The nature and apportionment of stock subscription rights; and

(ix) The extent of any existing and planned contributions to or investments in the community.

(2) In reviewing the materials required to be submitted under this section, the FDIC will take into account the extent to which the proposed conversion conforms with the various provisions of the mutual-to-stock conversion regulations of the Office of Thrift Supervision (12 CFR Part 563b), as currently in effect at the time the FDIC reviews the required materials related to the proposed conversion. Any nonconformity with those provisions will be closely scrutinized. Conformity with the FDI requirements, however, will not be sufficient for FDIC regulatory purposes if the FDIC determines that the proposed conversion would pose a risk.
to the institution’s safety and soundness, violate any law or regulation or present a breach of fiduciary duty. (e) Notification of completed filing of materials. The FDIC shall notify the institution when all the required materials related to the proposed conversion have been filed with the FDIC and the notice is thereby complete for purposes of computing the time periods designated in paragraphs (i) and (h) of this section.

(i) Notice of intent not to object. If the FDIC determines, in its discretion, that the proposed conversion would not pose a risk to the institution’s safety and soundness, violate any law or regulation or present a breach of fiduciary duty, then the FDIC shall issue to the bank seeking to convert, within 60 days of receipt of a complete notice of proposed conversion, a notice of intent not to object to the proposed conversion. The FDIC may, in its discretion, extend the time periods under paragraphs (i) and (h) of this section, and to notify institutions of the completion of the filing of the required materials is delegated to the Executive Director of Supervision and Resolutions, the Director of the Division of Supervision, and, where confirmed in writing by the Director of Supervision, to an associate director of the Division of Supervision or the regional director(s) (Division of Supervision) or deputy regional director(s) (Division of Supervision).

By the order of the Board of Directors.

Dated at Washington, D.C., this 8th day of February, 1994.

Federal Deposit Insurance Corporation

Robert E. Feldman,
Acting Executive Secretary.

[FR Doc. 94–3527 Filed 2–14–94; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 25

[Docket No. NM–90; Special; Conditions No. 25–ANM–79]

Special Conditions; Cessna Aircraft Company, Model 560 Block Point Change, S.N. 560–0260 and on, Airplanes, Lightning and High-Intensity Radiated Fields (HIRF)

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Cessna Aircraft Company (Cessna), Model 560 Block Point Change, S.N. 560–0260 and on, airplanes. These new airplanes will utilize new avionics/electronic systems that perform critical or essential functions. The applicable regulations do not contain adequate or appropriate safety standards for the protection of these systems from the effects of lightning and high-intensity radiated fields (HIRF). These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

EFFECTIVE DATES: March 17, 1994.


SUPPLEMENTARY INFORMATION:

Background

On December 2, 1992, Cessna Aircraft Company (Cessna), applied for an amended type certificate in the transport airplane category for the Model 560 Block Point Change, S.N. 560–0260 and on, airplanes. The Cessna Model 560 Block Point Change is a modified Cessna Model 560. The two Pratt and Whitney, Canada JT15D–5A engines will be replaced with JT15D–5D turbo fans which will have an increase of approximately 5 percent thrust. One 8x7-inch primary flight instrument display (PFD) will be installed at each pilot’s station and an 8x7-inch Multifunction Display (MFD) (without engine indication and crew alerting system (EICAS)) will be installed in the center panel as standard equipment. Copilot’s standard instruments will be an electro-mechanical attitude system driven by the VG–14 gyro and an electro-mechanical horizontal situation indicator (HSI) driven by the C–14D gyro. An option is offered to replace these copilot instruments with a copilot’s 8x7-inch display. A Honeywell Primus 1000, digital autopilot/flight director system will be installed. This system will operate in conjunction with a suite of Collins radios (dual Com, Dual Nav, dual distance measuring equipment (DME), dual Mode S Transponder, and automatic direction finder (ADF)). Optional available avionics will be a second ADF, emergency locator transmitter (ELT) and cockpit voice recorder (CVR).

The Cessna 560 Block Point Change will also include adhesive bonded cabin side stringers, rather than riveting. Other structural, thermal and acoustic improvements will be installed. The zero fuel weight will increase from 11,200 pounds (lbs.) to 11,700 lbs., the ramp weight will increase from 16,100 lbs. to 16,500 lbs. and the takeoff weight will increase from 15,900 lbs. to 16,300 lbs.

Type Certification Basis

Under the provisions of § 21.17 of the FAR, except as provided in § 25.2, the certification basis of the Model 560 Block Point Change, S.N. 560–0260 and on, will include the applicable provisions of Part 25, as amended by
Amendments 25—1 through 25—17; §§ 25.251(e), 25.934, and 25.1091(d)(2) as amended through Amendment 25—23; § 25.1401 as amended through Amendment 25—27; § 25.1387 as amended through Amendment 25—30; §§ 25.787, 25.789, 25.791, 25.853, 25.855, 25.857, and 25.1359 as amended through Amendment 25—32; §§ 25.1395(b) and 25.1395(c) as amended through Amendment 25—38; § 25.305 as amended through Amendment 25—54; § 25.1001 as amended through Amendment 25—57; Part 34 of the FAR; Part 36 of the FAR as amended through Amendments 36—1 through 36—18. Also included in the regulations are §§ 25.1301, 25—25.1321 (a), (b), (d), and (e), 25.1331, 25.1333, and 25.1335 as amended through Amendment 25—41.

If the Administrator finds that the applicable airworthiness regulations (i.e., Part 25, as amended) do not contain adequate or appropriate safety standards for the Cessna Model 560 Block Point Change because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations. Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29, and become part of the type certification basis in accordance with § 21.17(a)(2).

Novel or Unusual Design Features
The Model 560 Block Point Change, S.N. 560—0260 and on, incorporates new avionic/electronic installations, including one 8x7-inch PFD at each pilot’s station, and 8x7-inch MFD (without EICAS) in the center panel, an optional copilot’s 8x7-inch display, a Honeywell Primus 1000 digital autopilot/flight director system to operate in conjunction with a suite of Collins radios (dual Com, Dual Nav, dual DME, and ADF) and optional second ADF. These systems may be vulnerable to lightning and high-intensity radiated fields external to the airplane.

Discussion
The existing lightning protection airworthiness certification requirements are insufficient to provide an acceptable level of safety with new technology avionic systems. There are two regulations that specifically pertain to lightning protection: one for the airplane in general (§ 25.581), and the other for fuel system protection (§ 25.954). There are, however, no regulations that deal specifically with protection of electrical and electronic systems from lightning. The loss of a critical function of these systems due to lightning could prevent continued safe flight and landing of the airplane. Although the loss of an essential function would not prevent continued safe flight and landing, it could significantly impact the safety level of the airplane.

There is also no specific regulation that addresses protection requirements for electrical and electronic systems from HIRF. Increased power levels from ground based radio transmitters and the growing use of sensitive electrical and electronic systems to command and control airplanes have made it necessary to provide adequate protection.

To ensure that a level of safety is achieved equivalent to that intended by the regulations incorporated by reference, these special conditions are issued for the Cessna Model 560 Block Point Change, S.N. 560—0260 and on, which require that new technology electronic systems, such as the primary instrument flight displays, multifunction display, digital autopilot/flight director, etc., be designed and installed to preclude component damage and interruption of function due to both the direct and indirect effects of lightning and HIRF.

Lightning
To provide a means of compliance with these special conditions, clarification of the threat definition of lightning is needed. The following “threat definition,” based on FAA Advisory Circular 20—136, Protection of Aircraft Electrical/Electronic Systems Against the Indirect Effects of Lightning, dated March 5, 1990, is proposed as a basis to use in demonstrating compliance with the lightning protection special condition, with the exception of the multiple burst environment, which has been changed to agree with the latest recommendation from the Society of Automotive Engineers (SAE) AE4L lightning committee.

The lightning current waveforms (Components A, D, and H) defined below, along with the voltage waveforms in AC 20—53A, will provide a consistent and reasonable standard that is acceptable for use in evaluating the effects of lightning on the airplane.

These waveforms depict threats that are external to the airplane. How these threats affect the airplane and its systems depends upon their installation configuration, materials, shielding, airplane geometry, etc. Therefore, tests (including tests on the completed airplane or an adequate simulation) and/or verified analyses need to be conducted in order to obtain the resultant internal threat to the installed systems. The electronic systems may then be evaluated with this internal threat in order to determine their susceptibility to upset and/or malfunction.

To evaluate the induced effects to these systems, three considerations are required:

1. First Return Stroke: (Severe Strike—Component A, or Restrike-Component D). This external threat needs to be evaluated to obtain the resultant internal threat and to verify that the level of the induced currents and voltages is sufficiently below the equipment “hardness” level; then
2. Multiple Stroke Flash: (Component D). A lightning strike is often composed of a number of successive strokes, referred to as multiple strokes. Although multiple strokes are not necessarily a salient factor in a damage assessment, they can be the primary factor in a system upset analysis. Multiple strokes can induce a sequence of transients over an extended period of time. While a single event upset of Input/output signals may not affect system performance, multiple signal upsets over an extended period of time (2 seconds) may affect the systems under consideration. Repetitive pulse testing and/or analysis needs to be carried out in response to the multiple stroke environment to demonstrate that the system response meets the safety objective. This external multiple stroke environment consists of 24 pulses and is described as a single Component A followed by 23 randomly spaced restrikes of 1/4 magnitude of Component D (peak amplitude of 50,000 amps). The 23 restrikes are distributed over a period of up to 2 seconds according to the following constraints: (1) The minimum time between subsequent strokes is 10ms, and (2) the maximum time between subsequent strokes is 200ms. An analysis or test needs to be accomplished in order to obtain the resultant internal threat environment for the system under evaluation.
And,
3. Multiple Burst: (Component H). In-flight data-gathering projects have shown bursts of multiple, low amplitude, fast rates of rise, short duration pulses accompanying the
airplane lightning strike process. While insufficient energy exists in these pulses to cause physical damage, it is possible that transients resulting from this environment may cause upset to some digital processing systems.

The representation of this interference environment is a repetition of short duration, low amplitude, high peak rate of rise, double exponential pulses that represent the multiple bursts of current pulses observed in these flight data gathering projects. This component is intended for an analytical (or test) assessment of functional upset of the system. Again, it is necessary that this component be translated into an internal environmental threat in order to be used. This “Multiple Burst” consists of repetitive Component H waveforms in 3 sets of 20 pulses each. The minimum time interval between individual Component H pulses within a burst is 50 microseconds, the maximum is 1,000 microseconds. The 3 bursts are distributed according to the following constraints: (1) The minimum period between subsequent bursts is 30ms, and (2) the maximum period between subsequent bursts is 300ms. The individual “Multiple Burst” Component H waveform is defined below.

The following current waveforms constitute the “Severe Strike” (Component A), “Restrike” (Component D), “Multiple Stroke” (vs Component D), and the “Multiple Burst” (Component H).

These components are defined by the following double exponential equation:

\[ i(t) = I_0 (e^{-t} - e^{-\frac{t}{\tau}}) \]

where:

- \( t = \) time in seconds,
- \( i = \) current in amperes, and
- \( \tau = \) time constant in seconds.

With the trend toward increased power levels from ground based transmitters, plus the advent of space and satellite communications, coupled with electronic command and control of the airplane, the immunity of critical digital avionics systems to HIRF must be established.

It is not possible to precisely define the HIRF to which the airplane will be exposed in service. There is also uncertainty concerning the effectiveness of airframe shielding for HIRF. Furthermore, coupling to cockpit-installed equipment through the cockpit window apertures is undefined. Based on surveys and analysis of existing HIRF emitters, an adequate level of protection is established through system elements and their associated wiring harnesses without the benefit of airframe shielding.

Demonstration of this level of protection is established through system tests and analysis.

A threat external to the airframe of the following field strengths for the frequency ranges indicated.

<table>
<thead>
<tr>
<th>Frequency</th>
<th>Peak (V/M)</th>
<th>Average (V/M)</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 KHz - 100 KHz</td>
<td>50</td>
<td>50</td>
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<tr>
<td>100 KHz - 500 KHz</td>
<td>60</td>
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<td>500 KHz - 2000 KHz</td>
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<td>8 GHz - 12 GHz</td>
<td>3,500</td>
<td>1,270</td>
</tr>
<tr>
<td>12 GHz - 18 GHz</td>
<td>3,500</td>
<td>360</td>
</tr>
<tr>
<td>18 GHz - 40 GHz</td>
<td>2,100</td>
<td>750</td>
</tr>
</tbody>
</table>

The envelope given in paragraph 2 above is a revision to the envelope used in previously issued special conditions in other certification projects. It is based on new data and SAE AE4R subcommittee recommendations. This revised envelope includes data from Western Europe and the U.S. Aircraft Company called to our attention that the description of the avionics system is different than the configuration being presented for type certification. They stated that the standard equipment configuration will have an 8x7-inch PFD at each pilot’s station vs the Federal Register publication description of two PFD’s at the pilots station with an optional copilot PFD. This change was noted and incorporated in these final special conditions.

Conclusion

This action affects only certain unusual or novel design features on one model of airplane. It is not a rule of general applicability and affects only the manufacturer who applied to the FAA for approval of these features on the airplane.

List of Subjects in 14 CFR Part 23

Air transportation, Aircraft, Aviation safety, Safety.

The authority citation for those special conditions is as follows:


The Special Conditions

Accordingly, the following special conditions are issued as part of the type certification basis for the Cessna Aircraft

<table>
<thead>
<tr>
<th>Special Condition</th>
<th>Frequency Ranges</th>
<th>Peak (V/M)</th>
<th>Average (V/M)</th>
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<tr>
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<td>750</td>
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</tr>
</tbody>
</table>
14 CFR Part 25
[Docket No. NM–89; Special Conditions No. 25–ANM–60]

Special Conditions; Cessna Aircraft Company, Model 750 (Citation X) Airplane, High Altitude Operation

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final special conditions.

SUMMARY: These special conditions are issued for the Cessna Aircraft Company (Cessna) Model 750 (Citation X) airplane. This new airplane will have a novel and unusual design feature associated with an unusually high operating altitude (51,000 feet), for which the applicable airworthiness regulations do not contain adequate or appropriate safety standards. These special conditions contain the additional safety standards that the Administrator considers necessary to establish a level of safety equivalent to that established by the existing airworthiness standards.

EFFECTIVE DATE: March 17, 1994.


SUPPLEMENTARY INFORMATION:

Background

On October 15, 1991, Cessna Aircraft Company (Cessna), 6030 Cessna Blvd., P.O. Box 7704, Wichita, KS 67277–7704, applied for a new type certificate in the transport airplane category for the Model 750 (Citation X) airplane. The Cessna Model 750 is a T-tail, low swept wing, medium sized business jet powered by two GMA–3007C turbofan engines mounted on pylons extending from the aft fuselage. Each engine will be capable of delivering 6,000 pounds thrust. The flight controls will be powered and capable of manual reversion. The type design of the Cessna Model 750 series airplanes contains a number of novel and unusual design features for an airplane type certificated under the applicable provisions of part 25 of the FAR. These features include the relatively small passenger cabin volume and a high operating altitude. The applicable airworthiness requirements do not contain adequate or appropriate safety standards for the Cessna 750 series airplanes; therefore, special conditions are necessary to establish a level of safety equivalent to that established in the regulations.

Type Certification Basis

Under the provisions of § 21.17 of the FAR, Cessna must show, except as provided in §25.2, that the Model 750 (Citation X) meets the applicable provisions of part 25, effective February 1, 1965, as amended by Amendments 25–1 through 25–74. In addition, the certification basis for the Model 750 includes part 34, effective September 10, 1990, plus any amendments in effect at the time of certification; and part 36, effective December 1, 1969, as amended by Amendments 36–1 through the amendment in effect at the time of certification. No exemptions are anticipated. These special conditions will form an additional part of the type certification basis. In addition, the certification basis may include other special conditions that are not relevant to these special conditions.

If the Administrator finds that the applicable airworthiness regulations (i.e., part 25, as amended) do not contain adequate or appropriate safety standards for the Cessna Model 750 because of a novel or unusual design feature, special conditions are prescribed under the provisions of § 21.16 to establish a level of safety equivalent to that established in the regulations.

Special conditions, as appropriate, are issued in accordance with § 11.49 of the FAR after public notice, as required by §§ 11.28 and 11.29, and become part of the type certification basis in accordance with § 21.17(a)(2).

Novel or Unusual Design Feature

The Cessna Model 750 will incorporate an unusual design feature in that it will be certified to operate up to an altitude of 51,000 feet. The FAA considers certification of transport category airplanes for operation at altitudes greater than 41,000 feet to be a novel or unusual feature because current part 25 does not contain standards to ensure the same level of safety as that provided during operation at lower altitudes. Special conditions have therefore been adopted to provide adequate standards for transport category airplanes previously approved for operation at these high altitudes, including certain Learjet models, the Boeing Model 747, Dassault–Breguet Falcon 900, Canadair Model 600, Cessna Model 650, Israel Aircraft Industries Model 1125, and Cessna Model 560. The special conditions for the Cessna Model 650 are considered the most applicable to the Model 750 and its proposed operation and are therefore used as the basis for the special conditions described below.

Damage tolerance methods are proposed to be used to assure pressure vessel integrity while operating at the higher altitudes, in lieu of the 1/4-bay crack criterion used in some previous special conditions. Crack growth data are used to prescribe an inspection program that should detect cracks before an opening in the pressure vessel would allow rapid depressurization. Initial crack sizes for detection are determined under the applicable special condition in Amendment 25–72. The cabin altitude after failure must not exceed the cabin...
List of Subjects in 14 CFR Part 25
Aircraft, Aviation safety, Federal Aviation Administration, Reporting and recordkeeping requirements.

The authority citation for these special conditions is as follows:

The Special Conditions
Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna Model 750 (Citation X) series airplanes:

Operation to 51,000 Feet

1. Pressure Vessel Integrity. (a) The maximum extent of failure and pressure vessel opening that can be demonstrated to comply with paragraph 4 (Pressurization) of this special condition must be demonstrated by crack propagation and damage tolerance analysis supported by testing that a larger opening or a more severe failure than demonstrated will not occur in normal operations.

(b) Inspection schedules and procedures must be established to assure that cracks and normal fuselage leak rates will not deteriorate to the extent that an unsafe condition could exist during normal operation.

(c) With regard to the fuselage structural design for cabin pressure capability above 45,000 feet altitude, the pressure vessel structure, including doors and windows, must comply with § 25.835(d), using a factor of 1.67 instead of the 1.33 factor prescribed.

2. Ventilation. In lieu of the requirements of § 25.831(a), the ventilation system must be designed to provide a sufficient amount of uncontaminated air to enable the crewmembers to perform their duties without undue discomfort or fatigue, and to provide reasonable passenger comfort during normal operating conditions and also in the event of any probable failure of any system that could adversely affect the cabin ventilating air. For normal operations, crewmembers and passengers must be provided with at least 10 cubic feet of fresh air per minute per person, or the equivalent in filtered, recirculated air based on the volume and composition at the corresponding cabin pressure altitude of not more than 8,000 feet.

3. Air Conditioning. In addition to the requirements of § 25.831, paragraphs (b) through (e), the cabin cooling system must be designed to meet the following conditions during flight above 15,000 feet mean sea level (MSL): (a) After any probable failure, the cabin temperature-time history may not exceed the values shown in Figure 1. (b) After any improbable failure, the cabin temperature-time history may not exceed the values shown in Figure 2.

4. Pressurization. In addition to the requirements of § 25.841, the following apply: (a) The pressurization system, which includes for this purpose bleed air, air conditioning, and pressure control systems, must prevent the cabin altitude from exceeding the cabin altitude-time history shown in Figure 3 after each of the following: (1) Any probable malfunction or failure of the pressurization system. The existence of undetected, latent malfunctions or failures in conjunction with probable failures must be considered. (2) Any single failure in the pressurization system, combined with the occurrence of a leak produced by a complete loss of a door seal element, or a fuselage leak through an opening having an effective area 2.0 times the effective area that produces the maximum permissible fuselage leak rate approved for normal operation, whichever produces a more severe leak. (b) The cabin altitude-time history may not exceed that shown in Figure 4 after each of the following: (1) The maximum pressure vessel opening resulting from an initially detectable crack propagating for a period encompassing four normal inspection intervals. Mid-panel cracks and cracks through skin-stringer and skin-frame combinations must be considered. (2) The pressure vessel opening or duct failure resulting from probable damage (failure effect) while under maximum operating cabin pressure differential due to a tire burst, engine rotor burst, loss of antennas or stall warning vanes, or any probable equipment failure (bleed air, pressure control, air conditioning, electrical source(s), etc.) that affects pressurization. (3) Complete loss of thrust from all engines.

(c) In showing compliance with paragraphs 4(a) and 4(b) of these special conditions (Pressurization), it may be assumed that an emergency descent is made by approved emergency procedure. A 17-second crew recognition and reaction time must be applied between cabin altitude warning and the initiation of an emergency descent.
Note: For the flight evaluation of the rapid descent, the test article must have the cabin volume representative of what is expected to be normal, such that Cessna must reduce the total cabin volume by that which would be occupied by the furnishings and total number of people.

5. Oxygen Equipment and Supply. (a) A continuous flow oxygen system must be provided for the passengers. (b) A quick-donning pressure demand mask with mask-mounted regulator must be provided for each pilot. Quick-donning from the stowed position must be demonstrated to show that the mask can be withdrawn from stowage and donned within 5 seconds.
TIME - TEMPERATURE RELATIONSHIP

FIGURE 1

HUMIDITY < 2700 N/m² (27 mbar)

Vapor Pressure
TEMPERATURE

TIME - TEMPERATURE RELATIONSHIP

FIGURE 2
NOTE: For Figure 3, time starts at the moment cabin altitude exceeds 8,000 feet during depressurization. If depressurization analysis shows that the cabin altitude limit of this curve is exceeded, the following alternate limitations apply: After depressurization, the maximum cabin altitude exceedance is limited to 30,000 feet. The maximum time the cabin altitude may exceed 25,000 feet is 2 minutes; time starting when the cabin altitude exceeds 25,000 feet and ending when it returns to 25,000 feet.
NOTE: For figure 4, time starts at the moment cabin altitude exceeds 8,000 feet during depressurization. If depressurization analysis shows that the cabin altitude limit of this curve is exceeded, the following alternate limitations apply: After depressurization, the maximum cabin altitude exceedence is limited to 40,000 feet. The maximum time the cabin altitude may exceed 25,000 feet is 2 minutes; time starting when the cabin altitude exceeds 25,000 feet and ending when it returns to 25,000 feet.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Airbus Industrie Models A300, A310, and A300–600 series airplanes. This action requires repetitive deployment tests of the ram air turbine (RAT) and checks of the adjustment of the locking rod. This amendment is prompted by reports of failure of the RAT to rotate when necessary, due to maladjustment of the locking rod. The actions specified in this AD are intended to ensure the availability of the RAT in case of need.


The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of March 2, 1994.

Comments for inclusion in the Rules Docket must be received on or before April 18, 1994.


The service information referenced in this AD may be obtained from Airbus Industrie, 1 Rond Point Maurice Bellonte, 31707 Blagnac Cedex, France. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Stephen Slotte, Aerospace Engineer,
blades and RAT doors is not readily detectable during a normal RAT ground functional test, since the RAT does not rotate during the extension phase of the test. If this latent failure occurs, it can lead to damage of the RAT blades and subsequent reduced performance of the RAT during times when its use is needed.

In order to address this situation, Airbus Industrie issued All Operator Telex 29-09, dated November 16, 1993, which recommends similar inspection, adjustment, and lubrication actions to those called for in the previous AOT, but reduces the tolerances for adjustment of the RAT locking rod to 5 (±0.5 to ±1.0) degrees. This reduction of the adjustment tolerances will prevent the previously described situation from occurring and thereby preclude the problems associated with the RAT blades rotating too early. The DGAC classified this service bulletin as mandatory and issued French Airworthiness Information 93-136-146(f)R1, dated December 22, 1993, in order to assure the continued airworthiness of these airplanes in France.

This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of Section 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept the FAA informed of the situation described above. The FAA has examined the findings of the DGAC, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent reduced performance of the RAT in case of need. This AD requires repetitive ground extension tests of the RAT to ensure that it is in proper working condition, and repetitive checks of the locking rod for proper movement and adjustment, if necessary. This AD also requires application of additional lubricating grease at the top and bottom of the spring housing, so that the area would be inhibited from corroding and the resulting friction appeared high enough to contribute to the stiffness of the locking rod assembly. This condition, if not corrected, could result in the unavailability of the RAT in case of need.

In response to this situation, Airbus Industrie issued an All Operator Telex (AOT) in July 1993, recommending that operators perform repetitive ground extension tests of the RAT to ensure that it was in proper working condition, and repetitive checks of the locking rod for proper movement. That AOT instructed operators to adjust the locking rod at 5 to 10 degrees from full travel of the leg extended position. (By adjusting to that point, alignment with the surface of the lock plate was expected to be reached.) The AOT also recommended that operators apply additional lubricating grease at the top and bottom of the spring housing, so that the area would be sealed against moisture and corrosion would be inhibited.

Subsequent to the issuance of that AOT, a report was received indicating that, during an in-flight deployment test on a Model A300 series airplane, one of the blades of the RAT was damaged. Investigation of this incident revealed that the RAT locking rod had been adjusted to 10 degrees from full travel of the leg in extended position, as was recommended in the previously-issued AOT. Consequently, this had allowed the RAT blades to start to rotate too early and contact the RAT door. Potential contact between the RAT
under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption "ADDRESSES."

List of Subjects in 14 CFR Part 39
Air transportation, Aircraft, Aviation safety, Incorporation by reference, Safety.

Adoption of the Amendment
Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§39.13 [Amended]
2. Section 39.13 is amended by adding the following new airworthiness directive:

94-04-05 Airbus: Amendment 39-8823.
Docket 94-11-00-10.
Applicability: Models A300, A310, and A300-600 series airplanes, certified in any category; equipped with the following Dowty ram air turbines (RAT), part numbers:
RAT 16C 100 VG
RAT 16C 101 VG
RAT 16C 102 VG
RAT 16C 103 VG
RAT 16C 104 VG
RAT 16C 105 VG
RAT 16C 109 VG
RAT 16C 110 VG
RAT 16C 116 VG
RAT 16C 117 VG

Compliance: Required as indicated, unless accomplished previously.
To ensure the availability of the ram air turbine (RAT) in case of need, accomplish the following:
(a) Within 60 days after the effective date of this AD, or prior to accumulation of 500 hours time-in-service after the effective date of this AD, whichever occurs first, perform a deployment test of the RAT and check the adjustment of the locking rod, in accordance with Airbus All Operator Telex (AOT) 29-09, dated November 16, 1993. Repeat the deployment test and adjustment check thereafter at intervals not to exceed 10 months.
(b) If any discrepancy is found, prior to further flight, apply grease to the RAT leg at the entry and exit positions of the locking rod spring housing, in accordance with the AOT.
(c) If any discrepancy is found, prior to further flight correct it and apply grease to the RAT leg at the entry and exit positions of the locking rod spring housing, in accordance with the AOT.

PENSION BENEFIT GUARANTEE CORPORATION

29 CFR Parts 2619 and 2676

Valuation of Plan Benefits in Single-Employer Plans; Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal; Amendments Adopting Additional PBGC Rates

AGENCY: Pension Benefit Guaranty Corporation.
ACTION: Final rule.

SUMMARY: This final rule amends the Pension Benefit Guaranty Corporation's ("PBGC") regulations on Valuation of Plan Benefits in Single-Employer Plans and Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal. The former regulation contains the interest assumptions that the PBGC uses to value benefits for terminating single-employer plans. The latter regulation contains the interest assumptions for valuations of multiemployer plans that have undergone mass withdrawal. The amendments set out in this final rule adopt the interest assumptions applicable to single-employer plans with termination dates in March 1994, and to multiemployer plans with valuation dates in March 1994. The effect of these amendments is to advise the public of the adoption of these assumptions.

EFFECTIVE DATE: March 1, 1994.

FOR FURTHER INFORMATION CONTACT: Harold J. Ashner, Assistant General Counsel, Office of the General Counsel, Pension Benefit Guaranty Corporation, 1200 K Street, NW., Washington, DC 20005, 202-326-4024 (202-326-4179 for TTY and TDD). (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: This rule adopts the March 1994 interest assumptions to be used under the Pension Benefit Guaranty Corporation's ("PBGC") regulations on Valuation of Plan Benefits in Single-Employer Plans (29 CFR part 2619, the "single-employer regulation") and Valuation of Plan Benefits and Plan Assets Following Mass Withdrawal (29 CFR part 2676, the "multiemployer regulation"). Part 2619 sets forth the methods for valuing plan benefits of terminating single-employer plans covered under title IV of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Under ERISA section 4041(c), all single-employer plans wishing to terminate in a distress termination must value guaranteed benefits and "benefit liabilities", i.e., all benefits provided under the plan as of the plan termination date, using the formulas set forth in part 2619, subpart C. (Plans terminating in a standard termination may, for purposes of the Standard Termination Notice filed with PBGC, use these formulas to value benefit liabilities, although this is not required.) In addition, when the PBGC terminates a PBGC-insured plan involuntarily pursuant to ERISA section 4042(a), it uses the subpart C formulas to determine the amount of the plan's underfunding. Part 2676 prescribes rules for valuing benefits and certain assets of multiemployer plans under sections 4219(c)(1)(D) and 4281(b) of ERISA.

Appendix B to part 2619 sets forth the interest rates and factors under the
The PBGC has determined that this action is not a "significant regulatory action" under the criteria set forth in Executive Order 12866, because it will not have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a section of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.

Because no general notice of proposed rulemaking is required for this amendment, the Regulatory Flexibility Act of 1980 does not apply. See 5 U.S.C. 601(2).

List of Subjects

29 CFR Part 2619
Employee benefit plans, Pension insurance, and Pensions.

29 CFR Part 2676
Employee benefit plans, and Pensions.

In consideration of the foregoing, parts 2619 and 2676 of chapter XXVI, title 29, Code of Federal Regulations, are hereby amended as follows:

PART 2619—[AMENDED]

1. The authority citation for part 2619 continues to read as follows:

Authority: 29 U.S.C. 1301(a), 1302(b)(3), 1341, 1344, 1362.

2. In appendix B, Rate Set 5 is added to Table I, and a new entry is added to Table II, as set forth below. The introductory text of both tables is republished for the convenience of the reader and remains unchanged.

Appendix B to Part 2619—Interest Rates Used to Value Lump Sums and Annuities

Lump Sum Valuations

In determining the value of interest factors of the form $v^n$ (as defined in §2619.43(b)(1)) for purposes of applying the formulas set forth in §2619.43(b) through (l) and in determining the value of any interest factor used in valuing benefits under this subpart to be paid as lump sums (including the return of accumulated employee contributions upon death), the PBGC shall employ the values of Table I hereof as follows:

(1) For benefits for which the participant or beneficiary is entitled to be in pay status on the valuation date, the immediate annuity rate shall apply.

(2) For benefits for which the deferral period is $y$ years ($y$ is an integer and $0 < y \leq n_1$), interest rate $i_1$ shall apply from the valuation date for a period of $y$ years; thereafter the immediate annuity rate shall apply.

(3) For benefits for which the deferral period is $y$ years ($y$ is an integer and $n_1 < y \leq n_1 + n_2$), interest rate $i_2$ shall apply from the valuation date for a period of $y - n_1$ years, interest rate $i_1$ shall apply for the following $n_1$ years; thereafter the immediate annuity rate shall apply.

(4) For benefits for which the deferral period is $y$ years ($y$ is an integer and $y > n_1 + n_2$), interest rate $i_3$ shall apply from the valuation date for a period of $y - n_1 - n_2$ years, interest rate $i_2$ shall apply for the following $n_2$ years, interest rate $i_1$ shall apply for the following $n_1$ years; thereafter the immediate annuity rate shall apply.
In determining the value of interest factors of the form \( v^n \) as defined in §2676.13(b)(1) for purposes of applying the formulas set forth in §2676.13(b) through (i) and in determining the value of any interest factor used in valuing annuity benefits under this subpart, the plan administrator shall use the values of \( i \), prescribed in Table I hereof. The following table tabulates, for each calendar month of valuation ending after the effective date of this part, the interest rates (denoted by \( i_1, i_2, \ldots \)), and referred to generally as \( i_n \) assumed to be in effect between specified anniversaries of a valuation date that occurs within that calendar month; those anniversaries are specified in the columns adjacent to the rates. The last listed rate is assumed to be in effect after the last listed anniversary date.

### Table I

<table>
<thead>
<tr>
<th>Rate set</th>
<th>For plans with a valuation date</th>
<th>Immediate annuity rate (percent)</th>
<th>Deferred annuities (percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>On or after Before</td>
<td>( i_1 )</td>
<td>( i_2 )</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>3-1-94</td>
<td>4-1-94</td>
</tr>
</tbody>
</table>

### Annuity Valuations

In determining the value of interest factors of the form \( v^n \) (as defined in §2676.13(b)(1)) for purposes of applying the formulas set forth in §2676.13(b) through (i) and in determining the value of any interest factor used in valuing annuity benefits under this subpart, the plan administrator shall use the values of \( i_n \) prescribed in the table below.

### Table II

<table>
<thead>
<tr>
<th>For valuation dates occurring in the month</th>
<th>( i_n ) for ( t = n )</th>
<th>( i_n ) for ( t = n+1 )</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1994</td>
<td>.0580</td>
<td>.0525</td>
</tr>
</tbody>
</table>

### Appendix B to Part 2676—Interest Rates Used to Value Lump Sums and Annuities

#### Lump Sum Valuations

In determining the value of interest factors of the form \( v^n \) as defined in §2676.13(b)(1) for purposes of applying the formulas set forth in §2676.13(b) through (i) and in determining the value of any interest factor used in valuing lump sums under this subpart, the PBGC shall use the values of \( i \) prescribed in Table I hereof. The interest rates set forth in Table I shall be used by the PBGC to calculate benefits payable as lump sum benefits as follows:

1. For benefits for which the participant or beneficiary is entitled to be in pay status on the valuation date, the immediate annuity rate shall apply.

2. For benefits for which the deferral period is \( y \) years (\( y \) is an integer and \( 0 < y \leq n \)), interest rate \( i_1 \) shall apply from the valuation date for a period of \( y \) years; thereafter the immediate annuity rate shall apply.

3. For benefits for which the deferral period is \( y \) years (\( y \) is an integer and \( n < y \leq n+1 \)), interest rate \( i_2 \) shall apply from the valuation date for a period of \( y - n \) years; interest rate \( i_1 \) shall apply for the following \( n \) years; thereafter the immediate annuity rate shall apply.

4. For benefits for which the deferral period is \( y \) years (\( y \) is an integer and \( y > n+1 \)), interest rate \( i_3 \) shall apply from the valuation date for a period of \( y - n - 1 \) years; interest rate \( i_2 \) shall apply for the following \( n+1 \) years; interest rate \( i_1 \) shall apply for the following \( n_2 \) years; thereafter the immediate annuity rate shall apply.
between specified anniversaries of a valuation date that occurs within that calendar month; those anniversaries are specified in the columns adjacent to the rates. The last listed rate is assumed to be in effect after the last listed anniversary date.

<table>
<thead>
<tr>
<th>For valuation dates occurring in the month</th>
<th>The values of ( i ) are:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>( i ) for ( t = )</td>
</tr>
<tr>
<td>March 1994</td>
<td>0.560</td>
</tr>
</tbody>
</table>

**DEPARTMENT OF DEFENSE**

Office of the Secretary

32 CFR Part 254

Teacher and Teacher’s Aide Placement Assistance Program

AGENCY: Department of Defense.

ACTION: Interim final rule.

**SUMMARY:** This program provides stipends to Service members and eligible individuals losing Defense jobs and provides grants to local educational agencies who hire separated military members, terminated Department of Defense and Department of Energy employees, and displaced defense contractor scientists and engineers as teachers and teacher aides. The intent of this program is to relieve shortages of elementary and secondary school teachers and teacher aides through placement of qualified separating military, terminated Department of Defense and Department of Energy employees, and displaced contractor employees in schools that serve a concentration of children from low-income families.

**EFFECTIVE DATE:** February 22, 1994.

**DATES:** Comments: Comments must be received by April 18, 1994.

**ADDRESSES:** Forward comments to Department of Defense, Office of the Assistant Secretary of Defense (Personnel and Readiness) (PSF&E) (DoDEA), The Pentagon, room 3E784, Washington, DC 20301–4000.

FOR FURTHER INFORMATION CONTACT: Mr. Otto Thomas (703) 696–4384.

**SUPPLEMENTARY INFORMATION:**

**Background**

This program allows local educational agencies that serve a concentration of children from low-income families to receive a salary subsidy from the Department of Defense for up to five years to offset a portion of the basic salary of a teacher or teacher’s aide hired under this program. Local educational agencies that qualify for this program may inform the Defense Activity for Non-Traditional Support (DANTES) of their interest to participate and can advertise an opening on the DoD Transition Bulletin Board and receive a listing of interested personnel from an automated listing called the DoD Public and Community Service Registry.

**Executive Order 12866, "Regulatory Planning and Review"**

It has been certified that this interim final rule, in conformance with Executive Order 12866, does not:

- Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees or, loan programs or the rights and obligations of recipients thereof; or Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive order.

This interim final rule is necessary to initiate the program and benefit as many personnel as otherwise eligible. This program is time-sensitive and is authorized upon publication in the Federal Register until October 1, 1997. Comments will be considered in determining whether to amend this interim final rule.
§ 254.2 Definitions.
(a) Alternative certification. State or local teacher certification or licensure requirements that permit a demonstrated competence in appropriate subject areas gained in careers outside of education to be substituted for traditional teacher training course work.
(b) Eligible defense contractors or subcontractors. Those defense contractors or subcontractors that have applied and been selected using criteria established in “National Defense Authorization Act for Fiscal Year 1993,” Public Law 102–484, 106 stat. 2725 and meet the following criteria:
(1) Produce goods or services for the Department of Defense pursuant to a defense contract or operate nuclear weapons manufacturing facilities for the Department of Energy; and
(2) Have recently reduced operations, or are likely to reduce operations, due to the completion or termination of a defense contract or program or by reductions in defense spending.
(c) Eligible local educational agency. A local school jurisdiction that normally hires teachers, is located in a state offering an alternative program for teacher certification, is receiving money under chapter 1 of title I, “Elementary and Secondary Education Act of 1965” (20 U.S.C. 2701 et seq.) as a result of having within its jurisdiction a concentration of children from low income families, has been identified by its state as experiencing a shortage of qualified teachers. Priority for grants under this program will be given to those local education agencies which receive concentration grant funds under chapter 1 of title I, or are eligible to receive such funding. The local school shall be willing to enter into an agreement with the Department of Defense to employ a certified program participant for not less than five consecutive years in a school within its jurisdiction having a concentration of children from low income families.
(d) Eligible personnel. Service members, civilian employees of the Department of Defense and the Department of Energy, and defense contractor employees who during the time period beginning with the effective date of DoD guidance and ending October 1, 1997, meet the specific requirements identified in paragraphs (d)(1) through (d)(3) of this section. All persons selected shall have a baccalaureate or advanced degree (associate degree, or higher teacher's aide applicants) from an accredited institution of higher learning and, if selected, are willing to agree to obtain certification or licensure as an elementary or secondary school teacher or teacher's aide and to accept an offer of full-time employment as an elementary or secondary school teacher or teacher's aide for not less than five school years in a school which serves a concentration of low-income families.
(1) Eligible Service members. Members of the armed forces who are discharged or released from active duty, and apply not later than one year after the date of discharge or release from active duty, have served on active duty for at least six continuous years immediately before discharge, and are honorably discharged or released from active duty. Service members who are not educationally qualified. A member discharged or released from Service under other than honorable conditions shall not be eligible to participate in this program. A member who is entitled to benefits under 10 U.S.C. 1174(a) (Special Separation Benefits) or 10 U.S.C. 1175 (Voluntary Separation Incentive) or is given early retirement under “National Defense Authorization Act for Fiscal Year 1993,” section 4403, Public Law 102–484, 106 stat. 2702 shall not be paid a stipend.
(2) Eligible employees. Civilian employees of the Department of Defense or the Department of Energy who apply after receipt of a notice of termination but not later than 60 days following termination, and who are terminated from government employment as a result of reductions in defense spending or the closure or realignment of a military installation as determined by the Secretary of Defense or the Secretary of Energy, as the case may be. A stipend will not be paid to any civilian employee selected to participate in the placement program who voluntarily retires from the Federal Government, having met either early or optional retirement criteria, after receiving separation pay under 5 U.S.C. 5597.
(3) Eligible contractor employees. Scientists or engineers whose employment is terminated (or who have received notice of termination) as a result of the completion or termination of a defense contract or program or by reductions in defense spending. The individuals must have been employed for not less than five years as a scientist or engineer with a private defense contractor that has entered into a cooperative agreement with Department of Defense to help support the program including payment of 50 percent of the stipend provided to the contractor employee selected for assistance.
(e) Grant. Funding to be provided to a local education agency to offset the basic salary of a program participant during five consecutive years of employment. Assuming employment begins at the beginning of a school year, a grant shall be paid in five installments in accordance with the following schedule:
First Year—50 percent of basic salary not to exceed $25,000
Second Year—40 percent of basic salary not to exceed $10,000
Third Year—30 percent of basic salary not to exceed $7,500
Fourth Year—20 percent of basic salary not to exceed $5,000
Fifth Year—10 percent of basic salary not to exceed $2,500
(1) Installments shall be payable after the end of each school year within 30 days after the local education agency certifies to the Department of Defense the basic salary paid to the employee during the past school year is consistent with the written agreement between the local educational agency and the Department of Defense.
(2) If employment begins other than at the beginning of a school year, the grant shall be payable in up to six installments. The grant payments shall be based on the total teacher pay days equivalent to a full school year. Payments will be made so that reimbursement does not exceed the percentage and dollar amounts for any one equivalent full school year.
(f) Stipend. The lesser of $5,000 or the total costs of the type described in “Higher Education Act of 1965,” section 472 (20 U.S.C. 1087l), incurred by a selected program participant while obtaining certification.

§ 254.3 Responsibilities.
(a) The Assistant Secretary of Defense (Personnel and Readiness) shall:
(2) The Director of Education, as the representative for the ASD(P&R), shall:
(i) Identify program needs and program program direction.
(ii) Provide liaison and coordination with educational agencies, and school officials.

§ 254.4 Definitions.
(a) Alternative certification. State or local teacher certification or licensure requirements that permit a demonstrated competence in appropriate subject areas gained in careers outside of education to be substituted for traditional teacher training course work.
(b) Eligible defense contractors or subcontractors. Those defense contractors or subcontractors that have applied and been selected using criteria established in “National Defense Authorization Act for Fiscal Year 1993,” Public Law 102–484, 106 stat. 2725 and meet the following criteria:
(1) Produce goods or services for the Department of Defense pursuant to a defense contract or operate nuclear weapons manufacturing facilities for the Department of Energy; and
(2) Have recently reduced operations, or are likely to reduce operations, due to the completion or termination of a defense contract or program or by reductions in defense spending.
(c) Eligible local educational agency. A local school jurisdiction that normally hires teachers, is located in a state offering an alternative program for teacher certification, is receiving money under chapter 1 of title I, “Elementary and Secondary Education Act of 1965” (20 U.S.C. 2701 et seq.) as a result of having within its jurisdiction a concentration of children from low income families, has been identified by its state as experiencing a shortage of qualified teachers. Priority for grants under this program will be given to those local education agencies which receive concentration grant funds under chapter 1 of title I, or are eligible to receive such funding. The local school shall be willing to enter into an agreement with the Department of Defense to employ a certified program participant for not less than five consecutive years in a school within its jurisdiction having a concentration of children from low income families.
(d) Eligible personnel. Service members, civilian employees of the Department of Defense and the Department of Energy, and defense contractor employees who during the time period beginning with the effective date of DoD guidance and ending October 1, 1997, meet the specific requirements identified in paragraphs (d)(1) through (d)(3) of this section. All persons selected shall have a baccalaureate or advanced degree (associate degree, or higher teacher's aide applicants) from an accredited institution of higher learning and, if selected, are willing to agree to obtain certification or licensure as an elementary or secondary school teacher or teacher's aide and to accept an offer of full-time employment as an elementary or secondary school teacher or teacher's aide for not less than five school years in a school which serves a concentration of low-income families.
(1) Eligible Service members. Members of the armed forces who are discharged or released from active duty, and apply not later than one year after the date of discharge or release from active duty, have served on active duty for at least six continuous years immediately before discharge, and are honorably discharged or released from active duty. Service members who are not educationally qualified. A member discharged or released from Service under other than honorable conditions shall not be eligible to participate in this program. A member who is entitled to benefits under 10 U.S.C. 1174(a) (Special Separation Benefits) or 10 U.S.C. 1175 (Voluntary Separation Incentive) or is given early retirement under “National Defense Authorization Act for Fiscal Year 1993,” section 4403, Public Law 102–484, 106 stat. 2702 shall not be paid a stipend.
(2) Eligible employees. Civilian employees of the Department of Defense or the Department of Energy who apply after receipt of a notice of termination but not later than 60 days following termination, and who are terminated from government employment as a result of reductions in defense spending or the closure or realignment of a military installation as determined by the Secretary of Defense or the Secretary of Energy, as the case may be. A stipend will not be paid to any civilian employee selected to participate in the placement program who voluntarily retires from the Federal Government, having met either early or optional retirement criteria, after receiving separation pay under 5 U.S.C. 5597.
(3) Eligible contractor employees. Scientists or engineers whose employment is terminated (or who have received notice of termination) as a result of the completion or termination of a defense contract or program or by reductions in defense spending. The individuals must have been employed for not less than five years as a scientist or engineer with a private defense contractor that has entered into a cooperative agreement with Department of Defense to help support the program including payment of 50 percent of the stipend provided to the contractor employee selected for assistance.
(e) Grant. Funding to be provided to a local education agency to offset the basic salary of a program participant during five consecutive years of employment. Assuming employment begins at the beginning of a school year, a grant shall be paid in five installments in accordance with the following schedule:
First Year—50 percent of basic salary not to exceed $25,000
Second Year—40 percent of basic salary not to exceed $10,000
Third Year—30 percent of basic salary not to exceed $7,500
Fourth Year—20 percent of basic salary not to exceed $5,000
Fifth Year—10 percent of basic salary not to exceed $2,500
(1) Installments shall be payable after the end of each school year within 30 days after the local education agency certifies to the Department of Defense the basic salary paid to the employee during the past school year is consistent with the written agreement between the local educational agency and the Department of Defense.
(2) If employment begins other than at the beginning of a school year, the grant shall be payable in up to six installments. The grant payments shall be based on the total teacher pay days equivalent to a full school year. Payments will be made so that reimbursement does not exceed the percentage and dollar amounts for any one equivalent full school year.
(f) Stipend. The lesser of $5,000 or the total costs of the type described in “Higher Education Act of 1965,” section 472 (20 U.S.C. 1087l), incurred by a selected program participant while obtaining certification.
(iii) Oversee the funding of this program and ensure compliance with this memorandum.
(iv) Conduct a survey of States to identify those States that have alternative certification or licensure requirements for teachers, including those States that grant credit for service in the armed forces towards satisfying certification or licensure requirements for teachers.

(b) The Secretaries of the Military Departments shall:

(1) Ensure that separating Service members are informed about the subject program during preseparation counseling provided by Transition Assistance Offices.
(2) Ensure that installation Education Centers can, upon request, provide information and counseling on teacher training and certification, including alternative certification requirements.
(3) Ensure that separating employees are informed about this program during preseparation counseling by installation and activity Civilian Personnel Officers.
(4) Ensure that personnel management offices inform noncommissioned officers who will reach ten years of service during the current fiscal year (until September 30, 1997), who have the potential to perform as elementary or secondary school teachers, but who do not satisfy the minimum educational requirements to qualify for the program of the opportunity to obtain those qualifications within five years after discharge or release from active duty and apply for placement assistance within one year thereafter.
(c) The Secretary of the Navy shall, as executive agent for the Defense Activity for Non-Traditional Education Support (DANTES), ensure DANTES is provided assistance and support in meeting its responsibilities in support of this program.

§254.4 Procedures.

(a) The Secretary of the Navy, as executive agent for DANTES, shall ensure DANTES executes the program by:
(1) Issuing procedural guidance implementing this part, as necessary.
(2) Preparing and distributing information, forms and publications.
(6) As necessary and authorized, entering into agreements with other governmental and non-governmental entities, stipend awardees, and local educational agencies eligible to participate in the program.
(7) Establishing and maintaining a file on each applicant and tracking actions taken with regard to each applicant.
(8) Establishing and maintaining a file on each local educational agency or private defense contractor who seeks to enter into an agreement with the Department of Defense in connection with this program.
(9) Collecting debts owed the Department of Defense resulting from failure to comply with agreements made regarding the use of stipends given to program participants or grants made to local educational agencies.
(i) DANTES shall collect from local educational agencies an amount that bears the same ratio to the total amount already paid under the agreement as the unserved portion of required service bears to the five years of required service for participants that leave the employment of the local educational agency before the end of the five years of required service.
(ii) DANTES shall collect from personal participating in this program, if the participant in the placement program fails to obtain teacher certification or licensure or employment as an elementary or secondary school teacher as a teacher's aide or is terminated for cause, during the five years of required service. The participant shall be required to reimburse the Secretary of Defense for any stipend paid to the participant in the same ratio to the amount of the stipend as the unserved portion of required service bears to the five years of required service, except as provided in paragraph (f) of this section.
(10) Maintaining data on this program and provide reports to the Assistant Secretary of Defense (Personnel and Readiness) through the Navy, as executive agent, quarterly.
(b) Information about the program and those States that have alternative certification or licensure requirements for teachers shall be provided to members and employees as part of preseparation counseling.
(c) Eligible Service members shall apply, under procedures established by DANTES and published in the Federal Register, for participation in the program within one year after they are separated. Service members may make preliminary application to the program by registering in the Public Community Service (PACS) Registry and expressing an interest in pursuing employment as an elementary or secondary school teacher or teacher's aide.
(d) Eligible Department of Defense or Department of Energy civilian employees shall apply under procedures established by DANTES and published in the Federal Register, after they have received notice of termination but not later than 60 days following termination. DANTES shall provide program information to civilian personnel offices that will allow civilian personnel offices to make an initial determination of eligibility and refer interested employees to Installation Education Centers for program information and to DANTES for selection purposes.
(e) Applications will be screened upon receipt and grouped for either immediate evaluation or deferred evaluation. Those applications screened for immediate evaluation will be evaluated as soon as possible after receipt to determine if selection is justified. If so, applicants will be notified that they have been selected to become participants in the program. An application initially marked for deferred evaluation will be reviewed at the end of each calendar month to determine if it should be accepted for immediate evaluation, further deferred pending receipt of additional information, or rejected. Criteria to be used in selecting participants shall include the following:
(1) Is the applicant willing to work as a teacher or teacher's aide in an elementary or secondary school which serves a concentration of children from low income families?
(2) Does the applicant have educational or military experience in science, mathematics or engineering and
agree to seek employment teaching science, mathematics or engineering?
(3) Is the applicant particularly likely to serve as a positive role model in the kinds of schools that are eligible to participate in this program?
(4) Does the applicant have educational or military experience in English, history, geography, foreign language, the arts or special education and agree to seek employment teaching these subjects or working with special education students?
(f) Selected participants, if eligible, may be provided a stipend to offset costs of the type described in Higher Education Act of 1965, section 472 (20 U.S.C. 1087f) which are incurred by the participant while obtaining alternative certification or licensure to teach or necessary credentials to serve as a teacher’s aide. A stipend will not be paid to any Service member who is entitled to the Special Separation Benefit (SSB) under 10 U.S.C. 1174a, or the Voluntary Separation Incentive (VSI) under 10 U.S.C. 1175, or who is given early retirement under “National Defense Authorization Act for Fiscal Year 1993,” section 4403, Public Law 102–484, 106 stat. 2702.

(1) A stipend will not be paid to any civilian employee selected to participate in the placement program who receives separation pay under 5 U.S.C. 5597.
(2) If a participant fails to obtain certification or employment as a teacher or teacher’s aide, or voluntarily leaves or is terminated for cause from employment during the five years of required service, the participant shall reimburse the Department of Defense for any stipend paid in an amount that is a prorated share based on the unserved portion of required service as provided in this paragraph. A participant may be excused from the reimbursement requirement under certain circumstances provided for in “National Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, 106 stat. 2702. A participant shall be excused from the reimbursement requirement under the following circumstances. The participant:
(i) Is seeking a full-time employment as a teacher or teacher’s aide in an elementary or secondary school for a single period not to exceed 27 months.
(g) Participants will seek employment as elementary or secondary school teachers or teacher’s aides in eligible local educational agencies identified by the Department of Defense.
(h) The Department of Defense through its executive agent, DANTES, will offer to enter into an agreement with the first eligible local educational agency that employs the participant as a full-time elementary or secondary school teacher or teacher’s aide after the participant obtains necessary credentials. Under such agreements, DANTES will provide a grant to local educational agencies that agree to hire program participants for not fewer than five consecutive school years in a school of the local educational agency serving a concentration of children from low–income families. If employment is terminated by either the participant or the local educational agency before the end of the five years of required service, the grant will be adjusted as described in this part and any excess paid will be reimbursed to the government under guidance prescribed by DANTES.
(i) Participants may not be accepted to receive stipends nor agreements made with local educational agencies to provide grants unless sufficient appropriations are available to support the obligations which may be incurred.

L.M. Bynum,
Alternate OSD Federal Register Liaison Officer, Department of Defense.
[FR Doc. 94–3403 Filed 2–14–94; 8:45 am]
BILLING CODE 5000–04–M

Department of the Navy
32 CFR Part 706
Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972; Amendment

AGENCY: Department of the Navy, DOD.
ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Judge Advocate General of the Navy has determined that USS LABOON (DDG 58) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special functions as a naval destroyer. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

EFFECTIVE DATE: January 5, 1994.

FOR FURTHER INFORMATION CONTACT: Captain R. R. Rossi, JACC, U.S. Navy Admiralty Counsel, Office of the Judge Advocate General Navy Department, 200 Stovall Street, Alexandria, VA 22332–2400 Telephone number: (703) 325–9744.

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1905, the Department of the Navy amends 32 CFR part 706. This amendment provides notice that the Judge Advocate General of the Navy, under authority delegated by the Secretary of the Navy, has certified that USS LABOON (DDG 58) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS: Annex I, paragraph 3(a) pertaining to the location of the forward masthead light in the forward quarter of the vessel, the placement of the after masthead light, and the horizontal distance between the forward and after masthead lights; and Annex I, paragraph 3(c) pertaining to placement of the masthead light or lights above and clear of all other lights and obstructions; and, Annex I, paragraph 3(f) pertaining to placement of task lights not less than 2 meters from the fore and aft centerline of the ship in the athwartship direction; without interfering with its special function as a naval ship. The Judge Advocate General has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel’s ability to perform its military functions.

List of Subjects in 32 CFR Part 706
Marine Safety, Navigation (Water), and Vessels.

PART 706—[AMENDED]

Accordingly, 32 CFR part 706 is amended as follows:

1. The authority citation for 32 CFR part 706 continues to read:

§ 706.2 [Amended]

2. Table Four of 706.2 is amended by:
   a. Adding the following vessel to Paragraph 15:

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Horizontal distance from the fore and aft centerline of the vessel in the athwartship direction</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS Laboon</td>
<td>DDG 58</td>
<td>1.90 meters</td>
</tr>
</tbody>
</table>

   b. Adding the following vessel to Paragraph 16:

   Table Five

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Masthead lights not over all other lights and obstructions; Annex I, sec. 2(f)</th>
<th>Forward masthead light not in forward quarter of ship; Annex I, sec. 3(a)</th>
<th>After masthead light less than ½ ship’s length aft of forward masthead light; Annex I, sec. 3(a)</th>
<th>Percentage horizontal separation attained</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS Laboon</td>
<td>DDG 58</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>13.8</td>
</tr>
</tbody>
</table>

Approved:
H.E. Grant,
Rear Admiral, JAGC, U.S. Navy, Acting Judge Advocate General.

[FR Doc. 94-3495 Filed 2-14-94; 8:45 am]
BILLING CODE 3810-AE-P

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972; Amendment

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Judge Advocate General of the Navy has determined that USS STOUT (DDG 55) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with 72 COLREGS: Annex I, paragraph 3(a) pertaining to the location of the forward masthead light in the forward quarter of the vessel, the placement of the after masthead light, and the horizontal distance between the forward and after masthead lights; Annex I, paragraph 2(f)(ii) pertaining to placement of the masthead light or lights above and clear of all other lights and obstructions; and, Annex I, paragraph 3(c) pertaining to placement of task lights not less than 2 meters from the fore and aft centerline of the ship in the athwartship direction; without interfering with its special function as a naval ship. The Judge Advocate General has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR parts 295 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel’s ability to perform its military functions.

List of Subjects in 32 CFR Part 706

Marine Safety, Navigation (Water), and Vessels.

PART 706—[AMENDED]

Accordingly, 32 CFR part 706 is amended as follows:

1. The authority citation for 32 CFR part 706 continues to read:


§ 706.2 [Amended]

2. Table Four of 706.2 is amended by:

a. Adding the following vessel to Paragraph 15:

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Horizontal distance from the fore and aft centerline of the vessel in the athwartship direction</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS STOUT</td>
<td>DDG 55</td>
<td>1.90 meters</td>
</tr>
</tbody>
</table>

b. Adding the following vessel to Paragraph 16:

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Obstruction angle relative ship’s headings</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS STOUT</td>
<td>DDG 55</td>
<td>90.94 thru 108.19 degree.</td>
</tr>
</tbody>
</table>

3. Table Five of 706.2 is amended by adding the following vessel:

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Masthead lights not over all other lights and obstructions; Annex I, sec. 2(f)</th>
<th>Forward masthead light not in forward quarter of ship; Annex I, sec. 3(a)</th>
<th>After masthead light less than ½ ship’s length aft of forward masthead light; Annex I, sec. 3(a)</th>
<th>Percentage horizontal separation attained</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS Laboon</td>
<td>DDG 58</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>13.8</td>
</tr>
</tbody>
</table>
### ENVIRONMENTAL PROTECTION AGENCY

**40 CFR Part 52**

**[MN26-1-6056; FRL-4820-7]**

**Approval and Promulgation of Implementation Plans; Minnesota**

**AGENCY:** U.S. Environmental Protection Agency (USEPA).

**ACTION:** Final rule.

**SUMMARY:** On November 26, 1991, and August 31, 1992, and November 13, 1992, the State of Minnesota submitted revisions to its State Implementation Plans (SIPs) for particulate matter. These SIP revisions were submitted by the State of Minnesota for the purpose of bringing about the attainment of the national ambient air quality standards (NAAQS) for particulate matter for the Saint Paul and Rochester nonattainment areas, and for the purpose of satisfying certain Federal requirements for SIPs for such areas. USEPA proposed to approve these SIP revisions on June 25, 1993. One commenter commented on this proposal, and Minnesota provided further submittals on February 3, 1993, April 30, 1993, and October 15, 1993. USEPA is granting full approval of the particulate matter SIP revisions for both areas.

**EFFECTIVE DATE:** This action is effective March 17, 1994.

**ADDRESSES:** Copies of the State’s submittals, the public comment letter, and USEPA’s technical support document of September 26, 1993, are available for inspection at the following address: (It is recommended that you telephone John Summershays at (312) 886-6067, before visiting the Region 5 Office.) U.S. Environmental Protection Agency, Region 5, Air and Radiation Division (AE-17J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

### TABLE FIVE

<table>
<thead>
<tr>
<th>Vessel</th>
<th>Number</th>
<th>Masthead lights not over all other lights and obstructions, Annex I, sec. 2(f)</th>
<th>Forward masthead light not in forward quarter of ship, Annex I, sec. 3(a)</th>
<th>After masthead light less than 1/2 ship's length aft of forward masthead light, Annex I, sec. 3(a)</th>
<th>Percentage horizontal separation attained</th>
</tr>
</thead>
<tbody>
<tr>
<td>USS STOUT</td>
<td>DDG 55</td>
<td>X</td>
<td>x</td>
<td>x</td>
<td>13.0</td>
</tr>
</tbody>
</table>

Approved:
J.E. Dombroski,

[F R Doc. 94-3496 Filed 2-14-94; 8:45 am]
BIL ING CODE 3810-AG-P

A copy of this revision to the Minnesota SIP is available for inspection at:
U.S. Environmental Protection Agency, Public Information Reference Unit, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** John Summehays, Regulation Development Section, Air Enforcement Branch (AE-17J), U.S. Environmental Protection Agency, Region 5, Chicago, Illinois 60604, (312) 886-6067.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On July 1, 1987, USEPA promulgated revised air quality standards for particulate matter, replacing the former standard based on a broad range of particle size (known as total suspended particulate matter) with a standard based on finer particles. Specifically, the revised standard is based on particles having a nominal aerodynamic diameter of 10 microns or less. Upon enactment of the Clean Air Act Amendments of 1990, certain areas were designated nonattainment for particulate matter and classified as moderate under sections 107(d)(4)(B) and 189(a) of the amended Clean Air Act (Act). See 56 FR 56694 (November 6, 1991) and 57 FR 13498, 13537 (April 16, 1992). The amended Act required that States submit SIP revisions by November 15, 1991, for such areas satisfying specified planning requirements which are delineated below. In Minnesota, portions of the Saint Paul and Rochester areas were designated nonattainment and were thus the subject of planning requirements pursuant to the amended Act.

The State submitted SIP revisions intended to meet these planning requirements on November 26, 1991, August 31, 1992, and November 13, 1992. Technical support documents reviewing the adequacy of these submittals were completed November 16, 1992, and April 6, 1993. Based on these reviews, a notice of proposed rulemaking was published on June 25, 1993, at 58 FR 34397, proposing to approve the State’s submittal as satisfying applicable requirements, provided suitable limitations for one company were adopted and submitted. The State provided further submittals on February 3, 1993, April 30, 1993, and October 15, 1993. A technical support document in support of this notice of final rulemaking was completed September 28, 1993.

Pursuant to section 189 of the amended Clean Air Act (“Plan provisions and schedules for plan submittals”), those States containing initial moderate particulate matter nonattainment areas were required to submit by November 15, 1991, an implementation plan that includes:

1. Either a demonstration (including air quality modeling) that the plan will provide for attainment as expeditiously as practicable but no later than December 31, 1994, or a demonstration that attainment by that date is impracticable (section 189(a)(1)(B));
2. Provisions to assure that reasonably available control measures (RACM) (including such reductions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology (RACT)) shall be implemented no later than December 10, 1993 (section 189(a)(1)(C));
3. Control requirements applicable to major stationary sources of particulate matter precursors except where the Administrator determines that such sources do not contribute significantly to particulate matter levels which exceed the NAAQS in the area (section 189(d)); and
4. Miscellaneous related provisions of section 172(c); for example, quantitative milestones which are to be achieved every 3 years and which demonstrate reasonable further progress (RFP) toward attainment by December 31, 1994.

Some submissions are due at a later date. By November 15, 1993, States must supplement their particulate matter nonattainment area SIPs by submitting contingency measures which become effective without further action by the State or USEPA, upon a determination by USEPA that the area has failed to achieve RFP or to attain the particulate matter NAAQS by the applicable statutory deadline (section 172(c)(9) and 57 FR 13543-44).

Nevertheless, Minnesota submitted contingency measures with its August 31, 1992, submittal. Therefore, the contingency measure requirement is addressed in this rulemaking. States with initial moderate particulate matter nonattainment areas were also required...
to submit a permit program for the construction and operation of new and modified stationary sources of particulate matter by June 30, 1992 (section 189(a)(1)(A)). Minnesota addressed this requirement in a separate submittal. USEPA is conducting separate rulemaking with respect to this requirement.

Additional discussion of these requirements is provided in prior notices published in the Federal Register. An extensive discussion is provided in a “General Preamble,” published on April 16, 1992 (57 FR 13498), that describes USEPA’s preliminary positions on how USEPA would review SIP revisions submitted under Title I of the Act. The notice of proposed rulemaking on Minnesota’s submittals discusses these requirements further, with a focus on the application of USEPA’s interpretations of Act requirements to the specific factual situation presented in Minnesota. Today’s action merely summarizes these other more extensive discussions.

II. Summary of Proposed Rulemaking

The June 25, 1993, notice of proposed rulemaking (58 FR 34397) included discussion of several issues pertinent to Minnesota’s submittals. The first section of the notice discussed the requirements that the plan was intended to satisfy, as summarized above. The second section reviewed the State’s submittal with respect to section 189, including subsections concerning the State’s attainment demonstration, reasonably available control measures, and the significance of particulate matter precursors. The third section reviewed whether the State’s submittal satisfied other requirements, particularly the requirements of section 172(c). The final section of the notice of proposed rulemaking identified the proposed action.

A. Attainment Demonstrations

Section 189(a)(1)(B) requires a demonstration that the plan will provide for attainment (or a demonstration that timely attainment is infeasible). The principal guidance for such demonstrations is the Guideline on Air Quality Models, which specifies the criteria for selection of dispersion models and for estimation of emissions and other model inputs. In accordance with that guidance, Minnesota used the Industrial Source Complex Short Term (ISCST) model for its analyses. These analyses used urban dispersion coefficients, five years of National Weather Service meteorological data (using surface data from Minneapolis-Saint Paul for the Saint Paul analysis and from Rochester for the Rochester analysis and in both cases using Saint Cloud upper air data), regulatory default parameters, and receptors spaced 100 meters apart in the key impact areas. The emissions inputs to the model reflect appropriate emissions estimates for the various sources in the two areas. The Saint Paul area includes thirteen industrial facilities. USEPA’s proposed rulemaking is based on Minnesota’s original submittals, which include Administrative orders specifying limits for eight of these facilities. In general, the stack limits specify a total emission rate and an exit gas concentration limit based on test methods that measure fine particulate matter and condensable particulate matter (i.e., methods known as Method 201/201A and Method 202), and are supplemented by opacity limits which permit more continuous compliance monitoring. A few sources with process fugitive sources have opacity limits limiting these emissions. Emissions from roadways and storage piles at these sources are typically limited by means of specific work practice requirements identifying required quantities and rates at which these sources must be watered. Based on USEPA’s concerns, Minnesota subsequently adopted and submitted an administrative order for a fourth facility, Harvest States Cooperatives. The other four, less significant facilities are subject only to the emission limits in generic State regulations. The Rochester area includes only one significant source, which was subject to an administrative order providing limits similar to the limits on Saint Paul sources. Applicable guidance provides that the emissions estimates for significant sources shall reflect maximum allowable emissions rates. The proposed rulemaking concluded that this guidance was met for the Rochester source and for twelve of the thirteen sources in Saint Paul but was not met for the Harvest States Cooperatives facility. In response to this concern, the State adopted and submitted an administrative order for this facility. This order is discussed in a later section of this action.

Other elements of the attainment demonstration include minor area sources, growth, and background concentrations. Minnesota used a dispersion model that is appropriate for modeling stack sources, process fugitive sources, and area sources such as private and public roadways. In Saint Paul, the State compiled a comprehensive inventory of public area source emissions as well as emissions from the above noted thirteen industrial facilities, and input all of these emissions in its dispersion modeling runs. Minnesota then added background concentrations of 24 micrograms per cubic meter (µg/m³) to the 24-hour average modeled concentrations and 12 µg/m³ to the annual average modeled concentrations. In Rochester, the State did not inventory public area sources but compensated by using the same background concentrations as were used for Saint Paul. In effect arguing that local plus nonlocal sources in the Rochester area create the same background concentrations as nonlocal sources surrounding Saint Paul. In Saint Paul, an explicit growth margin for one source was included in the modeling analysis. Otherwise, growth was not explicitly addressed in Minnesota’s submittal, but major source growth will be covered by new source permitting requirements (including requirements that assure no new violations), and minor source growth is unlikely to be sufficient to consume the entire margin between the modeled concentrations and the air quality standards.

For analyses using 5 years of meteorological data, the sixth highest 24-hour average concentration at any receptor must not exceed 150 µg/m³, and no annual average concentration may exceed 50 µg/m³. The results of Minnesota’s analyses based on controlled emissions in Saint Paul was a highest sixth highest concentration of approximately 140 µg/m³ and a highest annual average concentration of 48 µg/m³. For the Rochester area, the modeling provided by Minnesota indicates a highest sixth highest 24 hour average concentration of 106 µg/m³ and a highest annual average concentration of 32 µg/m³. Based on these results and USEPA’s review of the State’s inventory and modeling procedures, USEPA proposed that once the State submitted an administrative order limiting Harvest States Coop emissions to the modeled emission rates, the State plan would then have satisfied the attainment demonstration requirements of section 189(a)(1)(B) for the Saint Paul area.

B. RACM

Sections 172(c)(1) and 189(a)(1)(C) require that States submit provisions to assure that RACM (including RACT) are implemented in initial moderate particulate matter nonattainment areas no later than December 10, 1993. The General Preamble contains a detailed discussion of USEPA’s interpretation of the RACM (including RACT) requirement (see 57 FR 13539–13545 and 13560–13561).

Minnesota’s administrative orders require immediate compliance for most sources. The only extended compliance...
date is for the electric arc furnace at North Star Steel, which provides for installation of a new baghouse by November 26, 1993, and for 75 percent closure of the roof monitor by December 31, 1993. The limitations effective November 26, 1993, require this source to achieve the control normally representing RACT as identified in an August 7, 1980, memorandum and attached table entitled “Steel Industry Particulate Emission Limitations Generally Achievable on a Retrofit Basis.” In addition, the State has required adequate measures to provide for attainment shortly after the December 10, 1993, RACT deadline, and no control options are known to be available that would provide for attainment any more quickly. Therefore, USEPA proposed to conclude that Minnesota’s submittal satisfies the requirement for RACT.

C. Other Provisions

Section 189(a) specifies that “control requirements * * * for major stationary sources of PM-10 shall also apply to major stationary sources of PM-10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM-10 levels which exceed the standard in the area.” Particulate matter precursors are pollutants emitted as gases that undergo chemical transformations to become particulate, and principally include sulfates and nitrates. Minnesota’s submittals document receptor modeling results that demonstrate that secondary particulate matter is a small fraction of monitored concentrations in Minnesota. For this and other reasons, USEPA proposed to conclude that precursors do not contribute significantly to particulate matter concentrations in either of Minnesota’s nonattainment areas.

In addition to the requirements in section 189, particulate matter nonattainment area plans must also meet the requirements of subpart 1 of part D of title I of the Clean Air Act, particularly section 172(c). Section 172(c) imposes several requirements which all nonattainment area SIPs, including particulate matter nonattainment area SIPs, must meet. Most notable among these requirements is the requirement of section 172(c)(9) that the State submit a contingency plan comprised of measures which would be implemented upon failure to achieve timely attainment without the need for any further planning or adoption effort by the State. The notice of proposed rulemaking included a discussion of each of these requirements and why USEPA believed that each requirement was satisfied.

III. Comments and Responses

In response to the request for public comments on the proposed rulemaking, USEPA received one set of comments. These comments were received from the Metropolitan Waste Control Commission (MWCC) in a letter dated August 6, 1993. The following discussion summarizes the three comments made by MWCC and USEPA’s responses.

Comment: MWCC expressed an understanding that the administrative orders included in the State’s SIP submittal would terminate upon USEPA approval of Minnesota’s forthcoming operating permit program.

Response: This understanding is incorrect. The operating permit program regulations that Minnesota is developing indeed are intended to provide for permits that could replace preceding administrative orders such as the order for MWCC. However, actual termination of the administrative order would not occur unless and until the State grants a permit that supersedes the order, requests a SIP revision to replace the administrative order with a substitute permit, and USEPA approves the SIP revision.

Comment: MWCC notes that area sources are not “relatively minor,” insofar as area sources (emitting 496 tons per year) emit more emissions than all but one industrial source (emitting 552 tons per year). USEPA responds that these numbers do not reflect the impact of industrial sources. More importantly, the impact of industrial sources is sufficiently significant relative to the impact of area sources that the choice of dispersion models used by the State is appropriate.

Response: MWCC’s figures are approximately correct. However, these area sources, by their very distribution, have a relatively minor impact as compared to the impact of the concentrated emissions from industrial sources. More importantly, the impact of industrial sources is sufficiently significant relative to the impact of area sources that the choice of dispersion models used by the State is appropriate.

Response: The State submitted administrative orders to address a USEPA concern that permit limits could be unenforceable after permit expiration. In any case, MWCC does not appear to disagree with USEPA’s proposed conclusion, which is that the administrative orders submitted by the State should be approved.

IV. New State Submittals

This final rulemaking must also consider three State submittals which were not considered in the proposed rulemaking. The first submittal, dated February 3, 1993, provides an administrative order for Harvest States Cooperatives, in response to USEPA’s concern that emissions at this facility be limited to levels that would provide for attainment. This administrative order was adopted after proper public notice and opportunity for comment, and enforceably limits emissions from this facility. Although the allowable emission rates under this order are slightly higher than the actual emission rates used in the State’s attainment demonstration, the differential is small relative to the margin of attainment near this facility. Therefore, USEPA now finds that the State’s modeling analyses demonstrate, in accordance with applicable guidance, that attainment is assured in both nonattainment areas even if all sources emit their full allowable emissions.

A second State submittal, dated April 30, 1993, provided a replacement administrative order for North Star Steel. In most respects this administrative order is the same as the earlier order on which USEPA proposed action, and is equally as enforceable as the prior order. Although the new order reflects a new furnace configuration, replacing a two furnace system with a system involving one larger furnace and a ladle metallurgy station, these new operations emit through the same emission points and have similar allowable emissions as the prior order. The changes in allowable emissions include a lower allowable emissions rate for the existing baghouse (essentially implementing one of the source’s contingency measures) and an enlarged growth margin that takes credit for the lesser emissions that will be caused by the new system. Thus, attainment is equally as well assured with the new order as with the prior order. Although the new order reduces the quantity of emissions reductions provided in the contingency plan by implementing one of the contingency measures), the remaining contingency plan is adequate to meet USEPA’s criteria for contingency plan adequacy.

A third submittal, dated October 15, 1993, makes only a minor amendment to the administrative order for Rochester Public Utilities, namely to defer the date for required testing for emission points which are currently shut down. This amendment does not alter the prior
V. Final Action

On June 25, 1993, USEPA proposed to approve the State's plans for the Saint Paul and Rochester nonattainment areas as meeting the requirements of sections 189(a)(1)(B) and 186(a)(1)(C) as well as various provisions of section 172(c) (specifically subsections (1), (2), (3), (4), (6), (7), (8), and (9)), provided the State adopted and submitted the intended administrative order for Harvest States Coop. USEPA further proposed to determine pursuant to section 186(e) that secondary particulate matter formed from particulate matter precursors does not contribute significantly to exceedances of the NAAQS.

Minnesota submitted the requested administrative order for Harvest States Cooperatives on February 3, 1993, thereby satisfying the condition for fully providing for attainment. A second submittal, a replacement administrative order for North Star Steel submitted April 30, 1993, and a third submittal, an amendment to the administrative order for Rochester Public Utilities submitted October 15, 1993, do not alter the plan's approvability. Although USEPA received one set of comments on the proposed rulemaking, these comments did not object to USEPA's proposed action or its underlying rationale. Therefore, USEPA is taking final action to approve Minnesota's submittals as satisfying applicable requirements for the Saint Paul and Rochester particulate matter nonattainment areas.

Specifically, USEPA concludes that these submittals fully satisfy the attainment demonstration requirement in section 189(a)(1)(B), the reasonably available control measures requirement in section 189(a)(1)(C), the contingency plan requirement in section 172(c)(9), and other applicable requirements of subsections (1), (2), (3), (4), (6), (7), and (8) of section 172, which by reference also includes the requirements of section 110(a)(2). In addition, USEPA is making a determination pursuant to section 186(e) that secondary particulate matter formed from particulate matter precursors does not contribute significantly to exceedances of the NAAQS. The State has made separate submittals to address the permit program requirements specified in section 189(a)(1)(A), section 172(c)(5), and section 173, which will be addressed in separate rulemaking.

As noted previously, the enforceable element of the State's submittals are the administrative orders for nine facilities in Saint Paul and one facility in Rochester. The codification portion of this action identifies the dates of the administrative orders and the names and locations of the facilities covered. In brief, this final action incorporates into the SIP and makes Federally enforceable the administrative orders for (1) Ashbach Construction Company, (2) Commercial Asphalt, (3) Great Lakes Coal & Dock, (4) Harvest States Cooperatives, (5) LaFarge Corporation, (6) Metropolitan Waste Control Commission and the Metropolitan Council, (7) North Star Steel, (8) PM Ag Products, (9) Rochester Public Utilities, and (10) J.L. Shiley.

Since the Regional Administrator has approved the State's applications for the determination pursuant to section 189(e) that precursors do not significantly contribute to exceedances of the NAAQS, USEPA approves the State's plans for the Saint Paul and Rochester nonattainment areas.

On June 25, 1993, USEPA proposed to approve the State's plans for the Saint Paul and Rochester nonattainment areas as meeting the requirements of sections 189(a)(1)(B) and 186(a)(1)(C) as well as various provisions of section 172(c) (specifically subsections (1), (2), (3), (4), (6), (7), (8), and (9)), provided the State adopted and submitted the intended administrative order for Harvest States Coop. USEPA further proposed to determine pursuant to section 186(e) that secondary particulate matter formed from particulate matter precursors does not contribute significantly to exceedances of the NAAQS. Therefore, USEPA is taking final action or its underlying rationale.

Amended as follows:

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

2. Section 52.1220 is amended by adding new paragraph (c)(29) to read as follows:

§ 52.1220 Identification of plan.

<table>
<thead>
<tr>
<th>(c)</th>
<th>*</th>
<th>*</th>
<th>*</th>
<th>*</th>
<th>*</th>
<th>*</th>
</tr>
</thead>
</table>

(1) Incorporation by reference.
EPA is approving the amendments to Oregon’s Administrative Rules (OAR) 340–20–136 and 340–22–440 through 340–22–640, adopted as part of the state of Oregon Clean Air Act Implementation Plan through OAR 340–20–047. These regulatory revisions were adopted by the Oregon Environmental Quality Commission on October 16, 1992 and went into effect on November 1, 1992. A more detailed analysis of the state submittal was prepared as part of the NPR action and is contained in a Technical Support document (TSD) dated July 1, 1993, which is available from the Region 10 office listed in the Addresses section of this document.

Other specific requirements of the oxygenated gasoline program and the rationale for EPA’s proposed action are explained in the NPR and will not be restated here. No substantial public comments were received on the NPR.

I. Final Action


II. Administrative Review

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 3 action for signature by the United States Environmental Protection Agency, 1200 Sixth Avenue, Seattle, Washington 98101; Department of Environmental Quality, Vehicle Inspection Program, 1301 SE Morrison St., Portland, Oregon 97214; and Jerry Kurtzweg ANR–443, United States Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:


SUPPLEMENTARY INFORMATION:

On October 20, 1993 (58 FR 54086–54089), EPA published a notice of proposed rulemaking (NPR) for the state of Oregon. The NPR proposed approval of an oxygenated gasoline program. The formal SIP revision was submitted by the state of Oregon on November 16, 1992. The revision included revisions to Oregon’s Administrative Rules (OAR) 340–20–136 and 340–22–440 through 340–22–640, adopted as part of the state of Oregon Clean Air Act Implementation Plan through OAR 340–20–047. These regulatory revisions were adopted by the Oregon Environmental Quality Commission on October 16, 1992 and went into effect on November 1, 1992.

A more detailed analysis of the state submittal was prepared as part of the NPR action and is contained in a Technical Support document (TSD) dated July 1, 1993, which is available from the Region 10 office listed in the Addresses section of this document.

Other specific requirements of the oxygenated gasoline program and the rationale for EPA’s proposed action are explained in the NPR and will not be restated here. No substantial public comments were received on the NPR.

I. Final Action


II. Administrative Review

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any SIP. Each request for revision to the SIP shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

This action has been classified as a Table 3 action for signature by the
Acting Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214–2225), as revised by an October 4, 1993 memorandum from Michael H. Shapiro, Acting Assistant Administrator for Air and Radiation. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 revisions from the requirements of section 3 of Executive Order 12291 for a period of two years (54 FR at 2222). EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. OMB has agreed to continue the waiver until such time as it rules on EPA's request. This request is continues in effect under Executive Order 12866, which superseded Executive Order 12291 on September 30, 1993.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [insert date 60 days from date of publication]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)) (See 42 U.S.C. 7607 (b)(2))

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Ozone, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements, Volatile organic compounds.

Note: Incorporation by reference of the Implementation Plan for the State of Oregon was approved by the Director of the Office of Federal Register on July 1, 1992.


Gerald A. Emison.
Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

Subpart MM—Oregon

2. Section 52.1970 is amended by adding paragraph (c) (104) to read as follows:

§ 52.1970 Identification of plan.

(c) * * *


(i) Incorporation by reference.

(A) The November 16, 1992 letter from the Director of the Oregon State Department of Environmental Quality to EPA Region 10 submitting revisions to the Oregon SIP.


[FR Doc. 94–3524 Filed 2–14–94; 8:45 am]

BILLING CODE 6560–60–F

40 CFR Part 52

IN27–2–6226; FRL–4837–3

Approval and Promulgation of Implementation Plans; Indiana

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: On November 24, 1993, the United States Environmental Protection Agency (USEPA) proposed to approve a State Implementation Plan (SIP) request for Vermillion County, Indiana. The request was submitted by the State of Indiana for the purpose of attaining the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM), and to satisfy Clean Air Act (Act) requirements for an approvable nonattainment area PM SIP for Vermillion County, Indiana. The public comments were solicited on the proposed SIP revision, and on USEPA's proposed rulemaking action. No public comments were received. This rulemaking action approved in final the Vermillion County, Indiana SIP revision as requested by Indiana.

EFFECTIVE DATE: This final rulemaking action becomes effective on March 17, 1994.

ADDRESSES: Copies of the State's submittal and other materials relating to this rulemaking action are available at the following address for review: United States Environmental Protection Agency, Region 5, Air and Radiation Division, 77 West Jackson Boulevard, Chicago, Illinois 60604. The docket may be inspected between the hours of 8:30 a.m. and 12 noon and from 1:30 p.m. until 3:30 p.m. Monday through Friday. A reasonable fee may be charged by USEPA for copying docket material.

FOR FURTHER INFORMATION CONTACT: David Pohlman, Regulation Development Branch, Regulation Development Section (AR–18), U.S. Environmental Protection Agency, Region 5, Chicago, Illinois 60604, (312) 886–3296. Anyone wishing to visit the Region 5 offices should first contact David Pohlman.

SUPPLEMENTAL INFORMATION:

Background

In 1988, several exceedances of the ambient air quality standard for PM were recorded in Vermillion County at monitoring sites located downwind of Peabody Coal Company's Universal Mine, Blanford East Area. As a result of these exceedances, and pursuant to section 107(d)(A)(B) of the Act, part of Clinton Township, in Vermillion County, was classified as moderate nonattainment for PM. See 56 FR 56752 (November 8, 1991) and 40 CFR 81.315. Section 189 of the Act requires State submittal of a PM SIP for moderate nonattainment areas by November 15, 1991.

On January 13, 1993, Indiana submitted the required PM SIP revision for the Vermillion County PM nonattainment area. Additional information in support of the request was submitted on February 22, 1993 and April 8, 1993. In these materials, the Indiana Department of Environmental Management (IDEM) stated that mining operations at the Peabody Coal Company's Blanford mining area ceased permanently in early 1992. The entire nonattainment area is now used exclusively for agricultural purposes.

IDEM has also stated that the operating permit issued to Peabody Coal Company for it's mining operations expired on April 1, 1992, and will not be renewed. This facility has been deleted from the State's emissions inventory and there are no other permitted or registered PM sources located in the Vermillion County nonattainment area.
The State also submitted a summary of air quality monitoring data for the nonattainment area. This data shows that there have been no violations of the NAAQS since 1988. It can be seen that the annual average PM concentration has decreased significantly from 45 micrograms per cubic meter (µg/m³) in 1988 to 29 µg/m³ in 1992 [the NAAQS is 50 µg/m³]. The monitored 24 hour PM concentrations have also decreased greatly in the last 5 years. The highest monitored concentration in 1988 was 202 µg/m³, compared to 84 in 1992 [the NAAQS is 150 µg/m³]. The most significant improvement is seen between the years 1991 and 1992 when mining operations in the nonattainment area ceased.

On November 24, 1993, USEPA proposed to approve the State's submission (58 FR 62067). In this proposal, USEPA identified the PM SIP elements required by the Act, including the requirement that the State must submit a demonstration showing that the plan will provide for attainment as expeditiously as practicable, but not later than December 31, 1994. See section 189(a)(1)(B) of the Act. USEPA's proposal to approve the Vermillion County SIP request was based on the State's having met this requirement; which, in turn, was based on both the permanent cessation of all mining operations and the low monitored concentrations of PM since 1988 in the Vermillion County area. In the proposal, USEPA also discussed the inapplicability of certain other PM SIP requirements due to the absence of industrial PM sources in the county. 1

The public comment period for the notice of proposed rulemaking closed on December 27, 1993. No public comments were received.

Rulemaking Action

USEPA approves the requested Vermillion County nonattainment area PM SIP revision which was submitted on January 13, 1993, as supplemented on February 22, 1993, and April 8, 1993. Among other things, the State of Indiana has demonstrated that the Vermillion County moderate PM nonattainment area will attain the PM NAAQS by December 31, 1994. This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the Federal Register on January 19, 1989 (54 FR 2214-2225). A revision to the SIP processing review tables was approved by the Acting Assistant Administrator for Office of Air and Radiation on October 4, 1993 (Michael Shapiro's memorandum to Regional Administrators). A future notice will inform the general public of these tables. Under the revised tables this action is remains classified as a Table 3. On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and Table 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for 2 years. The USEPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on USEPA's request. This request continued in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

Nothing in this action should be construed as permitting, allowing, or establishing a precedent for any future request for revision to the SIP in light of specific technical, economic, and environmental factors and in relation to relevant to statutory and regulatory requirements.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by April 18, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2) of the Act.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter.


David A. Ulrich,

Acting Regional Administrator.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7671q.

Subpart P—Indiana

2. Section 52.776 is amended by adding paragraph (p) to read as follows:

§ 52.776 Control strategy: Particulate matter.

* * * * *

(p) Approval—On January 13, 1993, the State of Indiana submitted a particulate matter State Implementation Plan revision for the Vermillion County nonattainment area. Additional information was submitted on February 22, 1993 and April 8, 1993. These materials demonstrate that the plan will provide for attainment of the National ambient air quality standards for particulate matter by December 31, 1994, in accordance with section 189(a)(1)(B) of the Clean Air Act. [FR Doc. 94-3523 Filed 2-14-94; 8:45 am]

BILLING CODE 6560-30-P

40 CFR Part 63

[FRL-4837-6]

National Emission Standards for Hazardous Air Pollutants; Compliance Extensions for Early Reductions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of complete enforceable commitments received.

SUMMARY: This notice provides a list of companies that have submitted "complete" enforceable commitments to the EPA under the Early Reductions Provisions [section 112([l][i)] of the Clean Air Act (CAA) as amended in 1990. The list covers commitments determined by the EPA to be complete through December 8, 1993, and includes the name of each participating company, the associated emissions source location, and the EPA Regional Office which is the point of contact for further information. This is one of a series of notices of this type. The most recent notice listed twenty-five sources which have had commitments deemed complete by the EPA. The EPA will publish additional lists of complete submittals on a monthly basis, as needed.

FOR FURTHER INFORMATION CONTACT:

David Beck (telephone: 919-541-5421), Rick Colyer (telephone: 919-541-5262), or Mark Morris (telephone: 919-541-5416), Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711 for general information on the Early Reductions Program. For further information on specific submittals received under the Early Reductions Program contact the appropriate EPA Regional Office representative listed below.

Region I—Janet Beloin (617) 565-2734
toward this demonstration, some sources may be required to submit an enforceable commitment containing base year emission information, or if not required, may voluntarily submit such emission information to the EPA for approval. As stated in the proposed Early Reductions rule, the EPA will review these submittals to verify emission information, and also will provide the opportunity for public review and comment. Following the review and comment process and after sources have had the chance to revise submittals (if necessary), the EPA will approve or disapprove the base year emissions.

To facilitate the public review process for program submittals, the proposed rule contains a commitment by the EPA to give public notice of submittals received which have been determined to be complete and which are about to undergo technical review within the EPA. Members of the public wishing to obtain more information on a specific submittal then may contact the appropriate EPA Regional Office representative listed above.

Thirty-eight enforceable commitments and base year submittals are currently being reviewed by EPA for completeness and thirty-three have been determined to be complete to date. Some of the early reductions submittals received actually contain multiple enforceable commitments; that is, some companies have decided to divide their particular plant sites into more than one early reductions source. Each of these sources must achieve the required emissions reductions individually to qualify for a compliance extension. The purpose of today's notice is to add the following commitments to the previously published list of twenty-five complete commitments: Aristechn, Ironton, Ohio; BP Oil, Belle Chase, Louisiana; DuPont, Camden, South Carolina; Hoechst Celanese, Bishop, Texas; Miles, Baytown, Texas; Miles, New Martinsville, WV; and Shell, Franklin, Kentucky. As the remaining submittals are determined to be complete, they will appear in subsequent notices. Also appearing in today's notice is a table listing enforceable commitments that have been approved by EPA to date.

Table 1 below lists companies that have made complete enforceable commitments or base year emissions submittals that have been approved by EPA as of December 8, 1993. Table 2 below lists those companies that have made complete enforceable commitments or base year emission submittals under the Early Reductions Program through December 8, 1993. These submittals are undergoing technical review within the EPA at this time.

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>EPA region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dow Corning</td>
<td>Midland, MI</td>
<td>V</td>
</tr>
<tr>
<td>Johnson &amp; Johnson</td>
<td>Sherman, TX</td>
<td>VI</td>
</tr>
<tr>
<td>Wyeth-Ayerst</td>
<td>Rouses Point, NY</td>
<td>II</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>EPA region</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amoco Chemical Co. (first source)</td>
<td>Texas City, TX</td>
<td>VI</td>
</tr>
<tr>
<td>Amoco Chemical Co. (second source)</td>
<td>Texas City, TX</td>
<td>VI</td>
</tr>
<tr>
<td>FPG Industries</td>
<td>Lake Charles, LA</td>
<td>VI</td>
</tr>
<tr>
<td>Allied-Signal (first source)</td>
<td>Baton Rouge, LA</td>
<td>VI</td>
</tr>
<tr>
<td>Allied-Signal (second source)</td>
<td>Baton Rouge, LA</td>
<td>VI</td>
</tr>
<tr>
<td>Allied-Signal (third source)</td>
<td>Baton Rouge, LA</td>
<td>VI</td>
</tr>
<tr>
<td>Allied-Signal (first source)</td>
<td>Ironton, OH</td>
<td>V</td>
</tr>
<tr>
<td>Allied-Signal (second source)</td>
<td>Ironton, OH</td>
<td>V</td>
</tr>
<tr>
<td>Saugus, MA</td>
<td></td>
<td>V</td>
</tr>
<tr>
<td>Texaco-Neches</td>
<td>Philadelphia, PA</td>
<td>V</td>
</tr>
<tr>
<td>Marathon Oil</td>
<td>Port Neches, TX</td>
<td>III</td>
</tr>
<tr>
<td>Monsanto</td>
<td>Garyville, LA</td>
<td>V</td>
</tr>
<tr>
<td>Polyken</td>
<td>Springfield, MA</td>
<td>VI</td>
</tr>
<tr>
<td>Occidental Chemical</td>
<td>Franklin, KY</td>
<td>V</td>
</tr>
<tr>
<td>Dayco</td>
<td>Bella, WV</td>
<td>IV</td>
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<tr>
<td>Dow</td>
<td>Waynesville, NC</td>
<td>IV</td>
</tr>
<tr>
<td>First Chemical</td>
<td>Dalton, GA</td>
<td>IV</td>
</tr>
<tr>
<td>Hoechst Celanese</td>
<td>Pascagoula, MS</td>
<td>IV</td>
</tr>
<tr>
<td>Monsanto (first source)</td>
<td>Bishop, TX</td>
<td>VI</td>
</tr>
<tr>
<td>Monsanto</td>
<td>St. Louis, MO</td>
<td>VII</td>
</tr>
</tbody>
</table>
At a later time (most likely within one to three months of today's date), the EPA Regional Offices will provide a formal opportunity for the public to comment on the submittals added to the list of "complete" commitments by today's notice. To do this, the Regional Office will publish a notice in the source's general area announcing that a copy of the source's submittal is available for public inspection and that comments will be received for a 30 day period.


Mary Nichols,
Assistant Administrator for Air and Radiation.

[FR Doc. 94-3430 Filed 2-14-94; 8:45 am]
BILLING CODE 4310-33-M

DEPARTMENT OF THE INTERIOR
Bureau of Land Management
43 CFR Public Land Order 7028
[OR-643-4210-06; GP4-014; OR-46063 (WASH)]

Partial Revocation of Executive Order No. 7693 Dated August 19, 1937; Washington

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive order insofar as it affects 11,725.30 acres of lands withdrawn for the Department of Agriculture for the Northeast Washington Project, LA–WA 2. The lands are no longer needed for the purpose for which they were withdrawn. The lands have been conveyed out of Federal ownership and will not be restored to surface entry.

EFFECTIVE DATE: March 17, 1994.

FOR FURTHER INFORMATION CONTACT:


By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Executive Order No. 7693 dated August 19, 1937, which withdrew public lands for reforestation, forestation, and soil erosion control purposes, is hereby revoked insofar as it affects the following described lands:

Willamette Meridian
Colville National Forest

T. 33 N., R. 40 E., Sec. 20, E½; Sec. 21, SW¼; T. 37 N., R. 40 E., Sec. 4, lots 1 and 3; Sec. 6, lots 3 and 4, and N¼SW¼; Sec. 21, SW¼; Sec. 28, N½NW¼ and SW¼NW¼; T. 31 N., R. 41 E., Sec. 12, SE¼; T. 33 N., R. 41 E., Sec. 18, lots 6 to 12, inclusive, and E½; Sec. 21, W½AV½SW¼NW¼; T. 36 N., R. 41 E., Sec. 29, N½SW¼.

T. 37 N., R. 41 E., Sec. 7, SE¼SE¼SW¼NW¼, E¼NE¼SW¼, S½NW¼NE¼SW¼, SW¼NE¼SW¼, NW¼NE¼SE¼SW¼, and N½NW¼SE¼SW¼.

T. 38 N., R. 41 E., Sec. 4, SW¼SE¼; Sec. 8, W½NE¼, SE¼NE¼, E¼NW¼, and S½; T. 31 N., R. 42 E., Sec. 5, N¼NW¼ and SW¼NW¼; Sec. 6, lots 1, 2, 3, and 4, E½, and E½W½; Sec. 7, lot 4, SE¼SW¼, and SE¼; Sec. 8, lots 1, 2, 3, and 4, and E½SW¼; Sec. 18, lots 1, 2, 3, and 4, E½, and E½W½; T. 33 N., R. 42 E., Sec. 19, lot 2 and W½SE¼NW¼; T. 37 N., R. 42 E., Sec. 12, E½W½ and SW¼SE¼.

T. 38 N., R. 43 E., Sec. 19, lot 8; T. 40 N. R. 43 E., Sec. 3, lots 4 and 9.

Kaniksu National Forest

T. 31 N., R. 42 E., Sec. 4, lots 1, 2, 3, and 4, SW¼NW¼, and SW¼; Sec. 12, NE¼NE¼; Sec. 14; Sec. 17, E½SW¼; Secs. 22 and 24; Sec. 26, NE¼NE¼ and SE¼NW¼; Sec. 28, NV¼; Sec. 29; Sec. 30, lots 1, 2, 3, and 4, E½, and E½W½; Sec. 31, lots 1, 2, NE¼, and E½NW¼; Sec. 34, lots 1 and 2; lots 7 to 12, inclusive, SW¼NE¼, and SW¼NW¼.

T. 34 N., R. 42 E., Sec. 11, N½NE¼ and SE¼NE¼; Sec. 13, lots 1 and 2, W½NE¼, N½NW¼, and SW¼NW¼; Sec. 14, NE¼; Sec. 22; Sec. 25, lots 3 and 4, NE¼NW¼, NE¼SW¼, and NW¼SW¼.

T. 31 N., R. 43 E., Sec. 19, lots 1, 2, and 3, E½NW¼, and NE¼SW¼.

T. 33 N., R. 43 E., Sec. 10, those lands in Patent No. 46890025 in NW¼SW¼.

Colville and Kaniksu National Forests

T. 31 N., R. 42 E., Sec. 5, SE¼SW¼; Sec. 8, E½ and EV¼NW¼.

The areas described aggregate 11,725.30 acres in Stevens and Pend Oreille Counties.

2. The lands have been conveyed out of Federal ownership and will not be restored to operation of the public land laws.


Bob Armstrong.
Assistant Secretary of the Interior.

[FR Doc. 94–3409 Filed 2–14–94; 8:45 am]
Proposed Rules

This section of the Federal Register contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
8 CFR Part 286
[INS No. 1392-93]
RIN 1115-AA30

Immigration User Fee; Remittance Requirements

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Proposed rule.

SUMMARY: This proposed rulemaking publishes changes to requirements related to the Immigration User Fee Account (IUFA). This document proposes to amend existing regulations to comply with the 1991 and 1994 Department of Justice Appropriations Acts and with a nomenclature change. In addition, this proposed rule establishes a change to where remittances shall be sent; a requirement for additional information in the remittance and statement procedures for fees; a clarification as to how remittances must be paid; and an extension to the length of time records must be maintained.

Important and necessary information not currently available to the Immigration and Naturalization Service (INS) would improve INS management of the IUFA. Budgetary estimates based upon projected fee collections would be more precise thereby improving the allocation of funds among programs. In addition, collections activities would be enhanced since the information provided with a remittance would ensure proper recording of the fees collected.

DATES: Written comments must be submitted on or before April 18, 1994.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., room 6307, Washington, DC 20536. To ensure proper handling, please reference INS No. 1392-93 on your correspondence.


SUPPLEMENTARY INFORMATION: The Department of Justice Appropriations Act, 1994, (Pub. L. 103-121, October 27, 1993,) increased the Immigration User Fee from $5.00 to $6.00 per individual. In addition, the Department of Justice Appropriations Act, 1991, (Pub. L. 101-515, November 5, 1990,) made other changes to the Immigration and Nationality Act. This proposed rule reflects those changes in 8 CFR 286. The requirements for fee collection data, remittance information, and record maintenance are required to improve financial management processes including budgeting, collection and debt management, and auditing functions. Lastly, this proposed rule implements a nomenclature change throughout 8 CFR 286 to remove the word “Comptroller” and to add in its place the words “Associate Commissioner, Finance.”

More specifically, this proposed rule changes the current regulation in the following ways. A new requirement is established for the monthly submission of a summary report showing the user fees collected in the preceding month and the associated number of ticket sales. In addition, the remittance depository cited in the current regulation is changed from one of specific identification to that of a “designated Treasury depository.” Further, a requirement is added to require the quarterly remittance statement to separately identify interest and penalty payments from the actual user fee remittance. Finally, the record retention period is changed from 2 years to 5 years. These changes are being made to improve financial management of the user fee account. Also, these changes are responsive to recommendations in Department of Justice, Office of Inspector General audits of the account.

In compliance with 5 U.S.C. 605(h), the Commissioner of INS certifies that the proposed rule would not have a significant adverse economic impact on a substantial number of small entities. The Government does not collect the user fees directly from passengers, but from the air and vessel carriers or their agents. Each entity that issues a document or ticket to an individual for transportation by a commercial aircraft or commercial vessel into the United States is required to collect the immigration user fee at the time the ticket is issued, and if the issuer fails to collect the fee at the time of issuance, the entity providing the transportation collects the user fee when the passenger departs the United States. The information required under this rule should be readily available from business records which must be maintained as a routine business practice.

This proposed rule is not considered by the Immigration and Naturalization Service, to be a “significant regulatory action” under Executive Order 12866 §3(f), Regulatory Planning and Review, and the Office of Management and Budget (OMB) has waived its review process under section 6(a)(3)(A).

The information collection requirements contained in this proposed rule have been cleared by the OMB, under the provisions of the Paperwork Reduction Act. The OMB clearance number is 1115-0142.

List of Subjects in 8 CFR Part 286

Air carriers, Immigration, Maritime carriers, Reporting and recordkeeping requirements.

Accordingly, part 286 of chapter I of title 8 of the Code of Federal Regulations is proposed to be amended to read as follows:

PART 286—IMMIGRATION USER FEES

1. The authority citation for part 286 continues to read as follows:


2. Section 286.2 is revised to read as follows:

§286.2 Fee for arrival of passengers aboard commercial aircraft or commercial vessels.

(a) Under the provisions of section 280(b) of the Act a $6.00 fee per individual is charged and collected by the Commissioner for the immigration inspection of each passenger aboard a commercial aircraft or commercial vessel, arriving at a Port-of-Entry in the United States, or for the prespection of a passenger in a place outside the United States prior to such arrival, except as provided in §286.3.

Federal Register
Vol. 59, No. 31
Tuesday, February 15, 1994
(b) Twenty business days after the end of each calendar month, each commercial aircraft and vessel carrier or ticket selling agent shall submit to the Immigration and Naturalization Service, Associate Commissioner, Finance, a summary statement showing the amount of user fees collected in the preceding month. The summary information shall include the fees expected to be remitted to INS and the number of tickets sold. This information should be forwarded to the Immigration and Naturalization Service, Chief, Fee Analysis and Operations Branch, 425 I Street, NW., room 6307, Washington, DC 20536.

3. In § 286.3 paragraph (a) is revised to read as follows:

§ 286.3 Exceptions.
* * * * *
(a) Persons, other than aircraft passengers, whose travel originated in Canada, Mexico, the adjacent islands, and territories or possessions of the United States;
* * * * *

4. In § 286.5 paragraphs (b), (c) and (d) are revised to read as follows:

§ 286.5 Remittance and statement procedures.
* * * * *
(b)(1) Fee remittances shall be sent to the Immigration and Naturalization Service, at a designated Treasury depository, for receipt no later than 31 days after the close of the calendar quarter in which the fees are collected, except the fourth quarter payment for fees collected shall be made on the date that is ten days before the end of the U.S. Government’s fiscal year, and the first quarter payment shall include any collections made in the preceding quarter that were not remitted with the previous payment. The fiscal year referenced is the U.S. Government’s fiscal year which begins on October 1 and ends on September 30.
(2) Late payments will be subject to interest, penalty, and handling charges as provided in the debt collection Act of 1982 (31 U.S.C. 3717). Refunds by a remitter of fees collected in conjunction with unused tickets or documents for transportation should be netted against the next subsequent remittance.
(c) Along with the remittance, as set forth in paragraph (b) of this section, each remitter making such remittance shall attach a statement which sets forth the following:

(1) Name and address;
(2) Taxpayer identification number;
(3) Calendar quarter covered by the payment;
(4) Interest and penalty charges; and
(5) Total amount collected and remitted.

(d) Remittances in U.S. dollars must be made by check or money order through a U.S. bank, to Associate Commissioner, Finance, INS.
* * * * *
5. Section 286.6 is revised to read as follows:

§ 286.6 Maintenance of records.
Each collector and remitter shall maintain records necessary for the Service to verify the accuracy of fees collected and remitted and to otherwise determine compliance with the applicable statutes and regulations. Such records shall be maintained for a period of five years from the date of fee collection. Each remitter shall advise the Associate Commissioner, Finance, of the name, address, and telephone number of a responsible officer who shall have the authority to verify and produce any records required to be maintained under this part. The Associate Commissioner, Finance, shall be promptly notified of any changes of the responsible officer.

§ 286.1(e), 286.4(c), 286.5(d), 286.5(e), and 286.6 [Amended]
6. In §§ 286.1(e), 286.4(c), 286.5(d), 286.5(e), and 286.6, remove the word “Comptroller” and add in its place “Associate Commissioner, Finance” wherever it appears.


Doris Meissner,
Commissioner, Immigration and Naturalization Service.

BILLING CODE 4410-15-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39
[Docket No. 93-NM-227-AD]

Airworthiness Directives; Airbus Industrie Model A300, A300-600, A310, and A320 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Airbus Industrie Model A300, A300-600, A310, and A320 series airplanes. This proposal would require that certain landing gear brakes be inspected for wear and replaced if the wear limits prescribed in this proposal are not met, and that the specified wear limits be incorporated into the FAA-approved maintenance inspection program. This proposal is prompted by an accident in which a transport category airplane executed a rejected takeoff (RTO) and was unable to stop on the runway due to worn brakes; and the subsequent review of allowable brake wear limits for all transport category airplanes. The actions specified by the proposed AD are intended to prevent the loss of brake effectiveness during a high energy RTO.

DATES: Comments must be received by April 11, 1994.


Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mark Quam, Aerospace Engineer, Standardization Branch, ANM-113, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (206) 227-2145; fax (206) 227-1320.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted 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 FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: “Comments to
Docket Number 93–NM–227–AD.” The postcard will be date stamped and returned to the commenter.

Availability of NPRMs


Discussion

In 1988, a McDonnell Douglas Model DC–10 series airplane was involved in an aborted takeoff accident in which eight of the ten brakes failed and the airplane ran off the end of the runway. Investigation revealed that there were failed pistons on each of the eight brakes, with O–rings damaged by over–extension due to extensive wear. Fluid leaking from the damaged pistons caused the hydraulic fuses to close, releasing all brake pressure. This accident prompted a review of allowable wear limits for all brakes installed on transport category airplanes. The FAA and the Aerospace Industries Association (AIA) jointly developed a set of dynamometer test guidelines that could be used to validate appropriate wear limits for all airplane brakes. It should be noted that this worn brake accountability determination validates brake wear limits with respect to brake energy capacity only and is not meant to account for any reduction in brake force due solely to the wear state of the brake. The guidelines for validating brake wear limits allow credit for use of reverse thrust with a critical engine inoperative to determine the energy level absorbed by the brake during the dynamometer test.

The FAA has requested that airframe manufacturers of transport category airplanes: (1) determine required adjustments in allowable wear limits for all of its brakes in use, (2) schedule dynamometer testing to validate wear limits as necessary, and (3) submit information from items (1) and (2) to the FAA so that appropriate rulemaking action(s) can be initiated.

Airbus Industrie has conducted worn brake rejected takeoff (RTO) dynamometer testing and analyses on various brakes installed on certain Model A300, A300–600, A310, and A320 series airplanes. Based on the results of that testing and analyses, the FAA has determined that the maximum brake wear limits currently recommended in the Component Maintenance Manual for Model A300, A300–600, A310, and A320 series airplanes equipped with brakes manufactured by Messier–Bugatti, BF Goodrich, Allied Signal (ALS) Aerospace Company (Bendix), or Aircraft Braking Systems (ABS) are acceptable as they relate to the effectiveness of the brakes during a high energy RTO. Consequently, the FAA has determined that the brake wear limits for Model A300, A300–600, A310, and A320 series airplanes must be incorporated into the FAA–approved maintenance inspection program.

The FAA has determined that, in order to prevent loss of brake effectiveness during a high energy RTO, the following maximum brake wear limits are necessary for Model A300, A300–600, A310, and A320 series airplanes equipped with Messier–Bugatti, BF Goodrich, ALS Aerospace Company (Bendix), or ABS brakes.

<table>
<thead>
<tr>
<th>Airplane model/series</th>
<th>Brake manufacturer</th>
<th>Brake part No.</th>
<th>Maximum brake wear limit (inch/mm)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A300–B2–100</td>
<td>Messier–Bugatti</td>
<td>286349–115</td>
<td>0.86” (25.0 mm)</td>
</tr>
<tr>
<td>A300–B2–100</td>
<td>Messier–Bugatti</td>
<td>286349–116</td>
<td>0.86” (25.0 mm)</td>
</tr>
<tr>
<td>A300–B2–100</td>
<td>BF Goodrich</td>
<td>2–1449</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A300–B2–100</td>
<td>BF Goodrich</td>
<td>2–1449</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>Messier–Bugatti</td>
<td>A21329–41–7</td>
<td>1.3” (33.0 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>Messier–Bugatti</td>
<td>A21329–41–17</td>
<td>1.3” (33.0 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>ALS (Bendix)</td>
<td>2606682–3–4–5</td>
<td>0.9” (22.9 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>ALS (Bendix)</td>
<td>2606682–3–4–5</td>
<td>0.9” (22.9 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>BF Goodrich</td>
<td>2–1449</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A300–B4–100</td>
<td>BF Goodrich</td>
<td>2–1449</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A300–B4–200 &amp; A300–600</td>
<td>Messier–Bugatti</td>
<td>C20060–100</td>
<td>1.1” (28.0 mm)</td>
</tr>
<tr>
<td>A300–B4–200 &amp; A300–600</td>
<td>Messier–Bugatti</td>
<td>C20060–100</td>
<td>1.1” (28.0 mm)</td>
</tr>
<tr>
<td>A300–B4–200 &amp; A300–600</td>
<td>ALS (Bendix)</td>
<td>2607632–1</td>
<td>0.9” (22.9 mm)</td>
</tr>
<tr>
<td>A300–B4–200 &amp; A300–600</td>
<td>ALS (Bendix)</td>
<td>2607932–1</td>
<td>0.9” (22.9 mm)</td>
</tr>
<tr>
<td>A300–B4–600R</td>
<td>Messier–Bugatti</td>
<td>C20210000</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A300–B4–600R</td>
<td>Messier–Bugatti</td>
<td>C20210000</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A301–200</td>
<td>Messier–Bugatti</td>
<td>C20225000</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A301–200</td>
<td>Messier–Bugatti</td>
<td>C20225000</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A310–300</td>
<td>Messier–Bugatti</td>
<td>C20194000</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A310–300</td>
<td>Messier–Bugatti</td>
<td>C20194020</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A320</td>
<td>Messier–Bugatti</td>
<td>C20225500</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A320</td>
<td>Messier–Bugatti</td>
<td>C20225500</td>
<td>1.0” (25.6 mm)</td>
</tr>
<tr>
<td>A320–220</td>
<td>BF Goodrich</td>
<td>2–1526–2</td>
<td>2.6” (66.0 mm)</td>
</tr>
<tr>
<td>A320–220</td>
<td>BF Goodrich</td>
<td>2–1526–3–4</td>
<td>2.6” (66.0 mm)</td>
</tr>
</tbody>
</table>

S.C. represents “Service Configured” brakes, which are marked according to the instructions provided in the brake manufacturer’s Component Maintenance Manual.

These airplanes are manufactured in France and are type design registered in the United States under the provisions of § 21.29 of the Federal Aviation Regulations and the applicable bilateral airworthiness agreement. The FAA has determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require
that certain landing gear brakes be inspected for wear and replaced if the wear limits prescribed in this proposal are not met, and that the specified wear limits be incorporated into the FAA-approved maintenance inspection program.

The FAA estimates that 101 Model A300, A300-600, A310, and A320 series airplanes of U.S. registry and 5 U.S. operators would be affected by this proposed AD. The FAA estimates that it would take approximately 20 work hours per operator, at an average labor rate of $55 per work hour, for each operator to incorporate the proposed revision of its FAA-approved maintenance inspection program. The total cost impact of that proposed requirement on U.S. operators of these airplanes is estimated to be $85,708, or $3,061 per airplane.

These total cost figures assume that no operator has yet accomplished the requirements of this AD.

The regulations proposed herein would not have substantial direct effects on the States, or 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, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(a), 1423, and 1463; 49 U.S.C. 106(g); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Airbus Industrie: Docket 93—NM—227—AD.

Applicability: Model A300, A300-600, A310, and A320 series airplanes equipped with Messier-Bugatti, BFGoodrich, Allied Signal (ALS) Aerospace Company (Bendix), or Aircraft Braking Systems (ABS) brakes.

Certification: Certified in any category.

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of brake effectiveness during a high energy rejected takeoff (RTO), accomplish the following:

(a) Within 180 days after the effective date of this AD, accomplish paragraphs (a)(1) and (a)(2) of this AD.

(b) (1) Inspect main landing gear brakes having the brake part numbers listed below for wear. Any brake worn more than the maximum wear limit specified below must be replaced, prior to further flight, with a brake within that limit.

<table>
<thead>
<tr>
<th>Airline model/series</th>
<th>Brake manufacturer</th>
<th>Brake part No.</th>
<th>Maximum brake wear limit (inch/mm)</th>
</tr>
</thead>
<tbody>
<tr>
<td>A300-B2-100</td>
<td>Messier-Bugatti</td>
<td>286349-115</td>
<td>0.98&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>Messier-Bugatti</td>
<td>286349-116</td>
<td>1.4&quot; (35.6 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>BFGoodrich</td>
<td>2-1449</td>
<td>1.1&quot; (27.9 mm). S.C.1</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>BFGoodrich</td>
<td>2-1449</td>
<td>1.1&quot; (27.9 mm). S.C.1</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>Messier-Bugatti</td>
<td>A21329-41-7</td>
<td>1.1&quot; (27.9 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>Messier-Bugatti</td>
<td>A21329-41-17</td>
<td>1.1&quot; (27.9 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>Messier-Bugatti</td>
<td>2606802-3-4/4-5</td>
<td>0.9&quot; (22.9 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>BFGoodrich</td>
<td>2-1449</td>
<td>1.4&quot; (35.6 mm)</td>
</tr>
<tr>
<td>A300-B2-100</td>
<td>BFGoodrich</td>
<td>2-1449</td>
<td>1.1&quot; (27.9 mm). S.C.1</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>Messier-Bugatti</td>
<td>2607832-1</td>
<td>0.9&quot; (22.9 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.48&quot; (37.5 mm). S.C.1</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.67&quot; (42.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.67&quot; (42.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.1&quot; (28.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.28&quot; (32.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ALS (Bendix)</td>
<td>2607832-1</td>
<td>1.5&quot; (38.2 mm). S.C.1</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>Messier-Bugatti</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>Messier-Bugatti</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ABS</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ABS</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ABS</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
<tr>
<td>A300-B2-200 &amp; A300-600</td>
<td>ABS</td>
<td>C20194000</td>
<td>0.97&quot; (25.0 mm)</td>
</tr>
</tbody>
</table>
AIRBUS INDUSTRIE MODEL A300, A300–600, A310, AND A320 SERIES AIRPLANES EQUIPPED WITH MESSIER–BUGATTI, BFGOODRICH, ALLIED SIGNAL (ALS) AEROSPACE COMPANY (BENDIX), OR AIRCRAFT BRAKING SYSTEMS (ABS) BRAKES—Continued

<table>
<thead>
<tr>
<th>Airplane model/series</th>
<th>Brake manufacturer</th>
<th>Brake part No.</th>
<th>Maximum brake wear limit (inch/mm).</th>
</tr>
</thead>
<tbody>
<tr>
<td>A320–200</td>
<td>BFGoodrich</td>
<td>2–1526–3/4</td>
<td>2.68” (68.0 mm).</td>
</tr>
</tbody>
</table>

1 S.C. represents “Service Configured” brakes, which are marked according to the instructions provided in the brake manufacturer’s Component Maintenance Manual.

Note 1: Measuring instructions that must be revised to accommodate the new brake wear limits specified above can be found in Chapter 32–42–27 of the Airplane Maintenance Manual (AMM), in Chapter 32–32–1 or 32–44–1 of the brake manufacturer’s Component Maintenance Manual (CMM), or in certain service bulletins (SB), as listed below:

<table>
<thead>
<tr>
<th>Brake manufacturer</th>
<th>Part No.</th>
<th>Document/chapter</th>
<th>Date/revision (or later revisions)</th>
</tr>
</thead>
</table>

(2) Incorporate into the FAA-approved maintenance inspection program the maximum brake wear limits specified in paragraph (a)(1) of this AD.

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Standardization Branch, ANM–113, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may make comments and then send it to the Manager, Standardization Branch, ANM–113. Note: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Standardization Branch, ANM–113.

(c) Special flight permits may be issued in accordance with Federal Aviation Regulations (FAR) 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on February 9, 1994.

Darrell M. Pederson,
Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–3461 Filed 2–14–94; 8:45 am]

BILLING CODE 4910–13–U

14 CFR Part 39
[Docket No. 93–NM–228–AD]

Airworthiness Directives; Boeing Model 767 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 767 series airplanes. This proposal would require dye penetrant inspection and proof pressure testing to detect cracks or ruptures of the crossover pneumatic duct, and repair or replacement, as necessary. This proposal would also require stress relieving of the crossover pneumatic duct assembly. This proposal is prompted by several reports of ruptured engine bleed air crossover ducts. The actions specified by the proposed AD are intended to prevent failure of the engine bleed air crossover duct, which could result in loss of pneumatics and damage to adjacent structure.

DATES: Comments must be received by April 11, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–103, Attention: Rules Docket No. 93–NM–228–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this...
location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Barbara Mudrovich, Aerospace Engineer, Systems and Equipment Branch, ANM–1308; Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–5056; telephone (206) 227–2670; fax (206) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted 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 FAA–public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Comments wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: “Comments to Docket Number 93–NM–228–AD.” The postcard will be date stamped and returned to the commenter.

Availability of NPRMs


Discussion

On July 14, 1993, the FAA issued AD 93–14–11, Amendment 39–8635 (58 FR 43350, August 17, 1993), applicable to Boeing Model 767 series airplanes, line position 001 through 307, inclusive. That AD requires a dye penetrant inspection and proof pressure testing to detect cracks or ruptures of the crossover pneumatic ducts, and repair or replacement, as necessary. That action was prompted by several reported incidents of ruptured engine bleed air crossover ducts on certain Boeing Model 767 series airplanes. The duct ruptures resulted in a loss of cabin pressure, loss of bleed air to the air driven hydraulic pump, loss of wing thermal anti-ice capabilities, and damage to the air conditioning panels. These duct ruptures were caused by cracking, which started and progressed around the circumferential welds. These cracks formed in the heat affected zones of the duct welds because of hydrogen oxide (hydride) concentration. The hydrides have an embrittling effect on the duct material, which may initiate the cracking.

Duct ruptures, if not corrected, could result in loss of pneumatics for cabin pressurization, air conditioning, air driven hydraulic pump, wing thermal anti–ice, hydraulic reservoir pressurization, engine cross starting ability, and cargo heating, and could also damage air conditioning panels.

Since the issuance of AD 93–14–11, the manufacturer has discovered that stress relieving of one of the four crossover ducts was incorporated during production on airplanes starting at line number 322 instead of line number 308. The manufacturer has informed the FAA that 14 airplanes did not receive stress relieving of the crossover duct. Therefore, these 14 airplanes would be subject to the same unsafe condition as addressed by AD 93–14–11.

The FAA has reviewed and approved Boeing Service Bulletin 767–36AQ041, Revision 2, dated October 28, 1993, that describes procedures for conducting dye penetrant inspections and proof pressure tests of the crossover pneumatic duct. This service bulletin also describes procedures for repairing or replacing this duct, and stress relieving this duct. Stress relieving this duct will eliminate the residual stress and local stress concentration. A dye penetrant inspection, proof pressure test, and stress relieving will reduce the possibility of engine bleed air crossover duct rupture caused by cracking due to hydride formation. The effectiveness listing of this service bulletin includes the 14 airplanes on which the stress relieving procedure was not accomplished during production.

Since an unsafe condition has been identified that is likely to exist on other products of this same type design, the proposed AD would require conducting dye penetrant inspections and proof pressure tests of the crossover pneumatic duct on 14 specific airplanes. This proposed AD would also require repairing or replacing this duct, and stress relieving this duct. The actions would be required to be accomplished in accordance with the service bulletin described previously.

(Note: The FAA’s normal policy is that, when an AD requires a substantive change, such as a change in its applicability, the “old” AD is superseded by being removed from the system and a new AD added. In the case of this AD action, the FAA normally would have proposed superseding AD 93–14–11 to expand its applicability to include the 14 additional airplanes. However, in reconsideration of the entire fleet size that would be affected by such a superseding action, and the consequent workload associated with revising maintenance record entries, the FAA has determined that a less burdensome approach is to issue a separate AD applicable only to the 14 airplanes. This AD would not supersede AD 93–14–11, and the airplanes listed in the applicability of AD 93–14–11 continue to be required to comply with the requirements of that AD. This proposed AD is a separate AD action, and is applicable only to airplanes having line numbers 308 through 321, inclusive.)

There are 14 Model 767 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 8 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 18 work hours per airplane to accomplish the proposed actions, and that the average labor rate is $55 per work hour. Required parts would cost approximately $2,208 per airplane. Based on these figures, the total cost impact of this proposed AD on U.S. operators is estimated to be $16,188, or $3,198 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

The regulations proposed herein 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, it is determined that this proposal would not have significant federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under the DOT Regulatory Policies and Procedures (44
FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. App. 1354(e), 1421 and 1423; 49 U.S.C. 106(g); and 14 CFR 11.89.

§39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Docket 93–NM–228–AD.

Applicability: Model 767 series airplanes, line position 308 through 321 inclusive, certificated in any category.

Compliance: Required as indicated, unless accomplished previously.

Note 1: Inspections, testing, and repair or replacement accomplished prior to the effective date of this amendment in accordance with Boeing Alert Service Bulletin 767–36A0041, dated July 2, 1993; or Revision 1, dated February 25, 1993; are considered acceptable for compliance with the applicable action specified in this amendment.

To prevent failure of the engine bleed air crossover duct, which could result in loss of pneumatics and damage to adjacent structure, accomplish the following:

(a) OPTION 1: As an alternative to the requirements of paragraph (b) of this AD, accomplish the following:

(i) Within 6 months after the effective date of this AD, or prior to the accumulation of 7,000 total flight cycles, whichever occurs later, conduct a dye penetrant inspection and proof pressure test of the crossover pneumatic duct and stress relieve the crossover pneumatic duct assembly, in accordance with Boeing Service Bulletin 767–36A0041, Revision 2, dated October 28, 1993. If cracks or ruptures are detected, prior to further flight, repair or replace the crossover pneumatic duct in accordance with the service bulletin.

(ii) Stress relieving of the duct, in accordance with the service bulletin, may be accomplished in conjunction with the initial dye penetrant inspection and proof pressure test required by this paragraph. Such action constitutes terminating action for the requirements of paragraph (a)(2) of this AD.

(b) OPTION 2: As an alternative to the requirements of paragraph (a) of this AD, accomplish the following:

(1) Within 18 months after the effective date of this AD, or prior to the accumulation of 7,000 total flight cycles, whichever occurs later, conduct a dye penetrant Inspection and proof pressure test of the crossover pneumatic duct and stress relieve the crossover pneumatic duct assembly, in accordance with Boeing Service Bulletin 767–36A0041, Revision 2, dated October 28, 1993. If cracks or ruptures are detected, prior to further flight, repair or replace the crossover pneumatic duct in accordance with the service bulletin.

(2) If cracks or ruptures are detected, prior to further flight, repair or replace the crossover pneumatic duct in accordance with the service bulletin.

(c) Replacement of the crossover pneumatic duct with a stress relieved duct in accordance with Boeing Service Bulletin 767–36A0041, Revision 2, dated October 28, 1993, constitutes terminating action for the requirements of paragraphs (a) and (b) of this AD.

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(e) Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on February 9, 1994.

Darrell M. Pederson,
Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 94–3460 Filed 2–14–94; 8:45 am]

BILLING CODE 4810–13–U

14 CFR Part 39

[Docket No. 93–NM–156–AD]

Airworthiness Directives; McDonnell Douglas Model DC–8, DC–9, and DC–9–80 Series Airplanes; Model MD–88 Airplanes; and C–9 (Military) Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–8, DC–9, and DC–9–80 series airplanes; Model MD–88 airplanes; and C–9 (military) airplanes, that would have required inspection of the center and side windshields, and replacement of discrepant windshields. That proposal was prompted by reports that the core ply of certain windshields were incorrectly tempered during the manufacturing process. This action revises the proposed rule by adding another windshield to the list of suitable replacement windshields and renumbering the part number for the left side windshield. The actions specified by this proposed AD are intended to prevent failure of the windshield.

DATES: Comments must be received by March 17, 1994.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–163, Attention: Rules Docket No. 93–NM–156–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4058. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from McDonnell Douglas Corporation, P.O. Box 1771, Long Beach, California 90801–1771, Attention: Business Unit Manager, Technical Administrative Support, Department L51, M.C. 2–98. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: David Hempe, Aerospace Engineer, Airframe Branch, ANM–122L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach,
California 90806–2425; telephone (310) 988–5224; fax (310) 988–5210; or Mike Lee, Aerospace Engineer, Airframe Branch, ANM–122L, FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3229 East Spring Street, Long Beach, California 90806–2425; telephone (310) 988–5325; fax (310) 988–5210.

**Comments Invited**

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted 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 FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: “Comments to Rules Docket Number 93–NM–156–AD.” The postcard will be date stamped and returned to the commenter.

**Availability of NPRMs**


**Discussion**

A proposal to amend part 39 of the Federal Aviation Regulations to add an airworthiness directive (AD), applicable to certain McDonnell Douglas Model DC–8, DC–9, and DC–9–80 series airplanes; Model MD–88 airplanes; and C–9 (military) airplanes, was published as a notice of proposed rulemaking (NPRM) in the Federal Register on October 13, 1993 (58 FR 52932). That NPRM would have required inspection of the center and side windshields, and replacement of discrepant windshields.

That NPRM was prompted by reports that the core ply of certain windshields were incorrectly tempered during the manufacturing process. That condition, if not corrected, could result in failure of the windshield.

Since the issuance of that NPRM, the FAA has received several comments from the manufacturer that have caused the FAA to reconsider its position on certain aspects of the proposed rule. McDonnell Douglas points out that Revision 2 of McDonnell Douglas Alert Service Bulletins A56–16, dated December 13, 1993 (for Model DC–8 series airplanes), and A56–15, dated November 9, 1993 (for Model DC–9 series airplanes), lists another alternative for a suitable windshield replacement. McDonnell Douglas requests that paragraphs (a)2 and (b)2 of the proposal be revised to include windshields manufactured by Pilkington Aerospace after October 1993 as suitable replacement windshields.

The FAA has verified that Pilkington Aerospace has revised its manufacturing process that previously produced incorrectly tempered core plies in these windshields. Therefore, the FAA has determined that center and side windshields manufactured by Pilkington Aerospace after September 30, 1993, are acceptable replacements for discrepant windshields. Paragraphs (a)2(iii) and (b)2(iii) have been added to this supplemental NPRM to include this third alternative to the list of acceptable replacement windshields.

The FAA has reviewed and approved Revision 2 of McDonnell Douglas Alert Service Bulletins A56–16, dated December 13, 1993 (for Model DC–8 series airplanes), and A56–15, dated November 9, 1993 (for Model DC–9 series airplanes), that describe procedures to inspect and replace center windshields (for Model DC–8 series airplanes), and center and side windshields (for Model DC–9 series airplanes) that were manufactured by Pilkington Aerospace. The service bulletins list the following windshields as acceptable replacement windshields:

1. Windshields that have not been manufactured by Pilkington Aerospace.
2. Windshields that have been manufactured by Pilkington, but have been recertified and re-identified.
3. Windshields that have been manufactured by Pilkington after September 30, 1993.

Paragraphs (a) and (b) of this supplemental NPRM have been revised to reference this revision of these service bulletins as the appropriate source of service information. A note has been added to the compliance section of this supplemental NPRM to indicate that the requirements contained in the previous revisions of these service bulletins would not be included in the requirements of this AD.

Further, the manufacturer indicates that paragraphs (b) and (c) of the proposal only list the part number for the right side windshield for the inspection and replacement requirements. McDonnell Douglas requests to revise the rule by including the left side windshield, part number 5912290–502, for inspection and replacement. The FAA concurs.

References to inspection and replacement of the left side windshield were inadvertently omitted from the NPRM; therefore, paragraphs (b) and (c) of this supplemental NPRM have been revised to add these requirements and part number references.

Since these changes expand the scope of the originally proposed rule, the FAA has determined that it is necessary to reopen the comment period to provide additional opportunity for public comment.

There are approximately 235 Model DC–8 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 140 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 0.5 work hour per airplane to accomplish the proposed inspection, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators of Model DC–8 series airplanes is estimated to be $3,850, or $27.50 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

There are approximately 1,978 Model DC–9 and DC–9–80 series airplanes, Model MD–88 airplanes, and C–9 (military) airplanes of the affected design in the worldwide fleet. The FAA estimates that 1,079 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 0.5 work hour per airplane to accomplish the proposed inspection, and that the average labor rate is $55 per work hour. Based on these figures, the total cost impact of the proposed AD on U.S. operators of Model DC–8 series airplanes is estimated to be $26,727, or $27.50 per airplane. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.
Based on the figures discussed above, the total cost impact of the proposed inspection actions on U.S. operators is estimated to be $33,523. This total cost figure assumes that no operator has yet accomplished the proposed requirements of this AD action.

Should an inspection reveal that a discrepant windshield was installed, the replacement of that windshield would require approximately 10 additional work hours to accomplish, at an average labor rate of $55 per work hour. Required replacement parts would be provided at no cost to operators. Based on these figures, the total cost impact for the replacement of discrepant windshields for U.S. operators would be $550 per airplane.

The regulations proposed herein 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 12861, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39
Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment
Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—AIRWORTHINESS DIRECTIVES

39.13 [Amended] 2. Section 39.13 is amended by adding the following new airworthiness directive:

McDonnell Douglas: Docket 93-NM-156-AD.

Applicability: Model DC-8-60 and -70 series airplanes on which the center windshield has been replaced after February 1992; and Model DC-9-81, -82, -83, and -87 airplanes, Model MD-88 airplanes, and C-9 (military) airplanes, on which the center and/or side windshield(s) has been replaced after February 1992; certified in any category.

Compliance: Required as indicated, unless accomplished previously.

Note 1: Replacement of any subject windshield that has been accomplished prior to the effective date of this amendment in accordance with McDonnell Douglas DC-8 Service Bulletin A56–16, dated June 15, 1993, or Revision 1, dated July 1, 1993 (for Model DC-8-60 and -70 series airplanes; or McDonnell Douglas DC-9 Alert Service Bulletin A56–15, dated June 15, 1993, or Revision 1, dated September 15, 1993, is considered acceptable for compliance with the applicable action specified in this amendment.

To prevent failure of the windshield, accomplish the following:
(a) For Model DC-8-60 and -70 series airplanes: Within 90 days after the effective date of this AD, perform a visual inspection of the center windshield to determine the manufacturer.
(b) If the windshield was not manufactured by Pilkington Aerospace: No further action is required by this AD.
(c) If the center windshield was manufactured by Pilkington Aerospace: Prior to further flight, replace the center windshield with one of the windshields specified in paragraph (a)(2)(i), (b)(2)(ii), or (b)(2)(iii) of this AD, in accordance with McDonnell Douglas DC-9 Alert Service Bulletin A56–15, Revision 2, dated December 13, 1993.
(i) A center windshield that was not manufactured by Pilkington Aerospace: or
(ii) A center windshield that has been manufactured by Pilkington Aerospace, but recertified and re-identified by Pilkington Aerospace.

(ii) A center windshield that was manufactured by Pilkington Aerospace after September 30, 1993.
(b) For Model DC-9-81, -82, -83, and -87 airplanes; Model MD-88 airplanes; and C-9 (military) airplanes: Within 90 days after the effective date of this AD, perform a visual inspection of the center windshield and side windshield to determine the manufacturer.

DAVID M. PEDERSON,
Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.
[FR Doc. 94–3462 Filed 2–14–94; 8:45 am]
BILLING CODE 4910–13–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

Food Safety Initiative; Notice of Public Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meetings.

SUMMARY: The Food and Drug Administration's (FDA) is announcing that it is sponsoring nine public meetings that are intended to promote understanding of FDA's recently announced food safety initiative. This
The purpose of these meetings is not, however, to receive comments. The food safety initiative also includes the issuance of the Food Code, which provides a model for those Federal, State, and local jurisdictions that have regulatory responsibility for food service, retail, and vending operations. The Food Code provides a framework for the application of HACCP at the retail level. Agency personnel will be present at these meetings to provide an overview of the Food Code.

The meetings will be held at the addresses and on the dates listed in Table 1 as follows:

### Table 1

<table>
<thead>
<tr>
<th>Meeting addresses</th>
<th>Dates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stouffer Harbor Place Hotel, 202 East Pratt St., Baltimore, MD</td>
<td>February 22, 1994</td>
</tr>
<tr>
<td>Wyndham Hamilton Hotel, 400 Park Blvd., Itasca, IL</td>
<td>February 25, 1994</td>
</tr>
<tr>
<td>The LaGuardia Marriott, 102-05 Ditmars Blvd.,., East Elmhurst, NY</td>
<td>March 2, 1994</td>
</tr>
<tr>
<td>Radisson Mart Plaza Hotel, 711 NW., 72d Ave., Miami, FL</td>
<td>March 3, 1994</td>
</tr>
<tr>
<td>Westin Hotel, 100 Iberville St., New Orleans, LA</td>
<td>March 4, 1994</td>
</tr>
<tr>
<td>Hyatt Regency Hotel, 6225 W. Century Blvd., Los Angeles, CA</td>
<td>March 7, 1994</td>
</tr>
<tr>
<td>Seattle Center, Olympic Room, 305 Harrison St., Seattle, WA</td>
<td>March 8, 1994</td>
</tr>
<tr>
<td>Regal Alaskan Hotel, 4800 Stenard Rd., Anchorage, AK</td>
<td>March 10, 1994</td>
</tr>
<tr>
<td>The Hynes Convention Center, rm. 100, 900 Boylston St., Boston, MA</td>
<td>March 16, 1994</td>
</tr>
</tbody>
</table>

Meetings will be held from 1 p.m. to 4:30 p.m. Evening sessions, which will be held from 7 p.m. to 8:30 p.m., are scheduled in all cities, except Chicago (Itasca), Anchorage, and Boston. The evening sessions in Baltimore, New York, Miami, New Orleans, Los Angeles, and Seattle are being scheduled to accommodate those unable to attend the afternoon sessions. Evening sessions will be limited to questions and answers only.

There is no charge to attend these meetings. Advance registration is requested. Early registration is suggested because space is limited. The deadline for registering is 1 week before each meeting. Late registration will be accepted pending availability of space. Those persons interested in attending should fax their name, organization, address, telephone number, and session of interest (afternoon or evening) to the local contact persons listed in Table 2 as follows:

### Table 2

<table>
<thead>
<tr>
<th>Meeting location</th>
<th>Contact person</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chicago</td>
<td>Maxine Aubert, Chicago District Office, FDA, 500 South Riverside Plaza, suite 550 South, Chicago, IL 60606, 312-353-7376 or FAX 312-888-3260.</td>
</tr>
<tr>
<td>Miami</td>
<td>Lynne C. Issacs, Orlando District Office, FDA, 7200 Lake Ellenor Dr., suite 120, Orlando, FL 32803, 407-648-6522 or FAX 407-648-6221.</td>
</tr>
<tr>
<td>Los Angeles</td>
<td>Yvonne Banegas, Los Angeles District Office, FDA, 1521 West Pico Blvd., Los Angeles, CA 90015, 213-252-7566 or FAX 213-252-7566.</td>
</tr>
<tr>
<td>Seattle</td>
<td>Sue Hutchcroft, Seattle District Office, FDA, 22201 23d Dr. SE., Bothell, WA 98011, 206-483-4899 or FAX 206-483-4901.</td>
</tr>
</tbody>
</table>
The International Maritime Organization (IMO), the Environmental Protection Committee of Prevention of Pollution from Ships, announced the notice of proposed rulemaking (NPRM) to interpret Annex I of the 29th session of the Marine Environment Protection Committee (MEPC). The NPRM proposed to implement the amendments to and interpretations of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 ("MARPOL 73/78"). It is now clear that the Coast Guard has amended the oil pollution prevention regulations for ships in order to implement the amendments to and interpretations of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 ("MARPOL 73/78"). This new rulemaking is intended to bring the domestic regulations implementing MARPOL 73/78 into conformance with the Convention.

The NPRM was published on February 7, 1986 (51 FR 4768), with comments due on May 7, 1986. The NPRM proposed to correct the final rulemaking of October 6, 1983 (48 FR 45704), implementing MARPOL 73/78. The Coast Guard received three comments in response to the proposed rule. In general, all three supported the stated goals of the NPRM: to implement the interpretations of MARPOL 73/78, Annex I. Two comments felt that the Coast Guard should issue oil pollution prevention regulations beyond those required by MARPOL 73/78, Annex I, while one comment took issue with a statement made in the NPRM, that the Coast Guard "strongly discourages the discharge of oil into bilges." (The comment asserted that there is no place for that type of statement in a rulemaking. The Coast Guard notes that it has been a long-standing policy of the Coast Guard to discourage the discharge of oil into bilges.)

Since publishing the NPRM, the Coast Guard has issued numerous oil pollution prevention regulations. Of particular note are those implementing the Oil Pollution Act of 1990 (OPA 90) [Pub. L. 101-380]. The Coast Guard has determined that, in the view of regulatory and statutory activity since the publication of the NPRM, it is appropriate to terminate the rulemaking and evaluate the need for another like it. Subsequent rulemakings have accomplished many of the changes called for by MARPOL 73/78. In addition, legislation, such as OPA 90, has required oil pollution prevention regulations that exceed those in the NPRM; these have been or are being implemented by separate rulemakings.

The Coast Guard will continue to track changes made to all annexes of MARPOL 73/78 to which the United States is a party. It will initiate separate rulemakings, as needed, to bring domestic regulations implementing MARPOL 73/78 into conformance with the Convention.


Michael R. Taylor,
Deputy Commissioner for Policy.

FOR FURTHER INFORMATION CONTACT:
LCDR M. McEwen, Project Manager, Marine Environmental Protection Division, U.S. Coast Guard Headquarters, (202) 267-6714.

SUPPLEMENTARY INFORMATION: On February 7, 1986 (51 FR 4768), the Coast Guard published an NPRM concerning the oil pollution prevention regulations for ships. The NPRM proposed to implement the amendments to and interpretations of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 ("MARPOL 73/78"). It is now clear that the Coast Guard has amended the oil pollution prevention regulations for ships in order to implement the amendments to and interpretations of Annex I of the International Convention for the Prevention of Pollution from Ships, 1973, as modified by the protocol of 1978 ("MARPOL 73/78"). This new rulemaking is intended to bring the domestic regulations implementing MARPOL 73/78 into conformance with the Convention.


A.E. Henn,
Rear Admiral, U.S. Coast Guard Chief, Office of Marine Safety, Security and Environmental Protection.
Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, Inc., (202) 857-3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible ex parte contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73
Radio broadcasting.

Federal Communications Commission.

John A. Karousos,
 Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–3471 Filed 2–14–94; 8:45 am]
BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 94–4, RM–8413]

Radio Broadcasting Services; Walker, MN

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition filed by Roger Paskvan proposing the allotment of Channel 282A to Walker, Minnesota, as that community's second FM broadcast service. Canadian concurrence has been requested for this allotment at coordinates 47–07–08 and 94–33–22. There is a site restriction 3 kilometers (2 miles) northeast of the community.

DATES: Comments must be filed on or before April 1, 1994, and reply comments on or before April 18, 1994.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Harry F. Cole, Bechtel & Cole, Charteried, 1901 I Street, NW., suite 250, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Kathleen Scheuerle, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–4, adopted January 14, 1994, and released February 8, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the Commission's Reference Center (Room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Services, Inc., 2100 M Street, NW., suite 140, Washington, DC 20037, (202) 857–3800.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible ex parte contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73
Radio broadcasting.

Federal Communications Commission.

John A. Karousos,
 Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–3469 Filed 2–14–94; 8:45 am]
BILLING CODE 6712–01–M

47 CFR Part 73

[MM Docket No. 94–2, RM–8415]

Radio Broadcasting Services; Hazlehurst, MS

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Paskvan proposing the allotment of Channel 282A to Hazlehurst, Mississippi, as the community's second local commercial FM transmission service. Channel 282A can be allotted to Hazlehurst in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.9 kilometers (8.6 miles) southwest in order to avoid a short-spacing with the allotment coordinates for Channel 283C3 at Tallulah, Louisiana. The coordinates for Channel 282A at Hazlehurst are North Latitude 32–45–57 and West Longitude 90–29–35.

DATES: Comments must be filed on or before April 1, 1994, and reply comments on or before April 18, 1994.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: Richard M. Riehl, Esq., Haley, Bader & Potts, 4350 North Fairfax Drive, suite 900, Arlington, Virginia 22203–1633 (Counsel for petitioner).

FOR FURTHER INFORMATION CONTACT: Pamela Blumenthal, Mass Media Bureau, (202) 634–6530.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 94–2, adopted January 14, 1994, and released February 8, 1994. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC's Reference Center (room 239), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, ITS, Inc., (202) 857–3800, 2100 M Street, NW., suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all ex parte contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible ex parte contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73
Radio broadcasting.

Federal Communications Commission.

John A. Karousos,
 Acting Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 94–3473 Filed 2–14–94; 8:45 am]
BILLING CODE 6712–01–M
Regulations for Automatic Vehicle Monitoring Systems

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; extension of comment period.

SUMMARY: The notice of Proposed Rule Making (NPRM), 58 FR 21276 (April 20, 1993), in this docket proposes regulations for licensing Automatic Vehicle Monitoring (AVM) systems. AVM systems are used to locate and track vehicles and are currently licensed in accordance with interim rules adopted in 1974. The comment and reply comment periods for the NPRM expired in 1993. This Public Notice is necessary to seek additional comment on new matters raised by ex parte presentations related to the licensing of wideband, multilateration AVM systems.

DATES: Comments must be filed on or before February 25, 1994, and reply comments must be filed on or before March 7, 1994.


FOR FURTHER INFORMATION CONTACT: John J. Borkowski, Private Radio Bureau, (202) 632-7125.

SUPPLEMENTARY INFORMATION: Public notice.

Additional Comment Sought on Ex Parte Presentations

February 9, 1994.

The Commission has received written memoranda to the Secretary from PacTel Teletrec (PacTel) on January 26, 1994, and from Southwestern Bell Mobile Systems, Inc. (SBMS) on February 2, 1994 and February 7, 1994, summarizing ex parte presentations made concerning the licensing of Automatic Vehicle Monitoring (AVM) systems, currently under consideration in PR Docket No. 93-61. The Commission also has received a written memorandum to the Secretary from MobileVision on February 1, 1994, summarizing an ex parte presentation responding to PacTel's January 26, 1994 ex parte presentation.

It has been determined that PacTel's and SBMS's ex parte presentations raise new issues that warrant giving interested parties an additional opportunity for comment. Specifically, these presentations address alternatives for the licensing of wideband multilateration AVM systems. PacTel espouses the use of Rand McNally Basic Trading Area (BTAs) as Commission-defined service areas for such systems and proposes a licensing procedure using these service areas. SBMS, on the other hand, suggests the use of Metropolitan Statistical Areas (MSAs) and Rural Statistical Areas (RSAs) as licensing boundaries.

Pursuant to Sections 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(j) and 303(r), we are hereby soliciting additional comment in PR Docket No. 93-61 on these issues. The filings addressed above that include these issues are available for inspection as part of the record in PR Docket No. 93-61 during normal business hours in the FCC Reference Center, room 239, 1919 M Street, NW., Washington, DC. All or part of the text of these filings may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, NW., room 246, Washington, DC 20554, telephone (202) 337-1433.

Comments on these additional issues must be filed on or before February 25, 1994. Reply Comments must be filed on or before March 7, 1994. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments in this proceeding, including those filed in response to this Public Notice, are available for public inspection during regular business hours in the FCC Reference Center.

By the Chief, Private Radio Bureau.

For additional information about this matter contact John Borkowski, Rules Branch, Private Radio Bureau, FCC, telephone (202) 632-7125.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94-3396 Filed 2-14-94; 8:45 am]

BILLING CODE 6712-01-M
This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 93–170–1]

Availability of List of U.S. Veterinary Biological Product and Establishment Licenses and U.S. Veterinary Biological Product Permits Issued, Suspended, Revoked, or Terminated

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: This notice pertains to veterinary biological product and establishment licenses and veterinary biological product permits that were issued, suspended, revoked, or terminated by the Animal and Plant Health Inspection Service, during the month of November 1993. These actions have been taken in accordance with the regulations issued pursuant to the Virus-Serum-Toxin Act. The purpose of this notice is to inform interested persons of the availability of a list of these actions and advise interested persons that they may request to be placed on a mailing list to receive the list.

FOR FURTHER INFORMATION CONTACT: Ms. Maxine Kitto, Program Assistant, Veterinary Biologies, Biotechnology, Biologies, and Environmental Protection,APHIS, USDA, room 838, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, (301) 436-8245. For a copy of this month's list, or to be placed on the mailing list, write to Ms. Kitto at the above address.

SUPPLEMENTARY INFORMATION: The regulations in 9 CFR part 102, "Licenses For Biological Products," require that every person who prepares certain biological products that are subject to the Virus-Serum-Toxin Act (21 U.S.C. 151 et seq.) shall hold an unexpired, unsuspended, and unrevoked U.S. Veterinary Biological Product License. The regulations set forth the procedures for applying for a license, the criteria for determining whether a license shall be issued, and the form of the license.

The regulations in 9 CFR part 102 also require that each person who prepares biological products that are subject to the Virus-Serum-Toxin Act (21 U.S.C. 151 et seq.) shall hold a U.S. Veterinary Biologies Establishment License. The regulations set forth the procedures for applying for a license, the criteria for determining whether a license shall be issued, and the form of the license.

The regulations in 9 CFR part 104, “Permits for Biological Products,” require that each person importing biological products shall hold an unexpired, unsuspended, and unrevoked U.S. Veterinary Biological Product Permit. The regulations set forth the procedures for applying for a permit, the criteria for determining whether a permit shall be issued, and the form of the permit.

The regulations in 9 CFR parts 102 and 105 also contain provisions concerning the suspension, revocation, and termination of U.S. Veterinary Biological Product Licenses, U.S. Veterinary Biologies Establishment Licenses, and U.S. Veterinary Biological Product Permits.

Each month, the Veterinary Biologies section of Biotechnology, Biologies, and Environmental Protection prepares a list of licenses and permits that have been issued, suspended, revoked, or terminated. This notice announces the availability of the list for the month of November 1993. The monthly list is also mailed on a regular basis to interested persons. To be placed on the mailing list you may call or write the person designated under FOR FURTHER INFORMATION CONTACT.

DONE in Washington, DC, this 10th day of February 1994.

Terry L. Medley,
Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 94–3504 Filed 2–14–94; 8:45 am]

BILLING CODE 3410–34–P

Farmers Home Administration

Technical and Supervisory Assistance Grants

AGENCY: Farmers Home Administration, USDA.

ACTION: Notice.

SUMMARY: The Farmers Home Administration (FmHA) announces that it is soliciting competitive applications in a pilot project under its Technical and Supervisory Assistance (TSA) Grants program. This action is taken to comply with Agency regulations found in 7 CFR part 1944, subpart K which require the Agency to announce the opening and closing dates for receipt of preapplications for TSA grants from eligible applicants. The intended effect of this Notice is to provide public and private nonprofit corporations, agencies, institutions, organizations, Indian tribes, and other associations notice of these dates. This TSA grant program will be available to provide funds to eligible applicants to conduct programs of technical and supervisory assistance for low-income rural residents to obtain and/or maintain occupancy of adequate housing.

DATES: FmHA hereby announces that it will begin receiving preapplications on February 15, 1994. The closing date for acceptance by FmHA of preapplications is March 17, 1994. This period will be the only time during the current fiscal year that FmHA accepts preapplications. Preapplications must be received by or postmarked on or before March 17, 1994.

ADDRESSES: Submit preapplications to FmHA field offices; applicants must contact their FmHA State Office for this information.

FOR FURTHER INFORMATION CONTACT: Walter B. Patton, Senior Loan Officer, Single Family Housing Processing Division, USDA, FmHA, room 5334, South Agriculture Building, Washington, DC 20250, telephone (202) 720–0099 (This is not a toll free number).

SUPPLEMENTARY INFORMATION: 7 CFR part 1943, subpart K provides details on what information must be contained in the preapplication package. Entities wishing to apply for assistance should contact the FmHA State Office to receive further information and copies of the application package.

Eligible entities for these competitively awarded grants include public and private nonprofit corporations, agencies, institutions, organizations, Indian tribes, and other associations.
In accordance with 7 CFR §1944.525(a), the FMHA Administrator has targeted a total of 55 Counties in nine States to participate in this pilot project. The States and Counties selected to participate in the pilot project are listed below. The FMHA Administrator, using data provided in the 1990 Census, targeted a State from each of the nine Census Regions as defined by the United States Census Bureau for participation in the pilot project. The targeted States had the highest degree of substandard housing and the highest number of persons living in poverty in rural areas who are eligible to receive FMHA housing assistance. The balance of TSA funds will be available for national competition at a later date and under separate notice.

This program is not listed in the Catalog of Federal Domestic Assistance but is subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials (7 CFR part 3015, subpart V; 48 FR 29115, June 24, 1983). Applicants are also referred to 7 CFR part 1944, Sections 1944.506(e)(1) and 1944.506(e)(2) for specific guidance on these requirements relative to the TSA Grant Program. In addition, FMHA is currently in the process of developing the FMHA Home Buyer's Handbook and upon completion will provide copies as needed at no cost to grantees. The FMHA Home Buyer's Handbook may be used by grantees to provide TSA funds.

The funding instrument for the TSA Grant Program will be a grant agreement. The term of the grant can vary from 1 to 2 years, depending on available funds and demand. The maximum grant amount for this pilot project is $15,000 per County served per year. Each FMHA State Office will submit to the FMHA National Office no more than one preapplication per County served. Notices of action on the preapplications should be made no earlier than 66 days prior to the closing date.

Following is a list of States and Counties selected to participate in the Home Buyer's Education Pilot Program:

<table>
<thead>
<tr>
<th>State and County</th>
<th>District</th>
<th>Number of loans made during FY 93</th>
</tr>
</thead>
<tbody>
<tr>
<td>New Mexico:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. San Juan</td>
<td>01</td>
<td>52</td>
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<tr>
<td>2. Santa Fe</td>
<td>02</td>
<td>50</td>
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<td>3. Dona Ana</td>
<td>03</td>
<td>42</td>
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<tr>
<td>4. Luna</td>
<td>03</td>
<td>27</td>
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<tr>
<td>5. Taos</td>
<td>02</td>
<td>28</td>
</tr>
<tr>
<td>6. Valencia</td>
<td>01</td>
<td>57</td>
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<tr>
<td>Mississippi:</td>
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<td>1. Copiah</td>
<td>01</td>
<td>36</td>
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<tr>
<td>3. Sunflower</td>
<td>04</td>
<td>53</td>
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<td>4. DeSoto</td>
<td>06</td>
<td>33</td>
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<tr>
<td>5. Neshoba</td>
<td>08</td>
<td>73</td>
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<td>6. Pearl River</td>
<td>10</td>
<td>27</td>
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<tr>
<td>1. Caddo</td>
<td>01</td>
<td>27</td>
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<td>2. Avoyelles</td>
<td>03</td>
<td>28</td>
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<td>3. Lafayetteda</td>
<td>04</td>
<td>33</td>
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<td>4. Ascension</td>
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<td>5. St. Bernard</td>
<td>08</td>
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<td>6. Morehouse</td>
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<td>5. Clark</td>
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<td>West Virginia:</td>
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<td>4. Putnam</td>
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<td>6. Kanawha</td>
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<td>South Dakota:</td>
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<tr>
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<tr>
<td>4. Pennington</td>
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<td>5. Beadle</td>
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<td>20</td>
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<td>6. Brockings</td>
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<td>Maine:</td>
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<td>2. Cumberland</td>
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<td>3. York</td>
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<td>5. Penobscot</td>
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<td>32</td>
</tr>
<tr>
<td>6. Washington</td>
<td>04</td>
<td>41</td>
</tr>
</tbody>
</table>


Michael V. Dunn,
Administrator, Farmers Home Administration.
understories of subalpine fir and Douglas-fir that are heavily damaged by spruce budworm and infected by root pathogens. Lodgepole pine in these understories is also infected with dwarf mistletoe and many of the overstory trees have fallen, creating high fuel loads that will result in intense future wildfires. Harvesting in these stands would reduce this fire risk, salvage dead and dying trees, and sustain these ecosystems by perpetuating new stands of lodgepole pine. In other stands, understory lodgepole is healthy and overstory trees need to be removed to allow this next generation of trees to continue growing and perpetuating the ecosystem.

(2) Watershed/Fisheries Rehabilitation—Major streams in the area include Two Bear, Bear Gulch, Lower Sleeping Child, Hog Trough, Railroad, Weasel and Skalkaho Creeks. A course filter analysis of watersheds has identified a range of different watershed conditions in the Bear area. A hypothesis is that thinning of the dead and dying lodgepole is healthy and overstory trees need to be removed to allow this next generation of trees to continue growing and perpetuating the ecosystem.

(3) Houselog Salvage—Infrequent fire in the Bear area has resulted in some areas with an abundance of recently dead and dying lodgepole pine trees. The proposal includes the salvage of these trees over 275 acres using over-the-snow type logging equipment.

(4) Underburning—To restore fire back into the ecosystem, underburning over the next 3 years is proposed. To assess cumulative effects, underburning over a 10 year period on approximately 2,380 acres will be analyzed. Many of these areas are on southern exposures where underburning will begin to regenerate more fire-tolerant species, reduce high natural fuel loadings and improve browse for wildlife.

(5) Precommercial Thinning—Past timber harvesting in some areas has resulted in overstocked plantations that need thinning to improve productivity. Approximately 475 acres of existing plantations are proposed for precommercial thinning.

(6) Transportation Management Road densities for several 3rd order drainages in the Bear area are not meeting Forest Plan standards for elk habitat effectiveness. Approximately 33 miles of road are proposed to be closed in order to meet or exceed Forest Plan standards for road densities. Some of these road sections are included in the road closures for watershed rehabilitation.

Alleviation to this proposed action will include No Action; an alternative that does not propose timber harvesting in any roadless area; two alternatives that treat the Bear area at differing landscape level intensities; an alternative that models 1987 Forest Plan outputs; and an alternative that includes only the watershed/fisheries rehabilitation projects.

Preliminary issues that the EIS will address include:

(a) How will the proposed affect ecosystem health and productivity?
(b) Can houselogs be salvaged from the area and what would the effect be?
(c) How will the proposed affect roadless areas?
(d) What will be the impacts of this alternative on wildlife?
(e) What effect will the proposal have on water and fishery resources?
(f) What effect will the proposal have on old growth?
(h) What are the cumulative impacts of private land logging in the area?

Management activities under consideration would occur in an area encompassing approximately 43,000 acres and include all National Forest land between Sleeping Bear, Two Bear Creeks, and all of the upper part of the Skalkaho Creek drainage. A portion of the assessment area being considered for harvest is within the Sleeping Child roadless area (X1074). None of the activities proposed would build any new or temporary road.

The scope of the proposed action is limited to the associated activities and analysis area identified above. The responsible official, who is Thomas G. Wagner, Darby District Ranger, will consider the comments and responses received concerning both the Bear Environmental Assessment and this EIS, as well as all applicable laws, regulations, and policies in making a decision regarding the Bear proposal. The responsible official will document the decision and reasons for the decision in the Record of Decision. The decision will be subject to review under applicable Forest Service Regulations.

The Draft EIS is expected to be available to the public in April, 1994 and the Final EIS and Record of Decision is expected to be available to the public in June, 1994. The comment period on the draft will be 45 days from the date the EPA's notice of availability appears in the Federal Register.

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions.

Vermont Yankee Nuclear Power Corp. v. NRDCE, 435 U.S. 519, 533 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. City of Angoon v. Hodel, 803 F. 2d 1016, 1022 (9th Cir. 1986) and Wisconsin Heritage, Inc. v. Harris, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45-day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement.

Comments may also address the adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)


Thomas C. Wagner,
District Ranger, Bitterroot National Forest.

[FR Doc. 94-3411 Filed 2-14-94; 8:45 am]

BILLING CODE 3410-11-M

Packers and Stockyards Administration

Posting of Stockyards

Pursuant to the authority provided under section 302 of the Packers and Stockyards Act (7 U.S.C. 202), it was ascertained that the livestock markets named below are stockyards as defined by Section 302(a). Notice was given to the stockyard owners and to the public as required by Section 302(b), by posting notices at the stockyards on the
dates specified below, that the stockyards are subject to the provisions of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.).

<table>
<thead>
<tr>
<th>Facility No., name, and location of stockyard</th>
<th>Date of posting</th>
</tr>
</thead>
<tbody>
<tr>
<td>NC-166 Mountain Livestock Auction, Murphy, North Carolina</td>
<td>Jan. 06, 1994.</td>
</tr>
<tr>
<td>TN-189 Middle Tennessee Horse Sales, Decherd, Tennessee</td>
<td>July 17, 1993.</td>
</tr>
</tbody>
</table>

Done at Washington, DC this 8th day of February, 1994.

Harold W. Davis,
Director, Livestock Marketing Division.

[FR Doc. 94–3418 Filed 2–14–94; 8:45 am]
BILLING CODE 3210–KD–P

ARCTIC RESEARCH COMMISSION

Meeting


Notice is hereby given that the Arctic Research Commission will hold its 34th Meeting in Arlington, Virginia, on March 9–10, 1994. On Wednesday, March 9, 1994, a Business Session open to the public will convene at 9 a.m. in the Wilson Room of the Holiday Inn at Ballston, 4610 N. Fairfax Drive, Arlington, Virginia. Agenda items include: (1) Chairman's Report; (2) Status of NSF Polar Programs Organization; (3) Arctic System Science Program Progress (ARCSS); (4) National Science and Technology Council Status and Plan; (5) International Arctic Activities; (6) Initial Analyses of Radioactive Materials in the Kara Sea Region; and (7) Progress Report on Interagency Coordination Mechanisms. The Business Session will convene at 9 a.m. Thursday, March 10. Agenda items for this session include (1) Plan for Visit to Canada; and (2) Other Business. An Executive Session for Members of the Commission will be held following the Business Session on March 10.

Any person planning to attend this meeting who requires special accessibility features and/or auxiliary aids, such as sign language interpreters, must inform the Commission in advance of those needs.


BILLING CODE 3510–KD–P

COMMISSION ON CIVIL RIGHTS

Agenda and Public Meeting of the Montana Advisory Committee

Notice is hereby given, pursuant to the provisions of the rules and regulations of the U.S. Commission on Civil Rights, that a meeting of the Montana Advisory Committee to the Commission will be held on Thursday, March 10, 1994, at the Best Western Heritage Inn, 1700 Fox Farm Road, Great Falls, Montana 59404. The purpose of the meeting is to discuss current issues, review current projects and plan future activities.

Persons desiring additional information, or planning a presentation to the Committee, should contact Committee Chairperson Donald D. Dupuis or William F. Muldrow, Director of the Rocky Mountain Regional Office, 303–866–1040 (TDD 303–866–1049). Hearing-impaired persons who will attend the meeting and require the services of a sign language interpreter should contact the Regional Office at least five (5) working days before the scheduled date of the meeting.

The meeting will be conducted pursuant to the provisions of the rules and regulations of the Commission.

Dated at Washington, DC, February 8, 1994.

Carol-Lee Hurley,
Chief, Regional Programs Coordination Unit.

[FR Doc. 94–3494 Filed 2–14–94; 8:45 am]
BILLING CODE 6355–01–P

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: Bureau of the Census.
Title: 1992 Census of Governments—Property Values Survey.
Form Number(s): GP–31.
Agency Approval Number: 0607–0741.
Type of Request: Extension of the expiration date of a currently approved collection without any change in the substance or in the method of collection.
Burden: 13,333 hours.
Number of Respondents: 40,000.
Avg Hours Per Response: 20 minutes.
Needs and Uses: The Census Bureau is requesting a six month extension of OMB approval of the Form GP–31 “Property Values Survey” to provide sufficient time for completing work on the Taxable Property Values Phase of the 1992 Census of Governments. We will use the GP–31 to collect information on sales price and other sales characteristics from buyers or sellers of real property. From this data and information on assessed values,
which we will obtain from public records of transfers available from recording, assessing, or other offices in the local area, we will develop property assessment roles from state government offices has delayed mail—out of the GP–31. Data on estimated market value of real property and on assessment—sales price ratios are used by many National associations. State and local officials use the data to compare assessment performance of and between jurisdictions within their states. The data will be presented as a major component of the Census Bureau’s report, Taxable Property Values and Assessment/Sales Price Ratios.

AFFECTED PUBLIC: Individuals or households.
Frequency: Every 5 years.
Respondent’s Obligation: Voluntary.
OMB Desk Officer: Maria Gonzalez, (202) 395–7313.
Copies of the above information collection proposal can be obtained by calling or writing Edward Michals, DOC Forms Clearance Officer, (202) 482–3271, Department of Commerce, room 5312, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Maria Gonzalez, OMB Desk Officer, room 3208, New Executive Office Building, Washington, DC 20503.

Edward Michals,
Departmental Forms Clearance Officer, Office of Management and Organization.
[FR Doc. 94–3525 Filed 2–14–94; 8:45 am]
BILLING CODE 3510–07–F

Changes in Organization and Functions During Calendar Year 1993

AGENCY: Office of the Secretary, Department of Commerce
SUMMARY: Following is a summary of Department of Commerce officials and units affected by major changes in authority, title, function, or structure during the past calendar year. Specific information on each action can be obtained by requesting a copy of the applicable Department Organization Order (DOO), also listed below.

Department Officials
Assistant Secretary for Administration:
DOO 10–5, Amendment 7, 1–15–93

Under Secretary For Oceans and Atmosphere and Administrator of the National Oceanic and Atmospheric Administration:
DOO 10–15, Amendment 5, 1–15–93
DOO 10–15, Amendment 6, 1–21–93

Director for Procurement and Administrative Services:
DOO 20–1, Revision, 11–16–93

Office of Administrative Law Judge:
DOO 20–19, Revocation Notice, 1–15–93

Director for Federal Assistance and Management Support:
DOO 20–28, Revision, 12–1–93

Minority Business Development Agency:
DOO 25–4B, Amendment 3, 11–3–93

National Oceanic and Atmospheric Administration:
DOO 25–5, Amendment 7, 1–15–93
DOO 25–5, Amendment 8, 11–16–93:

National Telecommunications and Information Administration:
DOO 25–7, Amendment 1, 12–1–93

National Institute of Standards and Technology:
DOO 30–2B, Amendment 2, 7–2–93

Patent and Trademark Office:
DOO 30–3, Amendment 1, 7–2–93

FOR FURTHER INFORMATION CONTACT: Sherry M. Cage, Office of Management and Organization, Department of Commerce, Room 5317, Washington, DC 20230, Telephone (202) 482–5481.

Stephen C. Browning,
Director, Office of Management and Organization

FOR FURTHER INFORMATION CONTACT: Mr. Lynn McNulty, Associate Director for Computer Security, Computer Systems Laboratory, National Institute of Standards and Technology, Gaithersburg, MD 20899. It would be appreciated if fifteen copies of written material could be submitted for distribution to the Board by March 1, 1994. Approximately 20 seats will be available for the public and media.

Public Participation

The Board agenda will include a period of time, not exceed one hour, for oral comments and questions from the public. Each speaker will be limited to ten minutes. Members of the public who are interested in speaking are asked to contact the Board Secretariat at the telephone number indicated below. In addition, written statements are invited and may be submitted to the Board at any time. Written statements should be directed to the Computer System Security and Privacy Advisory Board, Computer Systems Laboratory, Building 225, room B154, National Institute of Standards and Technology, Gaithersburg, MD 20899. It would be appreciated if fifteen copies of written material could be submitted for distribution to the Board by March 1, 1994. Approximately 20 seats will be available for the public and media.

FOR FURTHER INFORMATION CONTACT: Mr. Lynn McNulty, Associate Director for Computer Security, Computer Systems Laboratory, National Institute of Standards and Technology, Building 225, room B154, Gaithersburg, MD 20899, telephone: (301) 975–3240.

Samuel Kramer,
Associate Director.
COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Establishment of Import Restraint Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Myanmar

February 8, 1994.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits.


FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482-4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port or call (202) 927-5850. For information on embargoes and quota re-openings, call (202) 482-3715.

SUPPLEMENTARY INFORMATION:


Under the terms of Section 204 of the Agricultural Act of 1956, as amended, the Government of the United States has decided to establish restraint limits for cotton and man-made fiber skirts in Categories 342/642 and cotton and man-made fiber nightwear and pajamas in Categories 351/651, produced or manufactured in Myanmar and exported during the twelve-month period which began on February 1, 1994 and extends through January 31, 1995 at levels of 25,383 dozen (Categories 342/642) and 39,693 dozen (Categories 351/651).

Summary market statements concerning Categories 342/642 and 351/651 follow this notice. Anyone wishing to comment or provide data or information regarding the treatment of Categories 342/642 and 351/651 or to comment on domestic production or availability of products included in Categories 342/642 and 351/651, is invited to submit 10 copies of such comments or information to Rita D. Hayes, Chairman, Committee for the Implementation of Textile Agreements, U.S. Department of Commerce, Washington, DC 20230; ATTN: Helen L. LeGrande.

Further comments may be invited regarding particular comments or information received from the public which the Committee for the Implementation of Textile Agreements considers appropriate for further consideration.

The solicitation of comments is not a waiver in any respect of the exemption contained in 5 U.S.C. 553(a)(4) relating to matters which constitute "a foreign affairs function of the United States."

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see Federal Register notice 58 FR 62645, published on November 29, 1993).

D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

Market Statement—Myanmar

Category 342/642 Cotton and Man-Made Fiber Skirts

January 1994

Import Situation and Conclusion

U.S. imports of cotton and man-made fiber skirts, Category 342/642, from Myanmar reached 25,383 dozen during the year ending October 1993, nearly twelve times the 2,150 dozen imported from Myanmar in the year ending October 1992. In the first ten months of 1993, imports of Category 342/642 from Myanmar reached 25,046 dozen, or eleven and one half times the January-October 1992 level, and ten times Myanmar's total calendar year 1992 Category 342/642 imports.

The sharp and substantial increase of Category 342/642 imports from Myanmar is causing disruption in the U.S. market for cotton and man-made fiber skirts.

U.S. Production, Import Penetration, and Market Share

U.S. production of cotton and man-made fiber skirts fell from 7,444 thousand dozen in 1989 to 7,181 thousand dozen in 1992, a decrease of 4 percent. This decline continued in 1993, with U.S. production falling to 3,555 thousand dozen in the first half of 1993, a decline of 6 percent from the January-June 1992 level. In contrast, U.S. imports of Category 342/642 increased from 6,396 thousand dozen in 1989 to 6,848 thousand dozen in 1992, an 8 percent increase. Category 342/642 imports continued to increase in 1993, reaching 6,341 thousand dozen during the first ten months of 1993, 8 percent above the January-October 1992 level.

The ratio of imports to domestic production increased from 86 percent in 1989 to 96 percent in 1992. The ratio of imports to domestic production continued to increase in 1993, reaching 118 percent in the first half of 1993. The domestic manufacturers' share of the
the year ending in October 1993 entered Duty-Paid Value and U.S. Producers' Price half of 1993.

and fell to 51 percent during the first six months of 1993, as the ratio of domestic production reached 97 percent. The domestic manufacturers' share of this market declined from 66 percent in 1989 to 51 percent in 1992, and fell to 51 percent during the first half of 1993.

Category Twelve-month limit

342/642 .......... 25,383 dozen.
351/651 .......... 39,893 dozen.

The limits have not been adjusted to account for any imports exported after January 31, 1994.

Textile products in Categories 342/642 and 351/651 which have been exported to the United States prior to February 1, 1994 shall not be subject to the limits established in this directive.

Textile products in Categories 342/642 and 351/651 which have been released from the custody of the U.S. Customs Service under the provisions of 19 U.S.C. 1448(b) or 1448(a)(1) prior to the effective date of this directive shall not be denied entry under this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

Defense Science Board Task Force on Acquiring Defense Software Commercially

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: The Defense Science Board Task Force on Acquiring Defense Software Commercially will meet in open session on March 10-11, 1994 at Strategic Analysis, Inc., 4001 N. Fairfax Drive, suite 175, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense and the Under Secretary of Defense for Acquisition and Technology on scientific and technical matters as they affect the perceived needs of the
Department of Defense. At this meeting, the Task Force will review current DoD software acquisition regulations, DoD acquisition experiences with selected software-intensive systems, and contractor acquisition experiences with DoD and commercial software-intensive systems.


Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–3400 Filed 2–14–94; 8:45 am]
BILLING CODE 5000–04–M

Total Asset Visibility Government–Industry Conference

AGENCY: Deputy Under Secretary of Defense, Logistics.

ACTION: Notice of conference.

SUMMARY: The Deputy Under Secretary of Defense (Logistics) (DUSD/L) is sponsoring a Total Asset Visibility (TAV) Government–Industry Conference on March 9–10, 1994 in Springfield, Virginia. TAV is DoD’s program for implementing comprehensive improvements to its logistics processes and systems to track material throughout the pipeline, from procurement to disposal. The lack of asset visibility has hampered support of military operations during all previous conflicts. DUSD/L has established TAV as one of DoD’s highest priority tasks. DUSD/L recognizes that the commercial sector has been aggressively streamlining inventory, eliminating obsolescence, utilizing new technologies and reducing support costs; DUSD/L wants to capitalize on the most successful practices in government and commercial sectors. This conference will feature five panels made up of government and industry executives who will evaluate and recommend most successful TAV practices. Their discussions will focus on: (1) TAV technologies, (2) industry practices, (3) overall DOD practices, (4) management/tracking by commodity/class and (5) management/tracking by weapon system. This event is part of a continuing process to develop and deploy a road map for downsizing and improving management of logistics. Prospective government and industry panel participants and conference attendees are encouraged to quickly contact Sam Baker or Mary Claire Murphy at the American Defense Preparedness Association in Arlington, Virginia. Phone: (703) 522–1620. Please refer to ADPA Event # 478. Those in Industry with relevant table-top demonstrations/exhibits are strongly encouraged to present their displays.


CONTACT: For further information contact Sam baker or Mary Claire Murphy at the American Defense Preparedness Association. Phone: (703) 522–1820. Please refer to ADPA event number 487.

Patricia L. Toppings,
Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 94–3401 Filed 2–14–94; 8:45 am]
BILLING CODE 5000–04–M

Department of the Army

Availability for Licensing of U.S. Patent Application Concerning the Rapid and Accurate Quantification of HIV–1 Nucleic Acids in Large Numbers of Human Clinical Samples

AGENCY: U.S. Army Medical Research and Development Command, DOD.

ACTION: Notice.

SUMMARY: In accordance with 37 CFR 404.6, announcement is made of the availability of U.S. Patent Application Serial No. 08/154,416 entitled “High Through-Put Quantitative Polymerase Chain Reaction for HIV Clinical Specimens” filed November 19, 1993 for licensing. This invention has been assigned to the United States Government as represented by the Secretary of the Army.

ADDRESSES: Commander U.S. Army Medical Research and Development Command, ATTN: Staff Judge Advocate, Fort Detrick, Frederick, Maryland 21702–5012.


SUPPLEMENTARY INFORMATION: The invention involves methods and kits for the rapid and accurate quantitation of HIV–1 nucleic acids in large numbers of human clinical specimens. Cloned, standard internal controls for both HIV–1 and cellular sequences are used for parallel amplification and compared with test samples. A universal HIV–1 gag primer permits detection and quantitation of sequences from every known HIV–1 gag gene while liquid hybridization detection greatly reduces processing time, error, and cost.

Kenneth L. Denton,
Army Federal Register Liaison Officer.

[FR Doc. 94–3406 Filed 2–14–94; 8:45 am]
BILLING CODE 3710–08–M

Notice of Open Meeting

AGENCY: Board of Visitors, United States Military Academy, DOD.

ACTION: Notice.

In accordance with Section 10(a)(2) of the Federal Advisory Committee Act (P.L. 92–463), announcement is made of the following meeting:

Name of Committee: Board of Visitors, United States Military Academy.

Date of Meeting: 1 March 1994.

Place of Meeting: Rayburn House Office Building, Room B–352, Washington, DC.

Start Time of Meeting: Approximately 9 a.m.

Proposed Agenda: Election of officers; selection of Executive Committee; scheduling of meetings for remainder of year; and identification of areas of interest for 1994.

All proceedings are open. For further information contact Lieutenant Colonel Stephen R. Furr, United States Military Academy, West Point, New York 10996–5000, telephone: (914) 938–5078.

Kenneth L. Denton,
Army Federal Register Liaison Officer.

[FR Doc. 94–3406 Filed 2–14–94; 8:45 am]
BILLING CODE 3710–08–M

Army Corps of Engineers

Patents Available for Licensing

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice.

SUMMARY: In accordance with 37 CFR 404.6, the Department of the Army, U.S. Army Corps of Engineers announces the availability of the following U.S. patents for non-exclusive, exclusive or partially exclusive licensing:

<table>
<thead>
<tr>
<th>Patent No. and title</th>
<th>Issue date</th>
</tr>
</thead>
<tbody>
<tr>
<td>5,256,908 Facility Space Data Logging Device</td>
<td>10/26/93</td>
</tr>
<tr>
<td>5,288,032 Method for the Controlled Hardening of Acid-Setting Binders and Cements</td>
<td>12/07/93</td>
</tr>
<tr>
<td>5,266,548 Microwave Assisted Paint Stripping</td>
<td>1/04/94</td>
</tr>
<tr>
<td>5,277,517 Mobile Cofferdam</td>
<td>1/11/94</td>
</tr>
</tbody>
</table>

ADDRESSES: Director, Humphreys Engineer center Support Activity, Office of Counsel, Kingman Building, Fort Belvoir, Virginia 22060–5560.
DEPARTMENT OF EDUCATION
Office of Human Resources and Administration: Availability of Data Acquisition Activities

AGENCY: Department of Education.

ACTION: Notice of availability of data acquisition activities approved prior to February 15, 1994.

SUMMARY: The Secretary publishes this notice to advise interested persons that they may obtain information regarding a list of approved education-related data acquisition activities that Federal agencies will use to collect data during school year 1994–95. The list includes all data acquisition activities approved before February 15, 1994.

DATES: The listing of approved data acquisition activities will be available February 15, 1994.

FOR FURTHER INFORMATION CONTACT: For information about this list or copies of the list, contact Joyce C. Smith, U.S. Department of Education, Information Management and Compliance Division, 400 Maryland Avenue, SW., room 5624, ROB-3, Washington, DC 20202–4651. Telephone: (202) 708–9915. Individuals who use a telecommunication device for the deaf (TDD) may call the Federal Dual Party Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: Under section 400A of the General Education Provisions Act, the Secretary of Education is responsible for reviewing and coordinating the collection of information and data acquisition activity of Federal agencies:

(a) Whenever the respondents are primarily educational agencies or institutions;

(b) Whenever the purpose of the activities is to request information needed for the management of, or the formulation of, policy related to Federal education programs or research or evaluation studies related to the implementation of Federal education programs.

Section 400A also requires that the Secretary inform the public of data acquisition activities approved for the 1994–95 school year by February 15, 1994. These data acquisition activities are considered information collection requests under the Paperwork Reduction Act of 1980. Under that Act and Office of Management and Budget (OMB) implementing regulations, proposed information collection requests must be published in the Federal Register on or before submission to OMB for final approval. Thus, the list announced by this notice includes each data acquisition activity for which the following requirements have been met prior to February 15, 1994: Approval by the Secretary for use in the 1994–95 school year; publication in the Federal Register as a proposed information collection request; and approval by OMB.

Interested persons may obtain a copy of the list of approved information collection requests, or information regarding that list from Joyce C. Smith at the address and telephone number listed at the beginning of this notice.


Veronica D. Trietsch,
Acting Assistant Secretary for Human Resources and Administration.

[FR Doc. 94–3490 Filed 2–14–94; 8:45 am]
BILLING CODE 4000–01–P

[CFDA No.: 84.180T1]
Absolute Priority—Technology, Educational Media, and Materials
Projects that Create Innovative Tools for Students with Disabilities

This priority provides support for development projects that design and/or adapt technology, assistive technology, educational media, and/or materials to improve the education of children and youth with disabilities.

Invitational Priority: Within the absolute priority specified in this notice, the Secretary is particularly interested in applications that meet the following invitational priorities. However, under 34 CFR 75.105(c)(1) an application that meets one or more of these invitational priorities does not receive competitive or absolute preference over other applications.

The Secretary is particularly interested in projects that—
(a) Create Innovative Tools—by encouraging development of varied and integrated technologies, media, and materials which open up and expand the lives of those with disabilities. This work should enable individuals with disabilities to achieve the outcomes expected of all students such as independence, productivity, and a quality of life that promotes equity in opportunity; or
(b) Enable the Learner Across Environments—by fostering the creation of state-of-the-art instructional environments both in and out of school. These environments should use technology, educational media, and materials to enable students with disabilities to access knowledge, develop skills and problem-solving strategies, and engage in educational experiences necessary for their success as adults who are fully included in our society.

For Technical Information Contact:
For technical information please contact Dr. David Malof, U.S. Department of Education, 400 Maryland Avenue, SW., room 3521, Switzer Building, Washington, DC 20202–2843. Telephone: (202) 205–9111. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. Eastern time, Monday through Friday.

For Applications and General Information Contact: Requests for applications and general information should be addressed to: Darlene Crumblin, U.S. Department of Education, 400 Maryland Avenue, SW., room 3525, Switzer Building, Washington, DC 20202–2843. Telephone (202) 205–8953. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m. Eastern time, Monday through Friday.

DEPARTMENT OF ENERGY
International Energy Agency Meetings
AGENCY: Department of Energy.
ACTION: Notice of meetings.


SUPPLEMENTARY INFORMATION: In accordance with section 252(c)(4)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(4)(A)(ii)), the following notice of meetings is provided:

I. A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held on Monday, February 21, 1994 at the Shirayama Kanko Hotel in Kagoshima, Japan, beginning at 9 a.m. on February 22. The purpose of this meeting is to permit attendance by representatives of U.S. Reporting Companies at a “Workshop on Stockdraw and Emergency Response Policies and Management” which is to be held by the IEA at the aforesaid location on the aforesaid dates. The Agenda for the meeting is under the control of the IEA. It is expected that the following draft Agenda will be followed:

1. Opening of the Workshop by Japanese Administration, Standing Group on Emergency Questions (SEQ) Chairman and the IEA Secretariat
2. First Session: Stockholding
(a) Administration Introduction by the Session Chairman
(b) The financing, ownership and management of emergency reserves—Government emergency reserves
(c) Some aspects of storage contracts: A company view
2. Operations Introduction by the Session Chairman
(a) Structure of emergency stocks—Structure of emergency stocks: The EBV case—Balance between stocks of individual products: The case of Denmark—Use of emergency stocks held in other IEA countries
(b) Types of storage of emergency stocks—Salt cavern storage at Manosque and related facilities—Rock cavern storage—Floating storage
(c) Quality control of crude oil and product stocks—Storage in salt caverns and quality prediction—Some technical considerations: The solution of product obsolescence problems in Denmark—Issues resulting from deterioration of oil products in long-term storage
(d) Technical problems arising from stockholding

9. Anti-trust Clearances
—Renewal of the Commission of the European Communities Decision of December 12, 1983 (IV/30.525)
—Extension of Section 252 of the Energy Policy and Conservation Act
10. Preparations for Stockholding Workshop
11. IAB Administrative Issues
12. Future Work

II. A meeting of the IEA’s Group of Reporting Companies will be held on February 22–24, 1994 at the Shirayama Kanko Hotel in Kagoshima, Japan, beginning at 9 a.m. on February 22. The purpose of this meeting is to permit attendance by representatives of U.S. Reporting Companies at a “Workshop on Stockdraw and Emergency Response Policies and Management” which is to be held by the IEA at the aforesaid location on the aforesaid dates. The Agenda for the meeting is under the control of the IEA. It is expected that the following draft Agenda will be followed:

I. Opening of the Workshop by Japanese Administration, Standing Group on Emergency Questions (SEQ) Chairman and the IEA Secretariat
II. First Session: Stockholding
1. Administration Introduction by the Session Chairman
(a) The organization and administration of emergency reserves of the U.K.
(b) The financing, ownership and management of emergency reserves—Government emergency reserves—Organization and administration of emergency reserves: A company view
(c) Some aspects of storage contracts: A stockholding agency view
Discussion
2. Operations Introduction by the Session Chairman
(a) Structure of emergency stocks—Structure of emergency stocks: The EBV case—Balance between stocks of individual products: The case of Denmark—Use of emergency stocks held in other IEA countries
(b) Types of storage of emergency stocks—Salt cavern storage at Manosque and related facilities—Rock cavern storage—Floating storage
(c) Quality control of crude oil and product stocks—Storage in salt caverns and quality prediction—Some technical considerations: The solution of product obsolescence problems in Denmark—Issues resulting from deterioration of oil products in long-term storage
(d) Technical problems arising from stockholding

3. Operations
2. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
3. Operations
4. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
4. Operations
5. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
5. Operations
6. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
6. Operations
7. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
7. Operations
8. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
8. Operations
9. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
9. Operations
10. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
10. Operations
11. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
11. Operations
12. Operations
(a) Administration
(b) The financing, ownership and management of emergency reserves
(c) Some aspects of storage contracts: A company view
(d) Technical problems arising from stockholding
12. Operations

For Further Information Contact:
For further information please contact: Judith E. Heumann, Assistant Secretary for Special Education and Rehabilitative Services, [FR Doc. 94-3423 Filed 2-14-94; 6:55 am]
BILLING CODE 4000-01-U

Federal Register / Vol. 59, No. 31 / Tuesday, February 15, 1994 / Notices 7249
PANEL 1

3. Establishment and Re-Organization of Emergency Response and Stockdraw Systems

Introduction by the Session Chairman
(a) The establishment of emergency stockholding organizations and procedures to meet International Energy Program (IEP) requirements: Centralization, decentralization and other issues
(b) Reorganization of an administration responsible for emergency stock management: A case history of Finland

Discussion

Summary by the Session Chairman

III. Second Session: Stockdraw

1. Policy issues and Stockdraw Potential

Introduction by the Session Chairman
(a) Stockdraw organization and its procedures including the legal framework and the monitoring of the compliance by stockholders
(b) Overview of member countries' legislation and policies for emergency stocks
(c) Stockdraw capabilities of emergency stocks
—Logistics of stockdraw: The case of Canada
(d) Stockdraw policy of member countries
—The Netherlands
—Finland
—USA
(e) Lessons from stockdraw experience
—Lessons from test release and training
—Experience of the Gulf crisis: Practical stockdraw lessons
(f) Stockdraw in overall emergency response measures
—Coordination with demand restraint measures
—Coordination with fuel switching: The case of natural gas in Italy

Discussion

2. Market Impacts

Introduction by the Session Chairman
(a) Commercial stock management in uncertain market
(b) Timing, quantity and kinds of government emergency stockdraw

Discussion

Summary by the Session Chairman

IV. Third Session: The Outlook

Introduction by the Session Chairman

PANEL 2

2. Future IEA Stock Requirements and Policies

Introduction by the Session Chairman

Panel discussion
Summary by the Session Chairman

IV. Third Session: The Outlook (continued)

Panel discussion
Summary by the Session Chairman

V. Overall Summary/Closing Remarks

Panel discussion
Summary by the Session Chairman

Federal Energy Regulatory Commission

[Docket No. TM94–2–117–001]

KN Wattenberg Transmission Limited Liability Co.; Proposed Changes in FERC Gas Tariff

February 9, 1994.


KN Wattenberg states that such adjustment effects the removal of the Annual Charge Adjustment (ACA) from its Schedule of Rates for Transportation effective April 1, 1993 pursuant to the Commission's letter order dated January 21, 1994 in Docket No. TM94–1–117.

KN Wattenberg states that copies of this filing were served upon the company's jurisdictional customers, and interested public bodies. Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before February 16, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell, Secretary.

[FR Doc. 94–3442 Filed 2–14–94; 8:45 am]
BILLING CODE 6717–01–M

[Docket No. TM94–2–117–001]

KN Wattenberg Transmission Limited Liability Co.; Proposed Changes in FERC Gas Tariff

February 9, 1994.


KN Wattenberg states that the filing updates the Schedule of Rates for Transportation to include a minimum surcharge of zero for the Gas Research Institute Charge (GRI) and adds GRI funding mechanism provisions, effective January 1, 1994 pursuant to the Commission's letter order dated January 21, 1994 in Docket No. TM94–2–117.

KN Wattenberg states that copies of this filing were served upon KN Wattenberg's jurisdictional customers, and interested public bodies. Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with 18 CFR 385.211 of the Commission's Rules and Regulations. All such protests should be filed on or before February 16, 1994. Protests will
be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,
Secretary.

[FR Doc. 94–3443 Filed 2–14–94; 8:45 am]
BILLING CODE 6717–01–M

[Docket No. MT38-7–006]
Sabine Pipe Line Co.; Proposed Changes in FERC Gas Tariff

February 9, 1994.

Take notice that on February 1, 1994, Sabine Pipe Line Company (Sabine) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheet:

First Revised Sheet No. 269.

Sabine states that the revised tariff sheet reflects a change in operating personnel shared by Sabine and its affiliated marketing company.

Sabine states that copies of the filing were served upon the Sabine's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before February 16, 1994.

Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,
Secretary.

[FR Doc. 94–3440 Filed 2–14–94; 8:45 am]
BILLING CODE 6717–01–M

[Docket Nos. QF86–1014–008 and EL94–27–000]
Newark Bay Cogeneration Partnership, L.P.; Filing

February 9, 1994.

Take notice that on February 3, 1994, Newark Bay Cogeneration Partnership, L.P. (Newark Bay), of 1200 E. Ridgewood Avenue, Ridgewood, New Jersey 07450, tendered for filing a Petition For Temporary Waiver of the Commission's Regulations under the Public Utility Regulatory Policies Act of 1978 (PURPA). Newark Bay requests the Commission to temporarily waive the operating and efficiency standards for qualifying cogenerating facilities as set forth in §§ 292.205, 18 CFR 292.205 of the Commission's Regulations implementing Section 201 of PURPA, as amended, with respect to its cogeneration facility located in Newark, New Jersey. Specifically, Newark Bay requests waiver of the operating and efficiency standards for the calendar year 1993, during which the facility was undergoing start-up and testing.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests must be filed within 30 days after the publication of this notice in the Federal Register and must be served on the applicant. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

The proposed effective date of the above-mentioned tariff sheets is December 30, 1993.

Williston Basin Interests that the tariff sheets contain the amounts of the Account No. 191 balance refunded to each affected customer and related required tariff language revisions. These revisions were made in accordance with the Commission's January 26, 1994 Letter Order issued in Docket No. RP94–103–000.

Williston Basin states that the tariff sheets contain the amounts of the Account No. 191 balance refunded to each affected customer and related required tariff language revisions. These revisions were made in accordance with the Commission's January 26, 1994 Letter Order issued in Docket No. RP94–103–000.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of practice and Procedure (18 CFR
Notice of Approval of Prevention of Significant Air Quality Deterioration (PSD) Permit to Sierra Pacific Industries, Inc. (EPA Project Number SAC 89-01)

**AGENCY:** Environmental Protection Agency (EPA), Region 9.

**ACTION:** Notice of availability.

**SUMMARY:** This document provides notice of a proposed Permit to Sierra Pacific Industries for emissions from a proposed Lake Superior LaMP. The proposed Lake Superior LaMP describes a selected list of Critical Pollutants and the actions available to prevent, reduce, or control the amount of these pollutants entering the waters of the Lake Superior System. In particular, EPA is seeking comments regarding the proposed list of Critical Pollutants for Lake Superior, the proposed list of causal pollutants (candidate Critical Pollutants) and the actions available to Federal, State, and local agencies, as well as the public, to reduce the release of Critical Pollutants from all sources and the presence of these substances in the waters of the Lake Superior System.

**DATES:** EPA will accept comments on the proposed Lake Superior LaMP until May 16, 1994. Comments received after this date may not be considered. In addition, EPA has considered materials submitted by the public prior to today's notice in the development of the proposed LaMP. These materials contain comments on draft elements that have been superseded by today's proposal and EPA will not consider them in the development of the final LaMP. Further, EPA cannot ensure consideration of comments submitted to other agencies or entities other than EPA in the development of the final LaMP. Accordingly, EPA advises the public that for the purposes of exhaustion of administrative remedies, all comments must be submitted to EPA based on today's notice.

**ADDRESSES:** To obtain a copy of the proposed Lake Superior LaMP please contact Jeannette Morris-Collins, Environmental Protection Assistant, Water Quality Branch, U.S. EPA, Region 5 (WQ-161), 77 West Jackson Blvd., Chicago, Illinois, 60604, (telephone: 312—886—0152). Copies of the proposed Lake Superior LaMP may also be obtained from the following offices: Jean Hude, Michigan DNR, Surface Water Quality Division, P.O. Box 30273, Lansing, Michigan, 48909, Telephone: 517—335—6970; Carrie Losi-Hansen, Minnesota PCA, Division of Water Quality, 520 Lafayette Road, St. Paul, MN, 55155, Telephone: 612—296—9134; Danielle Valvasorri, Wisconsin DNR, Bureau of Water Resources, P.O. Box 7021, Madison, WI, 53707, Telephone: 608—266—9276.

The proposed Lake Superior LaMP will also be available for viewing by the public at the following locations:

- U.S. Environmental Protection Agency, Region 5 Library, 77 W. Jackson Blvd., Chicago, Illinois, 60604 (312—886—0152)
- Library of Michigan, Government Documents Service, 717 West Allegan, Lansing, Michigan, 48909 (517—373—1300)
- Detroit Public Library, Sociology and Economics Department, 5201 Woodward Avenue, Detroit, Michigan, 48902 (313—633—1440)
- Northwestern University Library, 5500 Scott Avenue, Evanston, Illinois, 60201 (312—506—7252)
- University of Michigan Library, 51 relaxation/211, All such protests should be filed on or before February 16, 1994. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make the protestants parties to the proceeding. Copies of the filing are on file with the Commission and are available for public inspection.

Lois D. Cashell, Secretary.

[FR Doc. 94—3441 Filed 2—14—94; 8:45 am]

BILLING CODE 6717—01—M

**ENVIRONMENTAL PROTECTION AGENCY**

**[FRL—4837—5]**

Notice of Approval of Prevention of Significant Air Quality Deterioration (PSD) Permit to Sierra Pacific Industries, Inc. (EPA Project Number SAC 89-01)

**AGENCY:** Environmental Protection Agency (EPA), Region 9.

**ACTION:** Notice of availability.

**SUMMARY:** This document provides notice of a proposed Permit to Sierra Pacific Industries for emissions from a proposed Stage 1 LaMP for Lake Superior. This Stage 1 LaMP, when finalized, will serve to satisfy the obligations of the United States Environmental Protection Agency (EPA or Agency) under Section 118 of the Clean Water Act (CWA). It also serves as a report on progress under the Binational Program to Restore and Protect Lake Superior. This proposed LaMP was developed through a binational process involving EPA, Environment Canada, the Province of Ontario, and the States of Michigan, Minnesota and Wisconsin under the ongoing implementation of the Binational Program. EPA puts forward this proposed LaMP for public comment in the United States on behalf of the agencies involved in the Binational Program.

The proposed Lake Superior LaMP describes a selected list of Critical Pollutants causing or contributing to adverse impacts on the Lake Superior ecosystem based on information available as of January 1, 1991, and informs the public of the variety of actions that Federal, State, Provincial, Tribal, and local governments and private organizations are taking, will take, or could take to reduce the amount of these pollutants entering the waters of the Lake Superior System. In addition, the proposed Lake Superior LaMP proposes candidate Critical Pollutants for evaluation in future revisions of the LaMP. Due to its length and format, the proposed Lake Superior LaMP is summarized in this notice, rather than published in full. As described in this notice, EPA is making copies of the entire LaMP available to the public. Furthermore, EPA is soliciting comments on all aspects of the proposed LaMP. In particular, EPA seeks comments regarding the proposed list of Critical Pollutants for Lake Superior, the proposed list of causal pollutants (candidate Critical Pollutants) and the actions available to Federal, State, and local agencies, as well as the public, to reduce the release of Critical Pollutants from all sources and the presence of these substances in the waters of the Lake Superior System.

Wisconsin: Water Resources Center, University of Wisconsin-Madison, 2nd floor, 1757 Willow Drive, Madison, Wisconsin (608–262–3069).


SUPPLEMENTARY INFORMATION:

I. Background

In Article VI, Annex 2 of the Great Lakes Water Quality Agreement (GLWQA), as amended in 1987, the United States and Canadian Governments agreed to develop and implement Lakewide Management Plans (LaMPs) for each of the five Great Lakes. EPA interprets LaMPs as management tools designed to: (1) Integrate Federal, State and local programs to reduce point and nonpoint source loadings and ambient water quality standards and beneficial uses; (2) assess whether these programs will ensure attainment of water quality standards or impairments; and (3) recommend any media-specific program enhancements necessary to reduce toxic loadings in waters currently not attaining water quality standards and/or beneficial uses. LaMPs provide an opportunity for regulatory authorities to design cost-effective approaches for meeting water quality standards and/or beneficial uses. EPA believes the primary goal of LaMPs is to achieve zero discharge and zero emission of certain designated persistent bioaccumulative toxic substances, which may degrade the ecosystem of the Lake Superior Basin. This goal is to be pursued through actions in three key areas: (1) Waters of the Lake Superior Basin will be designated for special protection and antidegradation requirements, and reductions in existing loadings will be achieved through both voluntary pollution prevention actions and enhanced control and regulatory efforts. In the United States, the Binational Program commits the State Governments of Michigan, Minnesota and Wisconsin to designate appropriate areas of the Lake Superior Basin as Lake Superior Outstanding International Resource Waters (LS-OIRW), or as Lake Superior Outstanding National Resource Waters (LS-ONRW). Under the LS-OIRW designation, increased discharges of designated persistent bioaccumulative toxic pollutants will be prohibited, without an adequate antidegradation demonstration which includes application of best technology for process and treatment. Under the LS-ONRW designation, any new or increased discharges of designated persistent bioaccumulative pollutants from point sources will be prohibited. EPA included provisions for the LS-ONRW and LS-OIRW designations in the proposed Great Lakes Water Quality Guidance (58 FR 20803) on behalf of the Lake Superior States. EPA anticipates publishing the final Guidance in the Federal Register by March 13, 1995.

In the United States, it is the goal of the Clean Water Act that the discharge of pollutants to the waters of the nation be eliminated. (Pub. L. 92–500, as amended by Pub. L. 100–4) Further, it is national policy that the discharge of toxic pollutants in toxic amounts be prohibited, and that programs be developed and implemented to meet the goals of the Act through the control of.

II. Binational Program to Restore and Protect Lake Superior

On September 30, 1991, the United States Environmental Protection Agency, Environment Canada, the States of Michigan, Minnesota and Wisconsin, and the Province of Ontario announced the “Binational Program to Restore and Protect the Lake Superior Basin”. This program represents the response of the Federal, State and Provincial governments to the recommendation of the International Joint Commission that **Lake Superior be designated** as a demonstration area where no point source discharge of any persistent toxic substance be permitted. This Binational Program encompasses two major areas. The first is a zero discharge demonstration program devoted to the goal of achieving zero discharge or emission of nine designated persistent toxic substances. The second is a broader program of identifying beneficial use impairments, and restoring and protecting the Lake Superior Basin ecosystem. The ultimate goal of the Lake Superior Binational Program is to protect, and where necessary, restore the integrity of Lake Superior's ecosystem through pollution prevention, enhanced regulatory measures, and remedial programs. The goal of the Lake Superior zero discharge demonstration program is "to achieve zero discharge and zero emission of certain designated persistent bioaccumulative toxic substances, which may degrade the ecosystem of the Lake Superior Basin". This goal is to be pursued through actions in three key areas: (1) Waters of the Lake Superior Basin will be designated for special protection and antidegradation requirements, and reductions in existing loadings will be achieved through both voluntary pollution prevention actions and enhanced control and regulatory efforts. In the United States, the Binational Program commits the State Governments of Michigan, Minnesota and Wisconsin to designate appropriate areas of the Lake Superior Basin as Lake Superior Outstanding International Resource Waters (LS-OIRW), or as Lake Superior Outstanding National Resource Waters (LS-ONRW). Under the LS-OIRW designation, increased discharges of designated persistent bioaccumulative toxic pollutants will be prohibited, without an adequate antidegradation demonstration which includes application of best technology for process and treatment. Under the LS-ONRW designation, any new or increased discharges of designated persistent bioaccumulative pollutants from point sources will be prohibited. EPA included provisions for the LS-ONRW and LS-OIRW designations in the proposed Great Lakes Water Quality Guidance (58 FR 20803) on behalf of the Lake Superior States. EPA anticipates publishing the final Guidance in the Federal Register by March 13, 1995.

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both point and nonpoint sources of pollution. Over the last twenty years, tremendous progress has been made in improving the water quality of the Great Lakes System, and encouraging continued progress towards zero discharge of pollutants to the waters of the Great Lakes System.

To ensure such progress continues, the United States commits to improved point source and nonpoint source controls through upgraded technology based requirements and water quality standard requirements, implementation of best management practices, and application of technology based air based requirements and water quality standards to ensure achievement of water quality criteria, including air emission standards for Great Lakes pollutants of concern.

Pollution prevention measures are the preferred approach to eliminate or further reduce persistent bioaccumulative toxic substances at their sources. In the United States, the Pollution Prevention Act of 1990 declares as national policy that pollution prevention is the preferred approach to environmental protection (United States Public Law 101–508). When preventing pollution is not feasible, recycling in an environmentally safe manner is the next preferred option, followed by treatment. Disposal or other release into the environment should be the management option of last resort, and should only be done in an environmentally protective manner.

A comprehensive multi-media pollution prevention strategy has been developed by EPA and Michigan, Minnesota and Wisconsin. The strategy focuses on the nine designated zero discharge pollutants and identifies sources and pollution prevention alternatives for reducing loadings from these sources. Implementation of the strategy encompasses technical assistance, education, special programs, legislative and regulatory recommendations, and financial incentives.

EPA views LaMPs as dynamic, action-oriented processes encompassing a number of components. These include an evaluation of beneficial use impairments and pollutants contributing to those impairments; a summary of sources and loads of these critical pollutants; identification of ongoing prevention, control and remediation actions as well as additional efforts needed to reduce pollutant loads and restore beneficial uses; and monitoring activities to evaluate the effectiveness of program actions. This approach for developing and implementing LaMPs is an evolutionary and iterative process for identifying and reducing loadings of Critical Pollutants from all sources.

While the focus of a LaMP is on toxic pollutants, the Federal, State and Provincial agencies participating in the LaMPs recognize that issues associated with beneficial use impairments, such as habitat quality and quantity, and endangered or threatened species, are significant factors in addressing the overall ecological health of the Great Lakes System. As the Lake Superior LaMP develops, participating Agencies will identify opportunities for addressing these issues in conjunction with toxic load reduction activities. In this manner the LaMP for Lake Superior will further the broader goal of the Binational Program of identifying beneficial use impairments, and restoring and protecting the Lake Superior Basin ecosystem.

Certain elements of this broader program are already underway, including a Binational Habitat Project to identify and rank critical habitat sites for protection and restoration, and special designations establishing protected management areas such as parks, reserves, and wildlife refuges.

III. Management Process

The development and implementation of LaMPs is an enormous undertaking in terms of the technical complexity of the issues, the geographic scope encompassed by the LaMP, and the extensive coordination required amongst Federal, Provincial, State, Tribal and local governments, and the public. EPA and the participating agencies believe LaMPs should be developed with full participation by all interested parties.

The Binational Program management structure serves as the management framework for the Lake Superior LaMP. The Binational Program is directed by the Lake Superior Task Force, a steering committee comprised of senior managers of Federal, Provincial, State and Tribal agencies. The Task Force is responsible for: (1) Providing overall policy direction to the program, defining program priorities and ensuring program implementation through application of all relevant programmatic and statutory authorities; (2) convening technical work groups composed of Federal, State, Provincial and other representatives as necessary to develop recommendations for actions; (3) reviewing and approving the LaMP or specific elements of it, technical workgroup products, and recommendations; (4) ensuring public participation and review; and (5) securing resources to support LaMP development and implementation.

The Lake Superior Workgroup (SWG), comprised of technical and scientific staff, reports to the Task Force and is responsible for program implementation.

The Lake Superior Forum is a public participation group consisting of 22 U.S. and Canadian members from academia, industry, municipalities, environmental organizations and concerned citizens representative of basin stakeholders. Public participation in the development and implementation of the Binational Program is accomplished through three tiers of activity: (1) General public education through workshops, public presentations, and the distribution of fact sheets and other written materials, (2) public notices to provide the opportunity for broad public review of the LaMP and progress on implementation on an ongoing basis; and (3) the Lake Superior Forum. Representatives of the Forum are invited to: (1) Participate as observers in both Task Force and technical-level committee meetings; (2) develop recommendations for Task Force and Workgroup consideration; and, (3) comment on recommendations and documents of the Binational Program. The Forum does not substitute for the activities described in tiers 1 or 2. Forum members are encouraged to be representative of various constituencies within the Basin, and to provide the Task Force with their views and concerns on Binational Program activities.

IV. Lake Superior Lakewide Management Plan

The proposed Lake Superior LaMP embodies a process for implementing an ecosystem-focused approach to environmental protection. The process consists of the following steps: (1) Monitoring the environment and reviewing available data to determine existing ecological or use impairments and any potential threats to the Lake Superior System; (2) Identifying the pollutants associated with impairments or threats; (3) Identifying the sources of these pollutants; (4) Measuring or estimating the quantity of pollutants being released by those sources and the amount reaching the waters of the Lake Superior System (i.e., the “loading” of the pollutants); (5) Establishing load reduction targets that will allow for the restoration and protection of the ecological health of the Lake Superior ecosystem; (6) Developing and implementing specific strategies to reduce the levels of...
pollutant loadings and/or ambient levels in the waters of the Lake Superior System;  
(7) Monitoring reductions from pollutant sources;  
(8) Evaluating ecosystem response, through monitoring of ecosystem indicators, in order to measure progress towards restoration of beneficial uses and ecosystem health and integrity, and to detect emerging problems; and,  
(9) Revising the LaMP to reflect the results of load reduction actions, incorporate additional data on the status of beneficial use impairments and identify the next series of priority actions.  

The development and implementation of a Lakeview Management Plan is an iterative process, a series of actions leading to environmental improvements and protection and restoration of beneficial uses. EPA and the binational partners view the LaMP as a series of dynamic, interrelated actions, rather than a static document. As more information becomes available, additional load reduction actions will be initiated in various agencies. As the effectiveness of ongoing efforts are evaluated, EPA and the participating agencies will establish new priorities as appropriate. The Agency believes development and implementation of the LaMP will enhance the ability of participating agencies to respond to emerging environmental problems quickly and effectively. Activities underway through the LaMP are not necessarily sequential; activities specific to each step likely will be ongoing simultaneously.  

Acquisition of more complete information regarding the association between critical pollutants and beneficial uses, sources and loads of pollutants, and achievement of ecosystem objectives will be a long-term process. The binational partners intend to move forward by reducing pollutant loads while simultaneously improving their understanding of the relationships between beneficial use impairments and pollutant loadings and sources. This refinement will be realized through more comprehensive data management, research, and monitoring efforts.  

Finally, the LaMP will improve the environmental protection efforts of the participating agencies by:  
• Providing a lakeview context for activities undertaken in support of the Great Lakes program in order to facilitate efforts focussed on the entire basin or on specific tributary subbasins;  
• Coordinating Federal, Provincial, State, local, and tribal activities to avoid duplication of effort, ensure that ongoing activities are complimentary, and identify opportunities to add value to ongoing efforts;  
• Communicating information among all levels of government and the public in order to keep the public informed of ongoing and proposed activities and provide a forum for public input and comment;  
• Providing a vehicle for linking agency pollution control activities to environmental results; and  
• Identifying and evaluating gaps in existing programs and authorities which represent impediments to complete restoration of Lake Superior, and making recommendations on how to fill those gaps.  

V. Critical Pollutants

Critical Pollutants are defined by Annex 2 of the Great Lakes Water Quality Agreement as substances that persist at levels that, singly or in synergistic or additive combination, are causing, or are likely to cause, impairment of beneficial uses despite past application of regulatory controls due to their: (1) Presence in open lake waters; (2) ability to cause or contribute to a failure to meet Agreement objectives through their recognized threat to human health and aquatic life; or (3) ability to bioaccumulate.  

As discussed above, the Lake Superior Binational Program has designated nine chemicals for zero discharge. The SWG proposes these nine pollutants be designated as Critical Pollutants in the Lake Superior LaMP: chlordane, DDT and metabolites, dieldrin, hexachlorobenzene, octachlorostyrene, PCBs, 2,3,7,8-TCDD, toxaphene and mercury.  

The SWG has evaluated pollutants which are causally linked to lakeview impairments of beneficial uses, exceedances of chemical criteria, standards or objectives, or impairments of ecosystem objectives. The SWG proposes these pollutants as Critical Pollutants. These causal pollutants (candidate Critical Pollutants) are:  

<table>
<thead>
<tr>
<th>Organics</th>
<th>Metals</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>alpha-BHC</td>
<td>arsenic</td>
<td>bark</td>
</tr>
<tr>
<td>heptachlor epoxide</td>
<td>cadmium</td>
<td>BOD</td>
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<tr>
<td>PAH’s furans &amp; dioxins</td>
<td>copper</td>
<td>phos-</td>
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<td>manganese effluent</td>
<td>nickel</td>
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<td></td>
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The Superior Workgroup will evaluate the list of causal pollutants for evidence of point or nonpoint discharges of these pollutants to the waters of the Lake Superior System. In addition, the causal pollutants will be evaluated on the basis of their potential to cause significant damage to the health of the Lake Superior ecosystem. This evaluation will form the basis for designating Critical Pollutants which currently impact Lake Superior.  

The Lake Superior Forum has developed a list of pollutants which the Forum believes should be subject to preventative measures in the basin. The Forum believes that identifying these substances as critical pollutants will enhance the level of protection afforded the Lake Superior ecosystem, and is consistent with the goals of the Bional Program. EPA puts forward these Forum proposals to further public discussion on this issue, and request comments on the scope and adequacy of the Forum proposal.  

The SWG proposes that Critical Pollutants will be targeted for: (1) Zero discharge; (2) lakeview load reductions; and/or, (3) preventative measures, based upon their characteristics, such as persistence, bioaccumulative potential, toxicity and potential for future introduction to the basin. Using such a categorization process will strengthen the ability of Federal, Provincial and State agencies to develop and apply appropriate environmental protection strategies.  

EPA finds merit with these proposals of the SWG and puts them forth in the United States in today’s notice on behalf of the binational partners. EPA requests specific comments on the proposal to designate the substances listed above as Critical Pollutants for Lake Superior. EPA requests proposals for pollutants other than those listed above to be added to the Critical Pollutant list. EPA further requests any information on the ambient concentrations of a pollutant in the water or sediments of Lake Superior, or in the tissues of the aquatic life, wildlife, or humans that are dependent on Lake Superior for food or water, which suggests that a substance should be considered a critical pollutant for Lake Superior. In addition, EPA requests any additional information on any sources and loadings of these and any other substances that may currently cause, or have the potential to cause, impairments of beneficial uses of the Lake Superior ecosystem.  

VI. Source Identification and Load Quantification

Today’s proposed Lake Superior LaMP focuses on the nine designated zero discharge pollutants which have been designated as Critical Pollutants. As of January 1, 1991, 43 major surface water dischargers to the waters of the Lake Superior System have been...
identified. Existing industrial sources include 27 facilities, including forest products manufacturers, mines and metals processing facilities, electrical generating stations, a wood preserving industry, an oil refinery, and a food processor. Sixteen municipal wastewater treatment facilities were evaluated. Of these 43 sources, available data indicate that 16 discharged detectable levels of TCDD, OCS, HCB, PCBs and mercury. The most commonly detected pollutant was mercury, identified in 14 of the 43 sources. Detailed descriptions for these 43 sources are included in Appendix 5 and detailed loadings estimates in Appendix 6. Available loadings and process information were used to assess each source against a proposed blueprint for zero discharge. The results of this assessment are included in Appendix 7. In only a few cases could loads be estimated by direct measurement of pollutant concentration multiplied by total flows.

EPA requests comments on the accuracy and completeness of these source evaluations. EPA further requests any additional information on the discharges of critical pollutants, or other pollutants which may adversely affect beneficial uses, to the waters of Lake Superior System from these or any other point or nonpoint sources.

EPA and the binational partners recognize that no direct method of measuring zero discharge exists due partly to the limits of analytical science as well as the lack of an authoritative definition of zero. Therefore, to assess the progress of the zero discharge demonstration program and the LaMP, today’s proposed LaMP includes a framework, or blueprint, for assessing zero discharge. This blueprint utilizes an approach of assessing chemical use, production, or potential for release in contrast to solely utilizing analytical detection. Such a staged approach accommodates evaluation of sources within as well as outside of the Lake Superior basin which cause or have the potential to cause impairments of beneficial uses.

EPA concurs with this proposed approach for Lake Superior, and puts forward this proposed blueprint for public review and comment in the United States on behalf of the binational partners. EPA requests comments on the suitability of such an approach in assessing progress towards zero discharge in Lake Superior, as well as other alternatives for assessing progress.

**VII. Ecosystem Objectives and Indicators**

In Annex 1 of the Great Lakes Water Quality Agreement, the U.S. and Canadian governments, in consultation with State and Provincial governments, agreed to develop ecosystem objectives for the waters of the Great Lakes System, as the state of knowledge permits. In addition, the Agreement specifies the following objective for Lake Superior - “the Lake should be maintained as a balanced and stable oligotrophic ecosystem with lake trout as the top aquatic predator of a cold water community and the *Pontoporeia hoyi* as a key organism in the food chain.”

EPA views ecosystem principles and objectives as an integral component of LaMP’s consistent with the general principles of Annex 2 of the Agreement that LaMPs embody a systematic and comprehensive ecosystem approach to restoring and protecting beneficial uses. EPA intends to incorporate ecosystem principles and objectives, and ultimately, ecosystem indicators, into the Lake Superior LaMP. The public will be provided opportunities to participate in the development of ecosystem indicators for Lake Superior, including review and comment on proposed ecosystem indicators. When finalized and adopted into the Lake Superior LaMP, EPA believes ecosystem principles, objectives and indicators will serve to further the goals of the Binational Program as well as the broader goals of the Agency’s Great Lakes program.

The proposed Lake Superior ecosystem principles and objectives were drafted by representatives of Federal, State and Provincial agencies in consultation with the Lake Superior Forum. EPA puts forward the proposed Lake Superior ecosystem principles and objectives for public review and comment in the United States on behalf of the binational partners. Comments received from the public on today’s proposal will be considered by the binational partners in finalizing and adopting Lake Superior ecosystem principles and objectives. EPA requests comments on all aspects of today’s proposal, including: (1) A Vision for Lake Superior adopted by the Lake Superior Forum; (2) general objectives; (3) aquatic community objectives; (4) terrestrial wildlife objectives; (5) habitat objectives; (6) human health objectives; and, (6) objectives for sustainable development. In addition, EPA requests comments on the proposed framework for developing ecosystem indicators for Lake Superior.

The Great Lakes Water Quality Guidance, when finalized, will establish water quality criteria and goals to protect aquatic life, wildlife, and human health in the Great Lakes. The water quality criteria and values proposed in the Guidance apply to all the ambient United States waters of the Great Lakes System, regardless of the source of pollutants. In this manner, the proposed water quality criteria and values provide the basis for integrating actions carried out under the range of environmental programs available to both Federal, State and Tribal regulators to protect and restore the Great Lakes ecosystem. EPA intends to use the water quality criteria and values, when finalized, as indicators of the health of the Lake Superior ecosystem. EPA requests comments on this approach.

**VIII. Management Strategies and Actions**

A wide range of actions are being undertaken by Federal, Provincial and State agencies through the Binational Program. These include specific actions intended to reduce pollutant loadings to the Lake Superior System, and further the goals of zero discharge. These include:
- Implementation of a comprehensive pollution prevention strategy for the nine designated zero discharge pollutants.
- Assessment and analysis of financial/economic tools and incentives to encourage virtual elimination and sustainable development throughout the Lake Superior Basin as mechanisms to achieve zero discharge.
- Basinwide educational programs to raise consumer consciousness regarding hazardous wastes and the impact of such wastes on the water quality.
- Load reductions through existing and expanded environmental programs at the Federal, Provincial and State levels.
- Development of specific procedures for LS-OIRW and LS-ONRW designations including candidate lists of waters.
- Investigation and remediation of contaminated sediments in targeted sites.
- Public workshops and meetings throughout the Lake Superior Basin to discuss both the proposed LaMP and the Binational Program.
- Development of a comprehensive monitoring program designed to quantify loads and identify sources of critical pollutants on a priority basis.

EPA requests public comment on the scope, adequacy, and timing of the actions described in the proposed Lake Superior water quality plan.
Superior LaMP. EPA requests proposals or information from the public on local actions to reduce loads of toxic pollutants to the waters of the Lake Superior System, on any other action which may reduce loads of toxic pollutants to the waters of the Lake Superior System, support the zero discharge demonstration program, further public participation and involvement in the Binational Program, or in any other way serve to protect and restore the Lake Superior ecosystem.

Robert Springer,
Acting Regional Administrator.
[FR Doc. 94-3432 Filed 2-14-94; 8:45 am]
BILLING CODE 8010-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES
National Institutes of Health
National Cancer Institute; Notice of Meeting

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the Board of Scientific Counselors, Division of Cancer Etiology on March 3-4, 1994. The meeting will be held in Building 31, C Wing, Conference Room 10, National Institutes of Health, 9000 Rockville Pike, Bethesda, Maryland 20892.

This meeting will be open to the public from 1 p.m. to recess on March 3 and from 9 a.m. to adjournment on March 4 for discussion and review of the Division budget and review of concepts for grants and contracts. Attendance by the public will be limited to space available.

In accordance with the provisions set forth in section 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92-463, the meeting will be closed to the public from 9 a.m. to approximately noon on March 3, 1994 for the review, discussion and evaluation of individual programs and projects conducted by the Division of Cancer Etiology. These programs, projects, and discussions could reveal personal information concerning individuals associated with the programs and projects, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. Ms. Carole A. Frank, Committee Management Officer, National Cancer Institute, National Institutes of Health, Executive Plaza North, Room 630, Bethesda, Maryland 20892 (301/496-5708) will provide summaries of the meeting and rosters of committee members, upon request.

Dr. David McB. Howell, Executive Secretary of the Board of Scientific Counselors, Division of Cancer Etiology, National Cancer Institute, National Institutes of Health, Building 31, Room 11A06, Bethesda, Maryland 20892 (301/496-6927) will furnish substantive program information.

Individuals who plan to attend and need special assistance, such as sign language interpretation or other special accommodations, should contact Dr. David McB. Howell, (301) 496-6927, in advance of the meeting.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.394, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support. 93.398, Cancer Research Manpower; 93.399, Cancer Control.)

Susan K. Feldman,
Committee Management Officer, NIH.
[FR Doc. 94-3507 Filed 2-14-94; 8:45 am]
BILLING CODE 4135-01-M

National Institute of Diabetes and Digestive and Kidney Diseases; Meetings of the National Kidney and Urologic Diseases Advisory Board and its Subcommittees

Pursuant to Public Law 92-463, notice is hereby given of the meeting of the National Kidney and Urologic Diseases Advisory Board, National Institute of Diabetes and Digestive and Kidney Diseases, and its Subcommittees on March 6-7, 1994.

The National Kidney and Urologic Diseases Advisory board is also sponsoring a National Workshop on Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection on March 7-9.

All meetings will be held, as listed below, at the Bethesda Marriott Hotel, 5151 Pooks Hill Road, Bethesda, Maryland, and will be open to the public, with attendance limited to space available.

For any further information, and for individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, please contact Dr. Ralph Baia, Executive Director, National Kidney and Urologic Diseases Advisory Board, 1801 Rockville Pike, Suite 500, Rockville, Maryland 20852, (301) 496-6045, two weeks prior to the meeting date. In addition, his office will provide a roster of the Board members and a summary of the meetings, upon request.

Name of Committee: National Kidney and Urologic Diseases Advisory Board.
Date of Meeting: March 6-7, 1994.
Open: 1:30 p.m.-3:30 p.m.
Name of Committee: Research Subcommittee.
Date of Meeting: March 6-7.
Open: March 6-7 p.m. to recess; March 7-8 a.m. to 12 noon.
Agenda: Discuss future kidney related activities.
Name of Committee: Health Care Issues Subcommittee.
Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should contact Mrs. Ann Dieffenbach.

Substantive program information may be obtained from each scientific review administrator whose name, room number, and telephone number are listed below each committee.

Name of Committee: Cellular and Molecular Basis of Disease Review Committee.


Place of Meeting: Building 31C, Conference Room 7, National Institutes of Health. Bethesda, Maryland 20892.

Open: March 2, 8 a.m.—9 a.m.

Closed: March 2, 9 a.m.—adjournment.

Name of Committee: Minority Access to Research Careers Review Subcommittee.


Dates of Meeting: March 10-12, 1994.

Place of Meeting: March 10-11, 1994, Building 31C, Conference Room 7, National Institutes of Health. Bethesda, Maryland 20892.

Place of Meeting: March 12, 1994, Hyatt Regency Hotel, One Bethesda Metro Center, Bethesda, Maryland 20814.

Open: March 10, 8:30 a.m.—9:30 a.m.

Closed: March 10, 9:30 a.m.—5 p.m.; March 11, 8:30 a.m.—5 p.m.; March 12, 8:30 a.m.—12 p.m.

Name of Committee: Pharmacological Sciences Review Committee.


Place of Meeting: 5333 Westbard Avenue (TELEPHONE CONFERENCE), Room 9A18, National Institutes of Health, Bethesda, Maryland 20892.

Open: March 15, 1 p.m.—3:30 p.m.

Closed: March 15, 1:30 p.m.—7:30 p.m.

Name of Committee: Minority Biomedical Research Support Review Subcommittee.


Place of Meeting: Holiday Inn, Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, Maryland 20815.

Open: March 17, 8:30 a.m.—9:30 a.m.

Closed: March 17, 9:30 a.m.—5 p.m.; March 18, 8:30 a.m.—adjournment.

(Catalog of Federal Domestic Assistance Program No. 93.847-849, Diabetes, Endocrine and Metabolic Diseases; Digestive Diseases and Nutrition; and Kidney Diseases, Urology and Hematology Research, National Institutes of Health.)


Susan K. Feldman, Committee Management Officer, NIH.

National Workshop: Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection.

Renal Disease and Chronic Urinary Infection.

Rehabilitation of Persons with End-Stage Kidney Disease.

Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection.

National Workshop: Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection.

Rehabilitation of Persons with End-Stage Kidney Disease.

Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection.

National Workshop: Barriers to Rehabilitation of Persons with End-Stage Renal Disease and Chronic Urinary Infection.

Rehabilitation of Persons with End-Stage Kidney Disease.
National Institute of Mental Health; Cancellation of Meeting

Notice is hereby given of the cancellation of one meeting of the National Institute of Mental Health which was published in the Federal Register on January 14, 1994 (59 FR 2414): The Services Research Review Committee, February 16–18, 1994, Hyatt Regency Bethesda, One Bethesda Metro Center, Bethesda, Maryland. The meeting was cancelled due to prior commitments of several members.


Susan K. Feldman, Committee Management Officer, NIH.

BILLING CODE 4140-01-M

Division of Research Grants; Meetings

Pursuant to Public Law 92–463, notice is hereby given of a meeting of the Division of Research Grants Behavioral and Neurosciences Special Emphasis Panel.

The meeting will be closed in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications in the various areas and disciplines related to behavior and neuroscience. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Office of Committee Management, Division of Research Grants, Westwood Building, National Institutes of Health, Bethesda, Maryland 20892, telephone 301–594–7265, will furnish summaries of the meetings and rosters of panel members.

Meeting To Review Small Business Innovation Research Program Applications' Scientific Review Administrator: Dr. Jane Hu (301) 594–7289.

Date of Meeting: July 21, 1994.

Place of Meeting: Holiday Inn, Chevy Chase, MD.

Time of Meeting: 9:30 a.m.

Scientific Review Administrator: Dr. Joseph Kimm (301) 594–7257.

Date of Meeting: March 28, 1994.

Place of Meeting: Hyatt Regency, Bethesda, MD.

Time of Meeting: 9 a.m.


Susan K. Feldman, Committee Management Officer, NIH.

[FR Doc. 94–3512 Filed 2–14–94; 8:45 am]

BILLING CODE 4140–01–M

Prospective Grant of Co-Exclusive License: Type Alpha Platelet-Derived Growth Factor (PDGF) Receptor Gene

AGENCY: National Institutes of Health, Public Health Service, DHHS.

ACTION: Notice.

SUMMARY: This is notice in accordance with 15 U.S.C. 209(c)(1) and 37 CFR 404.7(a)(1)(i) that the National Institutes of Health (NIH), Department of Health and Human Services, is contemplating the grant of a co-exclusive world-wide license to practice the invention embodied in U.S. Patent Applications SN 07/306,282 and SN 07/915,884, both entitled “Type Alpha Platelet-Derived Growth Factor Receptor Gene” to Targeted Genetics Corporation, of Seattle, Washington. The patent rights in this invention have been assigned to the United States of America.

The prospective license will be royalty-bearing, will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7, and is expected to be co-exclusive with one other party, COR Therapeutics, Inc. It is anticipated that this license will be limited to gene therapy treatment of cardiovascular disease. Publication of this notice should be considered a modification of an earlier notice “Prospective Grant of Exclusive License: Type Alpha Platelet-Derived Growth Factor” (Vol. 58, No.
The notice being revised, which is published in its entirety below, is: "Telephone Call Detail Records—Interior, DOI—36," previously published on November 9, 1988 (53 FR 45394) as "Interior, Office of the Secretary—36."]

In this notice, the existing system name has been revised to more adequately convey the Departmentwide extent of the scope-of-system coverage. Additionally, the existing system location statement and the existing system manager(s) and address statement are revised to reflect changes in addresses of system managers, and the existing retention and disposal statement has been revised to incorporate the Department's approved records management plan for this system.

Since these changes do not involve any new or intended use of the information in the system of records, the notice shall be effective on publication in the Federal Register (February 15, 1994). Additional information regarding this action may be obtained from the Departmental Privacy Act Officer, Office of the Secretary, Office of Administrative Services, 1849 “C” Street NW., Mail Stop 5412 MIB, Washington, DC 20240, telephone (202) 208-6045.


Albert C. Camacho,
Director, Office of Administrative Services.

INTERIOR/DOI—36

SYSTEM NAME:
Telephone Call Detail Records—Interior, DOI—36.

SYSTEM LOCATION:
(1) U.S. Department of the Interior, Office of Information Resources Management, Telecommunications Systems Division, m.s. 7355, 1849 C St. NW, Washington, DC 20240.
(2) U.S. Geological Survey, Information Systems Division, m.s. 7355, 1849 C St. NW, Washington, DC 20240.
(2) U.S. Geological Survey, Information Systems Division, m.s 809, 809 National Center, Reston, Virginia 22092.
(3) Offices of Bureau System Managers.
(4) Bureau offices nationwide.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:
Individuals (generally Department, bureau/office, and contractor employees) who make long distance telephone calls and individuals who receive long distance telephone calls placed from or charged to DOI telephones.

CATEGORIES OF RECORDS IN THE SYSTEM:
Records relating to the use of DOI telephone systems to place long distance calls; records indicating assignment of telephone numbers of employees; and records relating to the location of telephones.

Note: Records of telephone calls made to the Department's Office of Inspector General Hotline number are excluded from the records maintained in this system pursuant to the provisions of 5 U.S.C., Appendix 3 Section 7(b) (Inspector General Act of 1976).

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:
31 U.S.C. 1345(b), which prohibits agencies from using appropriated funds to pay for personal calls; 44 U.S.C. 3101, which authorizes agencies to create and preserve records documenting agency organizations, functions, procedures and transactions; and 43 CFR 201-38.007, which limits the use of Government telephone systems to the conduct of official business.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:
Disclosures within the Department of the Interior may be made to employees of the Department to determine responsibility for long distance telephone calls, and to resolve disputes and facilitate the verification of discrepancies relating to the billing, payment, or reconciliation of telephone operational or accountability records.

Disclosures outside the Department of the Interior may be made: (1) To representatives of a telecommunications company providing telecommunications support to permit the servicing of the account; (2) To representatives of the General Services Administration or the National Archives and Records Administration to conduct records management inspections under authority of 44 U.S.C. 2904 and 2906; (3) To the U.S. Department of Justice or in a proceeding before a court or adjudicative body when (a) the United States, the Department of the Interior, a component of the Department, or, when represented by the government, an employee of the Department is a party to litigation or anticipated litigation or has an interest in such litigation, and (b) the Department of the Interior determines that the disclosure is relevant or necessary to the litigation and is compatible with the purpose for which the records were compiled; (4) Of information indicating a violation or potential violation of a statute, regulation, rule, order or license, to appropriate Federal, State, local or
POLICIES AND PRACTICES FOR STORING, RETRIEVING AND ACCESSING, RETAINING AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Official records are stored in electronic form (at the U.S. Geological Survey). Paper reference copies of official records are stored in file cabinets.

RETRIEVABILITY:

Records are retrieved by employee name, telephone number, identification number, or by account code.

SAFEGUARDS:

Access to the records is limited to Departmental employees who have an official need to use the records in the performance of their duties. Records are stored in a controlled area and maintained with safeguards meeting the requirements of 43 CFR 2.51 for computer and paper records. Automated records are protected from unauthorized access through password identification procedures and other system-based protection methods.

RETENTION AND DISPOSAL:

In accordance with National Archives and Records Administration’s General Records Schedule 12, Item 4, official (electronic) records are retained for three (3) years and then destroyed. Paper reference copies are destroyed when no longer needed or, if not before, when three (3) years old.

SYSTEM MANAGER(S) AND ADDRESS:

(1) Chief, Telecommunications Systems Division, Office of Information Resources Management, m.s. 7355 MIB, 1849 C St. NW., Washington, DC 20240.
(2) Chief, Information Systems Division, U.S. Geological Survey, m.s. 809, 809 National Center, Reston, Virginia 22092.
(3) a. Telecommunications Manager, Office of Facilities Management, Bureau of Indian Affairs, P.O. Box 1248, Albuquerque, New Mexico 87103.
   b. Chief, Branch of Telecommunications, Bureau of Land Management, m.s. 1620 L, 1620 L St. NW., Washington, DC 20236.
   c. Telecommunications Manager, Property and General Services, Bureau of Mines, m.s. 2150, 810 7th St. NW., Washington, DC 20241.
   d. Telecommunications Manager, Bureau of Reclamation, Denver Federal Center, m.s. D-7140, P.O. Box 25007, Denver, Colorado, 80225.
   e. Telecommunications Manager, U.S. Fish and Wildlife Service, IRM/TFO, P.O. Box 25207, Denver, Colorado 80225.
   f. Chief, Branch of Telecommunications Services, U.S. Geological Survey, m.s. 809, 809 National Center, Reston, Virginia 22092.
   h. Telecommunications Manager, Information and Telecommunications Division, National Park Service, m.s. 270, P.O. Box 37127, NW., Washington, DC 20013-7127.
   i. Telecommunications Administrator, Office of Inspector General, m.s. 124 SIB, 1849 C St. NW., Washington, DC 20240.
   j. Chief, Branch of Telecommunications Management, Office of Administrative Services, Office of the Secretary, m.s. 1445 MIB, 1849 C St. NW., Washington, DC 20240.
   k. Telecommunications Manager, Office of Surface Mining Reclamation and Enforcement, m.s. 19 SIB, 1849 C St. NW., Washington, DC 20240.

NOTIFICATION PROCEDURE:

A request for notification of the existence of records shall be addressed to the appropriate System Manager. The request shall be in writing, signed by the requester, and comply with the content requirements of 43 CFR 2.60.

RECORD ACCESS PROCEDURES:

A request for access to records shall be addressed to the appropriate System Manager. The request shall be in writing, signed by the requester, and comply with the content requirements of 43 CFR 2.63.

CONTESTING RECORD PROCEDURES:

A request for amendment of a record shall be addressed to the appropriate System Manager. The request shall be in writing, signed by the requester, and comply with the content requirements of 43 CFR 2.71.

RECORD SOURCE CATEGORIES:

Telephone assignment records, call detail listings, and results of administrative inquires relating to assignment of responsibility for placement of specific long distance calls.

Bureau of Land Management

[CO-920-94-4120-03; COC 54623]

Colorado; Notice of Invitation for Coal Exploration License Application, Consol Inc.

Pursuant to the Mineral Leasing Act of February 25, 1920, as amended, and to Title 43, Code of Federal Regulations, Subpart 3410, members of the public are hereby invited to participate with Consol Inc., in a program for the exploration of unleased coal deposits owned by the United States of America in the following described lands located in Gunnison County, Colorado:

T. 13 S., R. 90 W., 6th P.M.
Sec. 11, lots 9, and 12;
Sec. 12, lots 7 to 9, inclusive, and
NW<SW/4.

The area described contains approximately 221.89 acres.

The application for coal exploration license is available for public inspection during normal business hours under serial number COC 54623 at the Bureau of Land Management (BLM), Colorado State Office, 2850 Youngfield Street, Lakewood, Colorado 80215, and at the Montrose District Office, 2465 South Townsend Avenue, Montrose, Colorado 81401.

Written Notice of Intent to participate should be addressed to the attention of the following persons:
James E. Edwards, Jr., Chief, Branch of Mining Law and Solid Minerals, Colorado State Office, Bureau of Land Management, 2850 Youngfield Street, Lakewood, Colorado 80215, and
Randy B. Stockdale, Consol Inc., Central Shop, Second Floor, P.O. Box 159, Pinckneyville, Illinois 62274.

Any party electing to participate in this program must share all costs on a pro rata basis with the applicant and with any other party or parties who elect to participate.
Availability of Draft Environmental Impact Statement for Western Energy Company's Coal Lease Application (MTM 80697) and Request for Public Comment; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management, Miles City District, Powder River Resource Area Office has produced a draft environmental impact statement (EIS) for the Western Energy Company Federal Coal Lease Application MTM 80697. By this notice the public is informed that the draft EIS application (MTM-80697) is located in Rosebud County, Montana, approximately 10 miles west of Colstrip, Montana, and is described as follows:

Principal Meridian, Montana
T. 1 N., R. 39 E., Sec. 2, SW1/4NW1/4, NW1/4SE1/4.
T. 1 N., R. 40 E., Sec. 8, lots 2, 3, 4, S1/2NW1/4, S1/4 SE1/4, SW1/4 NW1/4, SE1/4, S1/4SE1/4.
T. 2 N., R. 40 E., Sec. 32, all.

The 2,061 acre tract contains an estimated 35.6 million tons of recoverable reserves. The lands involved are all private surface/federal coal lands within Area C, except for one parcel in Area B.

EFFECTIVE DATE: Written comments will be accepted through April 25, 1994. Public meetings will be held at the following locations and times:

1. Monday, March 7, 1994; Dull Knife College Auditorium, Lame Deer, Montana, from 7-9 p.m.
2. Tuesday, March 8, 1994; Conference Room of the Bicentennial Library of Colstrip, 415 Willow Avenue, Colstrip, Montana, from 7-9 p.m.

FOR FURTHER INFORMATION CONTACT: Mary Alice Spencer, BLM Powder River Resource Area, Miles City Plaza, Miles City, Montana 59301, 406-232-7000 or TDD 406-232-1939.

SUPPLEMENTARY INFORMATION: Western Energy Company is lessee and operator of several federal coal leases at the Rosebud Mine near Colstrip, Montana. The area applied for is within an existing approved life-of-mine plan, with the exception of a portion of section 14 in T. 1 N., R. 40 E. which is included within the Area B extension mine application now under final stages of review by the Montana Department of State Lands and the Office of Surface Mining.

No additional exploration and/or exploratory drilling is anticipated for these areas prior to leasing. Exploration and drilling was conducted in the 1980 to 1985 era in preparation for the submittal of the Area C amendment permit application and the Area B extension permit application. The mining production sequence for the proposed lease tracts will be incorporated into the existing mine plan for Area C and the proposed mine plan for Area B extension.

Three alternatives are addressed in the environmental impact statement:

Alternative 1—Preferred (Proposed Action)—Lease the 2,061 acres of federal coal lands to Western Energy Company as applied for in the coal lease application. The federal coal lands would not be offered for lease.

Alternative 2—(No action)—Reject or deny the coal lease application. The federal coal lands would not be offered for lease.

Alternative 3—(Cultural Resource Avoidance)—The coal lease application would be partially approved. Two cultural properties with values as traditional cultural properties and sites with intangible spiritual attributes would be avoided by excluding federal coal lands in and around these two sites from the coal lease application.

Under Alternatives 1 and 3, the coal lease, as described in the respective alternative, would be offered under a competitive bid process with the lease going to the highest qualified bidder for the prospective coal lease.

For Alternative 1—Preferred (Proposed Action)—The Bureau of Land Management would offer a lease sale for 2,061 acres of federal coal reserves as applied for in the coal lease application. Assuming Western Energy Company is the successful bidder for this lease, these lands, which are incorporated into the company’s existing mine plans, would be mined accordingly. Of the 2,061 acres offered for lease, 914 acres would be mined and 1,127 would be disturbed. Approximately 734 acres would not be disturbed. Additional mitigation measures for traditional lifeway values, such as a 160-foot buffer zone to protect cultural properties, planting trees to screen the cultural properties from intrusions, or removal of the petroglyph panels could be incorporated as special stipulations to the lease and amends to the existing mine plan permit.

For Alternative 2—(No Action)—The Bureau of Land Management would deny or reject the coal lease application. The federal coal lands would not be offered for lease at this time. The Western Energy Company would continue mining other federal, state, and...
private coal lands instead. Impacts associated with mining these federal coal lands would be avoided and shifted to the other federal, state, and private coal lands that Western Energy Company would mine. The federal coal lands in this application would likely be bypassed for mining.

For Alternative 3—(Cultural Resource Avoidance)—The coal lease application would be partially approved. Two cultural properties in T. 2 N., R. 40 E., section 32, which have values as traditional cultural properties and sites with intangible spiritual attributes would be avoided by excluding 70 acres of federal coal lands in and around these two sites from the coal lease application. Since it would not be feasible to mine other areas in a strip mine operation, a total of 152 acres and 6.5 million tons of recoverable coal reserves would be excluded. Existing approved mitigation measures which were included as part of the mine plan permits by the Montana Department of State Lands and special coal lease stipulations would apply, and Western Energy Company would be required to comply with these mitigation measures.

Robert H. Lawton,
State Director.

[FR Doc. 94—3497 Filed 2-14-94; 8:45 am]
BILLING CODE 4310–50–M

Realty Action; Recreation and Public Purposes (R&PP) Act Classification; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The following public lands in Kern County, California have been examined and found suitable for classification for lease or conveyance to the South Fork Union School District under the provisions of the Recreation and Public Purposes Act, as amended (43 U.S.C. 869 et seq.).

Mount Diablo Meridian
T. 26 S., R. 34 E., Sec. 24; SE1/4 SE1/4

Containing 40 acres.
AP #426-072-37 to 426-072-44 and AP #426-072-53 to 426-072-60

The South Fork Union School District has filed an application for lease with the option to purchase a 40-acre parcel of public land to construct a new school campus. The school will house a 1,000-student facility for children attending Grades K–8 within the South Fork Union School District.

The lands are not needed for Federal purposes. Lease or conveyance is consistent with current BLM land use planning and would be in the public interest.

The lease/patent, when issued, will be subject to the following terms, conditions, and reservations:

1. Provisions of the Recreation and Public Purposes Act and to all applicable regulations of the Secretary of the Interior.
3. All minerals shall be reserved to the United States, together with the right to prospect for, mine, and remove the minerals.
4. All valid existing rights documented on the official public land records at the time of lease/patent issuance.
5. Any other reservations that the authorized officer determines appropriate to ensure public access and proper management of Federal lands and interests therein.

Detailed information concerning this action is available for review at the office of the Bureau of Land Management, Caliente Resource Area, 4301 Rosedale Highway, Bakersfield, California.

Upon publication of this notice in the Federal Register, the lands will be segregated from all other forms of appropriation under the public land laws, including the general mining laws, except for lease or conveyance under the Recreation and Public Purposes Act and leasing under the mineral leasing laws. For a period of 45 days from the date of publication of this notice, until April 1, 1994 interested persons may submit comments regarding the proposed lease/conveyance or classification of the lands to the Area Manager, Caliente Resource Area Office, 4301 Rosedale Highway, Bakersfield, CA 93308.

CLASSIFICATION COMMENTS: Interested parties may submit comments involving the suitability of the land for a school campus. Comments on the classification are restricted to whether the land is physically suited for the proposal, whether the use will maximize the future use or uses of the land, whether the use is consistent with local planning and zoning, or if the use is consistent with State and Federal programs.

APPLICATION COMMENTS: Interested parties may submit comments regarding the specific use proposed in the application and plan of development, whether the BLM followed proper administrative procedures in reaching the decision, or any other factor not directly related to the suitability of the land for a school campus.

Any adverse comments will be reviewed by the State Director. In the absence of any adverse comments, the classification will become effective 60 days from the date of publication of this notice in the Federal Register.

James Wesley Abbott,
Caliente Resource Area Manager.

[FR Doc. 94–18 Filed 2–14–94; 8:45 am]
BILLING CODE 4310–00–M

Bureau of Land Management

[CA–010–03–4332–01; 4–00160–GP–010–007]

Temporary Vehicle Use Restriction Order for Caliente Resource Area

AGENCY: Bureau of Land Management, Interior.

ACTION: Establishment of temporary vehicle use restriction in the Case Mountain/Milk Ranch Peak Management Area within Tulare County in the Caliente Resource Area, Bakersfield District, California.

SUMMARY: This emergency action restricts vehicle use on BLM-administered public land in the Case Mountain/Milk Ranch Management Area due to the acquisition of public lands which have yet to be addressed in a Resource Management Plan. Vehicle use on roadways is restricted to “Administrative Access Only” and shall be limited to persons specifically designated by the Area Manager to drive on said roadways. The public lands affected by this category of road closure are located in portions of NV2SWV4, NE1/4, SEV4NW1/4, S1/2 Section 16; NEV4SWV4NEV4, S1/2SWV4SEV4, SEV4NW1/4, N1/4SWV4, SEV4SWV4, SEV4 Section 17, all in Township 17 South, Range 29 East, Mount Diablo Base and Meridian, in the County of Tulare, State of California. This restriction will apply from the date of publication in the Federal Register and remain in effect until an amendment thereof or until publication of a Resource Management Plan which adequately addresses public access on these lands.

SUPPLEMENTARY INFORMATION: This emergency road closure is intended to control vehicle use on public lands for protection of the Sequoia Redwood grove, the maintenance of the critical winter range of deer, and fuels management. Authority for this restriction order is contained in CFR Title 43, Chapter II, 8364.1(a).
Notice of document availability

Public Comments Solicited

The Service solicits written comments on the recovery plan described. All comments received by the date specified above will be considered prior to the approval of the plan.

Authority

The Authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533 (f).


John G. Rogers, Regional Director.

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before February 5, 1994. Pursuant to § 60.13 of 36 CFR part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, P.O. Box 37127, Washington, DC 20013–7127. Written comments should be submitted by March 2, 1994.

Patrick Andrus, Acting Chief of Registration, National Register.

ARKANSAS

Izard County

Pine Ridge School Building (Public Schools in the Ozarks MPS), Izard Co. Rd. 237 W of the jet. with AR 45, Lincoln, 94000141

Lincoln County

Lincoln County Courthouse, 300 S. Drew St., Star City, 94000142

Pulaski County

Booz, Bishop Hiram A., House, 22 Armistead Rd., Little Rock, 94000142

Washington County

Bank of Fayetteville Building, Old, 100 W. Center St., Fayetteville, 94000144

Bean Cemetery, N. side US 62, about 2.2 mi. W of the jet. with AR 45, Lincoln, 94000152

Cane Hill Battlefield, Area surrounding AR 45 and Co. Rds. 291, 8, 284, and 285, Cane Hill vicinity, 94000132

Twin Bridges Historic District, (Historic Bridges of Arkansas MPS), Washington Co. Rd. 3412 across unnamed cr. and Old Washington Co. Rd. 11 across Baron Fork, Morrow vicinity, 94000162

COLORADO

Denver County
NEW MEXICO

Bernalillo County

Bali Hill Business Center, 3500 Central Ave. SE, Albuquerque, 94000118

NORTH CAROLINA

 Alamance County

Johnston Hall, 103 Antioch St., Elon College, 94000130

Mecklenburg County

Parks—Cramer Company Complex, Former, 2000 South Blvd., Charlotte, 94000146

Pasquotank County

Elizabeth City Historic District (Boundary Increase) (Elizabeth City MPS), Roughly bounded by W. Church, W. Ehringhaus, Elliott, Cedar and Ashe Sts., Elizabeth City, 94000163

Riverside Historic District (Elizabeth City MPS), Roughly, along Riverside Ave. from Morgan St. to Rivershore Rd. and Raleigh St. from Fairfax Ave. to Riverside, Elizabeth City, 94000105

Shepard Street—South Road Street Historic District (Elizabeth City MPS), Roughly bounded by Ehringhaus and Edge Sts., Brooks and Boston Aves. and Charles Cr., Elizabeth City, 94000164

SOUTH DAKOTA

Harding County

Archaeological Site No. 39HN16 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000088

Archaeological Site No. 39HN162 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000093

Archaeological Site No. 39HN167 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000092

Archaeological Site No. 39HN165 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000092

Archaeological Site No. 39HN207 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000094

Archaeological Site No. 39HN265 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000095

Archaeological Site No. 39HN467 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000097

Archaeological Site No. 39HN205 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000098

Archaeological Site No. 39HN484 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000097

Archaeological Site No. 39HN485 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000099

Archaeological Site No. 39HN324 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000100

Archaeological Site No. 39HN322 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000101

Archaeological Site No. 39HN219 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000102

Archaeological Site No. 39HN218 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000103

Archaeological Site No. 39HN217 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000104

Archaeological Site No. 39HN213 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000105

Archaeological Site No. 39HN210 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000106

Archaeological Site No. 39HN209 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000107

Archaeological Site No. 39HN12 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000108

Archaeological Site No. 39HN5 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000110

Archaeological Site No. 39HN227 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000111

Archaeological Site No. 39HN228 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000112

Archaeological Site No. 39HN160 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000113

Archaeological Site No. 39HN159 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000114

Archaeological Site No. 39HN155 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000115

Archaeological Site No. 39HN159 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000116

Archaeological Site No. 39HN121 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000117

Archaeological Site No. 39HN153 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000118

Archaeological Site No. 39HN50 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000119

Archaeological Site No. 39HN34 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000120

Archaeological Site No. 39HN90 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000121

Archaeological Site No. 39HN26 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000122

Archaeological Site No. 39HN22 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000123

Archaeological Site No. 39HN21 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000124

Archaeological Site No. 39HN19 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000125

Archaeological Site No. 39HN177 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000126

Archaeological Site No. 39HN174 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000127

Archaeological Site No. 39HN171 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000128
Archeological Site No. 39HN168 (Prehistoric Rock Art of South Dakota MPS), Address Restricted, Ludlow vicinity, 94000129

VIRGINIA
Richmond Independent City
West of Boulevard Historic District, Roughly bounded by Colonial Ave., W. Grace St., Cutshaw Ave., Thompson St., and Ellwood Ave., Richmond, 94000153

WISCONSIN
Chippewa County
Chippewa Shoe Manufacturing Company, 28 W. River St., Chippewa Falls, 94000133

Milwaukee County
Newberry Boulevard Historic District, 1802—3000 E. Newberry Blvd., Milwaukee, 94000137

Racine County
Northside Historic District of Cream Brick Workers' Cottages (Racine Workers' Cottages MPS), Roughly bounded by Good, Erie, English, Main, Yout and Chatham Sts. and Lakeview Community Center, Racine, 940000155

Vilas County
Mayo School, 2301 Townhall Rd., Eagle River, 94000135

 Winniebago County
Chicago and Northwestern Railroad Depot, 500 N. Commercial St., Neenah, 94000134
Irving—Church Historic District, Roughly bounded by W. Irving Ave., Franklin St., Church Ave., Wisconsin St. and Amherst Ave., Oshkosh, 94000156

[BILLING CODE 4310—70—M]

INTERSTATE COMMERCE COMMISSION
[Ex Parte No. 347 (Sub-No. 2)]
Rate Guidelines; Non-Coal Proceedings

In a petition filed January 14, 1992, the Association of American Railroads (AAR) proposed a simplified stand-alone cost (SSAC) method for determining maximum rate reasonableness in small shipper complaint proceedings. SSAC employs a computer program which the AAR claims estimates stand-alone cost. On February 25, 1993, the Commission's staff and AAR conducted a workshop to explain their respective proposals for simplified maximum rate methodologies. The Commission's staff presented a briefing on its Revenue Shortfall Allocation Method (RSAM) and AAR, and its consultants, discussed the mechanics and theory of SSAC.

On April 28, 1993, the AAR conducted a second technical demonstration of SSAC. At that demonstration the AAR applied their model to three hypothetical rail movements developed by the Commission's staff. The results, produced by the SSAC model, did not appear to set a meaningful limit on rates.

In a decision served December 17, 1993, the Commission asked the AAR to explain why the SSAC method should receive further consideration, given its apparent infirmities. On January 14, 1994, the AAR filed a petition requesting a waiver of that written explanation and proposed instead to make an oral presentation before the full Commission. The AAR indicates that representative railroad CEO's and their economic experts will explain why, “in light of the logic of CMP and in the context of circumstances facing the railroads, shippers and the Commission, SSAC is a sound tool for developing probative evidence” in maximum rate reasonableness proceedings.

Several shipper interests filed a joint response (dated January 26, 1994) to the AAR's request. Although the shippers do not oppose AAR's petition, they request an opportunity to respond to any AAR presentation. The shippers suggest that AAR be directed to present in writing the evidence it intends to present orally to the Commission, with service upon all parties and that the Commission allow shippers to reply. On February 1, 1994 the AAR replied.

Given the importance of the non-coal rate guidelines, the time and effort AAR has put into developing its SSAC method, and the concerns expressed by the Commission's staff and shippers about the infirmities of SSAC, we believe an oral presentation would be helpful as we consider what action to take in this area. While we understand the theory underlying CMP and the need to develop simplified rate guidelines consistent with that theory, we need to understand how the SSAC results can produce a realistic limit on rates. Therefore, the railroads should explain their position with a written statement prior to their oral presentation as directed below. However, we do not believe that it is necessary at this time to schedule a hearing for all parties to present evidence on the same date. The Commission will schedule a second hearing for shippers if deemed necessary.

Due to the nature and importance of this proceeding, the Commission finds it necessary to modify its current service list as directed below.

For further information contact Thomas A. Schmitz (202) 927-5720. TDD for the hearing impaired: (202) 927-5721.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Persons already on our current service list, as well as those persons not already on the list, but who wish henceforth to participate must advise the Commission, in writing, of their intent to do so, on or before February 25, 1994. Persons must indicate whether they intend to actively participate as a party of record, or wish only to receive copies of Commission decisions. An original and 10 copies of these mailings referencing Ex Parte 347 (Sub-No. 2), supra, must be mailed to: Office of the Secretary, Interstate Commerce Commission, Washington, DC 20423.

2. AAR's comments, originally ordered in our decision dated December 17, 1993, are now due March 17, 1994.

3. In its comments explaining why SSAC should receive further consideration, the AAR is requested, among other things, to address the results produced by their SSAC model. Specifically, the AAR should discuss the reasonableness of the results, as opposed to the theoretical underpinnings of their model, and describe why they believe such output provides a useful constraint on rail rates in the context of a small shipper rate reasonableness proceeding. AAR's comments should also provide a schedule for their oral presentation including a list of speakers, the time required for each speaker, and a synopsis of the topics to be discussed by each. AAR should serve upon each party of record all evidence filed with the Commission based on the revised service list which we will provide as soon as possible after the service list is modified.

4. AAR's oral presentation will be held between 10 a.m. and noon, March 30, 1994, in Hearing room A, Interstate Commerce Commission, 12th Street and Constitution Avenue, NW., Washington, DC.

5. Other interested persons may file comments addressing the AAR's written and oral presentations by April 30, 1994. Those persons may indicate whether, in addition to their written
comments, they wish to make an oral presentation to the Commission.


By the Commission, Chairman McDonald, Vice Chairman Phillips, Commissioners Simmons and Philbin.

Sidney L. Strickland, Jr., Secretary.

In accordance with the policy of the Department of Justice, notice is hereby given that on February 2, 1994 a proposed Modification of Consent Decree ("Modification") in United States v. Kurdziel Industries, Inc. was lodged with the United States District Court for the Western District of Michigan. The proposed Modification will resolve the Motion of the United States to Enforce Consent Decree filed with the court on July 31, 1991. In that Motion, the United States alleged that Kurdziel Industries, Inc. ("KII") had violated certain provisions of an existing consent decree, entered by the court on July 7, 1987, pursuant to the Resource Conservation and Recovery Act ("RCRA"). 42 U.S.C. 6901 et seq. regarding the closure of areas containing hazardous wastes located at its foundry in Rothbury, Michigan.

Under the Modification, KII will complete closure of those areas containing hazardous waste at its facility according to a closure plan approved by the Michigan Department of Natural Resources and pay the United States $600,000 in stipulated penalties for alleged violations of the existing consent decree. The consent decree also requires Kurdziel to make monthly payments to a trust fund and three of the primary shareholders of Kurdziel to sign personal guaranties to provide financial assurance for Kurdziel's completion of its obligations under the closure plan.

The Department of Justice will receive comments relating to the proposed Modification of Consent Decree for a period of 30 days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to United States v. Kurdziel Industries, Inc., DOJ Ref. # 90-5-2-1-1436.

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in United States v. Apache Nitrogen Products, Inc., Civil Action No. CIV 92-382 TUC, was lodged on February 7, 1994, with the United States District Court for the District of Arizona. That action was brought against defendant pursuant to Sections 111(e) and 114 of the Clean Air Act (the "Act"), 42 U.S.C. 1701 et seq. in connection with defendant's operation of a nitric acid production facility. The decree requires the defendant to pay a civil penalty of $55,000 for alleged past violations of the Act, and to comply with specific emissions limits applicable to oxides of nitrogen ("NOx").

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed consent decree. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to United States v. Apache Nitrogen Products, Inc., DOJ Ref. # 90-5-2-1-1436.

The proposed consent decree may be examined at the Office of the United States Attorney, 110 South Church Street, Tucson, Arizona; at the Region IX Office of the Environmental Protection Agency, 75 Hawthorne, San Francisco, California 94105; and at the Consent Decree Library, 1120 G Street NW., 4th Floor, Washington, DC 20005. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street NW., 4th Floor, Washington, DC 20005. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $4.75 (25 cents per page reproduction costs), payable to the Consent Decree Library.

John C. Cruden, Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

BILTING CODE 4110-01-M

Lodging of Consent Decree Pursuant to the Clean Air Act

In accordance with the policy of the Department of Justice, notice is hereby given that on February 2, 1994 a proposed Modification of Consent Decree ("Modification") in United States v. Kurdziel Industries, Inc. was lodged with the United States District Court for the Western District of Michigan. The proposed Modification will resolve the Motion of the United States to Enforce Consent Decree filed with the court on July 31, 1991. In that Motion, the United States alleged that Kurdziel Industries, Inc. ("KII") had violated certain provisions of an existing consent decree, entered by the court on July 7, 1987, pursuant to the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 et seq. regarding the closure of areas containing hazardous wastes located at its foundry in Rothbury, Michigan.

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The Department of Justice will receive comments relating to the proposed Modification of Consent Decree for a period of 30 days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to United States v. Kurdziel Industries, Inc., DOJ Ref. # 90-7-1-188.

The proposed consent decree may be examined at the Office of the United States Attorney, 425 W. Capital, 5th floor, Little Rock, Arkansas 72201; the Region VI Office of the Environmental Protection Agency, 1455 Ross Avenue, Dallas, Texas 75202; and at the Consent Decree Library, 1120 G Street NW., 4th floor, Washington, DC 20005. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street NW., 4th floor, Washington, DC 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of

John C. Cruden, Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

BILTING CODE 4110-01-M

Lodging of Consent Decree Pursuant to the Clean Water Act

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that a proposed consent decree in United States v. Vertac Chemical Corp., et al., Civil Action No. LR-C-80-109, was lodged on January 21, 1994 with the United States District Court for the Eastern District of Arkansas. The proposed consent is a de minimis settlement with The Dow Chemical Company under Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9622(g). The settlement resolves the Dow Chemical Company's liability with respect to the Vertac Site located in Jacksonville, Arkansas.

The Department of Justice will receive comments relating to the proposed consent decree in United States v. Vertac Chemical Corp., et al., Civil Action No. LR-C-80-109, for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to United States v. Vertac Chemical Corp., et al., DOJ Ref. # 90-7-1-188.

The proposed consent decree may be examined at the Office of the United States Attorney, 425 W. Capital, 5th floor, Little Rock, Arkansas 72201; the Region VI Office of the Environmental Protection Agency, 1455 Ross Avenue, Dallas, Texas 75202; and at the Consent Decree Library, 1120 G Street NW., 4th floor, Washington, DC 20005. A copy of the proposed consent decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street NW., 4th floor, Washington, DC 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of
Notice Pursuant to the National Cooperative Research and Production Act of 1993; CAD Framework Initiative, Inc.

Notice is hereby given that, on November 1, 1993, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 et seq. ("the Act"), CAD Framework Initiative, Inc. ("CFI") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing certain changes in its membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, these changes are as follows: (1) Hughes Aircraft Company/ GM-Delco has changed its name to Hughes Aircraft; (2) GE Aerospace, an existing Corporate Member, is now listed as MartinMarietta (General Electric); (3) Corporate Members, Bull, S.A., Computervision Corporation, Data General Corporation, Elsco, Inc., Object Design, Inc., and Zycad Corporation, have not renewed their membership in CFI; (4) Associate Members, Applied Physics Laboratory, CNET-Grenoble, CPQD-Telebras, Gesellschaft Für Mathematik und Datenverarbeitung mbH (GMD), INESC, Nanyang Technological University, Semiconductor Research Corporation, Earl F. Ecklund, Jr., Steve Evanczuk, John Granacki, John Hardin, Peter Haynes, Wolfgang Herden, Ushio Kobayashi, Hitoshi Nishimura, Patrick Offers, Bora Praciz, Hiru Ranga, Otto Schiebel, Mark Schuette, Alan Smith, and Tuomo Tikkanen have not renewed their membership in CFI.

On December 30, 1988, CFI filed its original notification pursuant to section 6(a) of the Act. That filing was amended on February 7, 1989. The Department of Justice published a notice concerning the amended filing in the Federal Register pursuant to section 6(b) of the Act on March 13, 1989. A correction notice was published on April 20, 1989.

The last notification was filed with the Department on March 23, 1993. A notice was published in the Federal Register pursuant to Section 6(b) of the Act on April 22, 1993 (58 FR 21597).

Joseph H. Widmar, Director of Operations, Antitrust Division.

National Foundation on the Arts and the Humanities

Music Advisory Panel; Meeting

Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Public Law 92-463), as amended, notice is hereby given that a meeting of the Music Advisory Panel (Professional Training/Career Development Section) to the National Council on the Arts will be held on March 1-2, 1994 from 9 a.m. to 5:30 p.m. This meeting will be held in room M-14, at the Nancy Hanks Center, 1100 Pennsylvania Avenue NW, Washington, DC 20506.

A portion of this meeting will be open to the public from 3:30 p.m. to 5:30 p.m. on March 2, 1994 for a policy discussion and guideline review.

The remaining portions of this meeting from 9 a.m. to 5:30 p.m. on March 1, 1994 and from 9 a.m. to 3:30 p.m. on March 2, 1994 are for the purpose of Panel review, discussion, evaluation, and recommendation on applications for financial assistance under the National Foundation on the Arts and the Humanities Act of 1965, as amended, including information given in confidence to the agency by grant applicants. In accordance with the determination of the Chairman of November 24, 1992, these sessions will be closed to the public pursuant to subsection (c)(4), (6) and (8)(B) of section 552b of title 5, United States Code.

Any person may observe meetings, or portions thereof, of advisory panels which are open to the public, and may be permitted to participate in the panel's discussions at the discretion of the panel chairman and with the approval of the full-time Federal employee in attendance.

If you need special accommodations due to a disability, please contact the Office of Special Constituencies, National Endowment for the Arts, 1100 Pennsylvania Avenue NW, Washington, DC 20506. TTY 202/682-5496, at least seven (7) days prior to the meeting.

Further information with reference to this meeting can be obtained from Ms. Yvonne Sabine, Committee Management Officer, National Endowment for the Arts, Washington, DC 20506, or call 202/682-5439.


Yvonne M. Sabine, Director, Office of Panel Operations, National Endowment for the Arts.

Amended Notice of Meeting; Arts in Education Advisory Panel; Scheduling of Open Sessions for Arts in Education Partnership Panel Meeting: Correction

SUMMARY: This notice corrects the scheduling of opening sessions for the Arts in Education Advisory Panel (Arts in Education Partnership Section) previously published in the Federal Register on January 28, 1994 (59 FR 4117).

The open sessions will be held from 9 a.m. to 9:15 a.m. on February 16, 1994 for welcome and introductions and from 9 a.m. to 10 a.m. and 1 p.m. to 2 p.m., on February 18, 1994 for policy discussions. The meeting location, the Nancy Hanks Center, 1100 Pennsylvania Avenue NW., Washington, DC 20506, in room M-07, remains unchanged.

The date and times for the meeting also remain unchanged: February 16-18, 1994, from 9 a.m. to 6:15 p.m. on February 16, 1994; from 9 a.m. to 8:30 p.m. on February 17, 1994; and from 9 a.m. to 4 p.m. on February 18, 1994.


Yvonne M. Sabine, Director, Office of Panel Operations, National Endowment for the Arts.

Performance Review Board

AGENCY: National Endowment for the Humanities.

ACTION: Notice.

SUMMARY: This notice announces membership in the Performance Review Board of the National Endowment for the Humanities.

FOR FURTHER INFORMATION CONTACT: Timothy G. Connelly, Director of Personnel, National Endowment for the Humanities, 1100 Pennsylvania Avenue NW., Washington, DC 20506.

Effective January 27, 1994, the new members of the National Endowment for the Humanities SES Performance Review Board who will serve until December 31, 1996 are: George Farr, Director, Division of Preservation and Access—Board Chairman, Carole
Implement the power increase, the temperatures. Upon attempting to power level and reduced operating reactor coolant temperature specifications to reflect the planned operation of Wolf Creek at the higher power level and reduced operating temperatures. Upon attempting to implement the power increase, the licensee discovered that the unit was unable to achieve 3565 MWt at the reduced operating temperatures. The reduced operating temperature specifications had resulted in an effective derating of the unit. Considering that the unit is being limited to less than the allowable licensed power level, the staff is issuing this notice under exigent circumstances.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations. Pursuant to 10 CFR 50.91(a)(6) for amendments to be granted under exigent circumstances, the NRC staff must determine that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(e), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated. The probability of occurrence and the consequences of an accident evaluated previously in the USAR [Updated Safety Analysis Report] are not increased due to the proposed technical specification change. Plant operation at 3565 MWt with the revised temperatures does not affect any of the mechanisms postulated in the USAR to cause LOCA [Loss of Coolant Accident] or non-LOCA designs basis events. Analyses, evaluations, and minimum DNBR [Departure from Nucleate Boiling Ratio] calculations confirm that the USAR conclusions remain valid for the proposed changes. On these bases it is concluded that the probability and consequences of the accidents previously evaluated in the USAR are not increased.

2. The proposed change does not create the possibility of a new or different kind of accident from any previously evaluated. The proposed technical specification changes do not increase the probability of occurrence of a malfunction of equipment important to safety or increase the consequences of a malfunction of equipment evaluated in the USAR. The technical specification changes do not create the possibility of a new or different kind of accident from any accident previously evaluated because the change in operating $T_{tho}$ will not impose a new operating configuration that would create new failure scenario. The proposed changes do not change the plant configuration in a way that introduces a new potential hazard to the plant and do not involve a significant reduction in the margin of safety. No new failure modes will be created by the proposed changes for any plant equipment. Operation with a 6°F — 5°F $T_{tho}$ reduction is bounded by the analyses performed previously for the power rerate and approved by the NRC in Amendment No. 69 to the WCGS (Wolf Creek Generating Station) Technical Specifications on November 10, 1993, and does not create a new or unanalyzed condition. For these reasons, the possibility of a new accident which is different from any already evaluated in the USAR is not created.

3. The proposed change does not involve a significant reduction in the margin of safety. The analyses and evaluations discussed in the safety evaluation demonstrate that all applicable safety analysis acceptance criteria continue to be met for the proposed operating conditions. The change in operating $T_{tho}$ does not involve a significant reduction in a margin of safety because the operating temperature is one of the inherent assumptions that determines the safe operating range defined by the accident analyses, which are in turn protected by the technical specifications. The coincidence criteria for the accident analyses are conservative with respect to the operating conditions defined by the technical specifications. The analyses performed for the power rerate and this proposed change confirm that the accident analyses criteria are met at the revised configuration. Therefore, it is concluded that the proposed change does not involve a reduction in a margin of safety described in the bases to any technical specification. The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within 15 days after the date of
publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 15-day notice period. However, should circumstances change during the notice period, such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 15-day notice period, provided that its final determination is that the amendment involves no significant hazardous consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish in the Federal Register a notice of issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this Federal Register notice. Written comments may also be delivered to room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555.

The filing of requests for hearing and petitions for leave to intervene is discussed below.

By March 17, 1994, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714 which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555 and at the local public document room located at Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801, and Washburn University School of Law Library, Topeka, Kansas 66621. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely in proving the contention at the hearing. The petition must also provide evidence as to the nature and extent of the petitioner's interest. The petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Jay Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street NW.
Draft NUREG: Issuance, Availability

On May 21, 1991, the Nuclear Regulatory Commission (NRC) published a revision to 10 CFR part 20, "Standards for Protection Against Radiation." The rule became effective in February 1994. For the Nuclear Regulatory Commission.

William D. Reckley,
Project Manager, Project Directorate IV–2,
Division of Reactor Projects III/IV/V; Office of Nuclear Reactor Regulation.

[FR Doc. 94-3464 Filed 2-14-94; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

Request Under Review by Office of Management and Budget

Agency Clearance Officer: John J. Lane, (202) 942-8800.

Upon written request copy available from: Securities and Exchange Commission, Office of Filing, Information, and Consumer Services, 450 5th Street, NW., Washington, DC 20549.

Revised

Mutual Funds Focus Group: File No. 270-

6112.

A free single copy of draft NUREG–6112, may be requested by those considering public comment by writing to the U.S. Nuclear Regulatory Commission, Washington, DC 20555.

Comments on the draft report should be sent to the Chief, Rules Review and Directives Branch, Division of Freedom of Information and Publications Services, Mail Stop P–223, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Copies of the comments received may be examined at the NRC Public Document Room at 2120 L Street NW. (Lower Level), Washington, DC. Comments will be most helpful if they are received by June 30, 1994.

For further information contact George E. Powers, Radiation Protection and Health Effects Branch, Mail Stop NL–139, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone (301) 492–3747.

Dated at Rockville, Maryland, this 18th day of January, 1994.

For the Nuclear Regulatory Commission.

Bill M. Morris,
Director, Division of Regulatory Applications, Office of Nuclear Regulatory Research.

BILLING CODE 7590-01-M

WASHINGTON, DC 20037, attorney for the licensee.

Non timely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i–v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated February 7, 1994, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the local public document rooms, located at Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801, and Washburn University School of Law Library, Topeka, Kansas 66621.

Dated at Rockville, Maryland, this 8th day of February 1994. for the Nuclear Regulatory Commission.

William D. Reckley,
Project Manager, Project Directorate IV–2,
Division of Reactor Projects III/IV/V; Office of Nuclear Reactor Regulation.

[FR Doc. 94–3464 Filed 2–14–94; 8:45 am am]

[Page 2298–2300]

BILLING CODE 7590–01–M

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[FR Doc. 94–3464 Filed 2–14–94; 8:45 am]

BILLING CODE 7590–01–M

SECURITIES AND EXCHANGE COMMISSION

Request Under Review by Office of Management and Budget

Agency Clearance Officer: John J. Lane, (202) 942–8800.

Upon written request copy available from: Securities and Exchange Commission, Office of Filing, Information, and Consumer Services, 450 5th Street, NW., Washington, DC 20549.

Revised

Mutual Funds Focus Group: File No. 270–386.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for approval on revisions to currently approved focus group sessions.

The purpose of these sessions is to obtain information regarding the public's understanding of the risks involved when purchasing mutual funds from a bank. The results will be used by the agency to get a sense from the public on their understanding of the level of risk involved when purchasing mutual funds sold through banks. The focus group sessions are estimated to

Washington, DC 20037, attorney for the licensee.

Non timely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the presiding Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i–v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated February 7, 1994, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC 20555, and at the local public document rooms, located at Emporia State University, William Allen White Library, 1200 Commercial Street, Emporia, Kansas 66801, and Washburn University School of Law Library, Topeka, Kansas 66621.

Dated at Rockville, Maryland, this 8th day of February 1994. for the Nuclear Regulatory Commission.

William D. Reckley,
Project Manager, Project Directorate IV–2,
Division of Reactor Projects III/IV/V; Office of Nuclear Reactor Regulation.

[FR Doc. 94–3464 Filed 2–14–94; 8:45 am]

[Page 2298–2300]

BILLING CODE 7590–01–M

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Mutual Funds Focus Group: File No. 270–386.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget a request for approval on revisions to currently approved focus group sessions.

The purpose of these sessions is to obtain information regarding the public's understanding of the risks involved when purchasing mutual funds from a bank. The results will be used by the agency to get a sense from the public on their understanding of the level of risk involved when purchasing mutual funds sold through banks. The focus group sessions are estimated to
require 3.15 burden hours per participant.

General comments regarding the estimated burden hours should be directed to Gary Waxman at the address below. Any comments concerning the accuracy of the estimated burden hours for compliance with Commission rules and forms should be directed to John J. Lane, Associate Executive Director, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549 and Gary Waxman, Clearance Officer, Office of Information and Regulatory Affairs (Paperwork Reduction Act number 3235-0440), Office of Management and Budget, room 3208, New Executive Office Building, Washington, DC 20503.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94–3424 Filed 2–14–94; 8:45 am]
BILLING CODE 9010–01–M


Self-Regulatory Organizations; The Depositary Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Foreign Currency Redemption Service

February 8, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act”), notice is hereby given that on October 12, 1993, The Depository Trust Company ("DTC") filed with the Securities Exchange Commission ("Commission") the proposed rule change (File No. SR–DTC–93–10) as described in Items I, II, and III below, which items have been prepared primarily by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change consists of enhancements to DTC’s foreign currency payment service to provide for a foreign currency redemption service.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, DTC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. DTC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

DTC’s current foreign currency payment service enables participants to elect to receive periodic interest payments on certain foreign currency denominated issues either through DTC in U.S. dollars or directly from the paying agent in the currency in which the issue is denominated. The purpose of the proposed rule change is to enable participants to make the same election for maturity or redemption payments on those foreign currency denominated issues for which the foreign currency redemption service is made available with the agreement of the paying agent.

When a participant wishes to receive maturity or redemption proceeds in foreign currency on all or part of its position in a foreign currency denominated issue, the participant will utilize DTC’s Participant Terminal System to submit instructions to DTC (including an instruction on where to wire the foreign currency proceeds). DTC will forward the instructions to the paying agent. DTC will pay the appropriate amount of U.S. currency proceeds to the participant, and the paying agent will pay the appropriate amount of foreign currency proceeds directly to the participant or its customer. A participant that wishes to be paid the maturity or redemption proceeds on its entire position in U.S. currency will not have to take any action.

The proposed rule change is consistent with the requirements of the Act, particularly section 17A of the Act, and the rules and regulations thereunder applicable to DTC because the proposed rule change will encourage the immobilization of foreign currency denominated issues in DTC. The proposed rule change will be implemented consistently with the safeguarding of securities and funds in DTC’s custody or control or for which it is responsible because the proposed rule change will enhance DTC’s existing services for foreign currency denominated issues.


B. Self-Regulatory Organization’s Statement on Burden on Competition

DTC perceives no impact on competition by reason of the proposed rule change.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

DTC has neither solicited nor received any written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e)(4) of Securities Exchange Act Rule 19b–4 because the proposed rule change effects changes in existing services of DTC that (i) do not adversely affect the safeguarding of securities or funds in the custody or control of DTC or for which it is responsible and (ii) do not significantly affect the respective rights or obligations of DTC or persons using the services.

At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal
A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

(a) The purpose of the proposed rule change is to provide an alternate means for participants to satisfy their obligation to provide DTC with a short position penalty. When a participant incurs a short position, DTC now imposes a cash penalty of 130% of the market value of the short securities. The cash DTC receives is invested and earns interest. The interest earned is returned to participants at periodic intervals during the year as part of the general refund. Under the proposed rule change, interest earned on pledged securities will be automatically credited to participants' accounts (as is currently the procedure for all pledged securities positions). The proposed rule change thereby will provide participants with a more efficient method to receive interest income. By allowing participants to pledge government securities to DTC to replace cash deposits, the proposed rule change will improve participants' cash management abilities.

Under the proposal, participants could pledge government securities residing in their DTC "free" accounts to DTC as collateral to replace cash deposits to cover outstanding NDFS short positions. Only short positions aged thirty calendar days or more will be considered eligible for collateralization. Initially, only DTC-eligible U.S. Treasury issues (Treasury bills, bonds, and notes) which are fully guaranteed by the U.S. government will be accepted as collateral.

Each day, DTC will inform each participant of its short positions aged thirty days or older as of the close of the previous business day. The participant could then enter a request over DTC's Participant Terminal System (PTS) to pledge government securities to a newly established DTC pledge account in order to have its short charges reversed. The pledge system will verify that the securities being pledged are eligible for collateralization before the pledge is allowed to update into DTC's system.

The value of participants' securities short positions and pledged securities will be marked to the market on a daily basis, and short charges will be adjusted accordingly. Participants may pledge additional securities to cover an increase in their aggregate short charges or request a release of pledged securities which are no longer needed to cover their aggregate short charges.

A participant may request a release of collateral. In that instance, the securities would be returned to the "free" account at the end of the processing day, and the short charges would be reinstated the following day. The participant may also substitute pledged securities. After inputting the new pledge and the release request, the participant will contact the Reconciliation Department prior to 12:30 p.m. to request a release approval.

If pledged securities are redeemed, DTC will hold the redemption proceeds in a suspense account until the pledged securities are released and moved to the participant's "free" account. At that time, the redemption proceeds are credited to participants' settlement accounts. If pledged government securities are called for redemption, the participant must release the pledge and move the securities to a "free" account. Interest earned on pledged securities will be automatically credited to participants' accounts.

(b) The proposal is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable to DTC since the proposed rule change will give DTC participants greater flexibility in collateralizing their short positions. At the same time the proposal will continue to provide DTC with high quality collateral for short positions.

B. Self-Regulatory Organization's Statement on Burden on Competition

DTC does not believe that the proposed rule change imposes any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

DTC's Short Position Advisory Committee, composed of members representing DTC participants, has reviewed the proposed rule change and supports its approval. No official comments have been solicited or received. DTC will notify the Commission of any written comments received by DTC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period: (i) as the Commission may designate up to ninety days of such date if it finds...
January 7, 1994, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission, and published its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve the proposed rule change or
B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of such submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization. All submissions should refer to File No. SR—DTC—94—2 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94—3483 Filed 2—14—94; 8:45 am]

BILLING CODE 8010—01—M

[Release No. 34—35959; File No. SR—MCC—94—1]

Self-Regulatory Organizations; Midwest Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Processing of Basket Trades

February 8, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), notice is hereby given that on January 7, 1994, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by MCC. The Commission is publishing this notice to solicit comments from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Midwest Clearing Corporation ("MCC") proposes to amend its rules relating to the processing of trades in the Chicago Basket ("CXM"). A detailed description of the CXM is contained in File No. SR—CHX—93—18, and a detailed description of the current procedure for processing CXM trades is contained in File No. SR—MCC—93—3.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MCC included statements concerning the purpose of and statutory basis for the proposed rule change and discussed any comments it received on the proposal. The text of these statements may be examined at the places specified in Item IV below. MCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to amend MCC’s rules relating to the processing of trades in the CXM. The CXM is a basket of stocks that is comprised of the stocks included in the Chicago Mercantile Exchange’s MMI stock index futures contract and is comprised of a fixed quantity of twenty-five shares of each of the stocks included in that futures contract. Basket trades are defined by MCC as trades in a group of securities that an exchange or market place Self-Regulatory Organization ("SRO") has designated as eligible for execution in a single trade. MCC’s current rules relating to basket trades permit MCC to accept from an exchange or market place SRO locked-in basket trade data. On T+1, MCC reports the locked-in basket trades to participants on a basket trade and sales report. MCC separately combines, by participant, all basket buy transactions and all basket sell transactions. Aggregate buy side and aggregate sell side basket transactions are then “burst” into their component securities for clearance and settlement. The continuous net settlement ("CNS") system nets all component securities.

This results in an individual participant being either a net buyer or a net seller in each of a basket’s component securities.

The component securities are CNS eligible and are reflected on the appropriate CNS purchase and sales report. "Burst" basket trades are netted with all other transactions in the same component security having the same settlement.

The proposed rule will provide an alternative clearing process for trades in the CXM. The alternative must be elected on an account-by-account basis (as opposed to a trade-by-trade basis). Under this alternative, rather than aggregating all buy transactions and all sell transactions in one account prior to the separation of the CXM into its component stocks, MCC will separate each basket transaction, as executed, into its component securities, by lot, without the aggregation process. MCC will report this information to the electing participant instead of the participant’s aggregate net buy and aggregate net sell basket information. This new alternative will make it easier for participants to allocate the correct number of shares to customers and will make it easier to identify trades for cancellation and correction.

Because the proposed rule change will facilitate the prompt and accurate clearance and settlement of securities transactions, it is consistent with the requirements of Section 17A of the Act.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

MCC believes that no burden will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No comments were received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within thirty-five days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory
organization consents, the Commission will:
(A) By order approve the proposed rule change or
(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments
Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the principal office of MCC. All submissions should refer to File No. SR-MCC-94-1 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority. Margaret H. McFarland, Deputy Secretary.

[FR Doc. 94-3477 Filed 2-14-94; 8:45 am]
BILLING CODE 8010-01-M

[Release No. 34-33601; File No. SR-MCC-93-10]

Self-Regulatory Organizations; Midwest Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Extend the Waiver of Certain Fees Associated With the Chicago Basket

February 8, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),1 notice is hereby given that on December 23, 1993, the Midwest Clearing Corporation ("MCC") filed with the Securities and Exchange Commission ("Commission" or "Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared substantially by MCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

MCC proposes to amend a portion of its Services and Schedule of Charges by extending the waiver of certain fees for trades in the Chicago Basket product2 through March 31, 1994.3 The text of the proposed rule change is as follows:

ACCOUNT MAINTENANCE

<table>
<thead>
<tr>
<th>Fee</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participant Account Maintenance Fee:</td>
<td>$170.00</td>
</tr>
<tr>
<td>(Local and Out of Town Accounts)</td>
<td></td>
</tr>
<tr>
<td>(Specialist, Trading and Market Maker Accounts)</td>
<td>160.00</td>
</tr>
<tr>
<td>Secondary Account:</td>
<td></td>
</tr>
<tr>
<td>(Specialist, Trading and Market Maker Accounts)</td>
<td>125.00</td>
</tr>
<tr>
<td>MCC Only Settlement Fee</td>
<td>200.00</td>
</tr>
</tbody>
</table>


Trade Recording

In addition, a discount of $0.15 per trade side recorded will be applied to the trade recording fees for trades of 1,000 shares or larger when a participant exceeds 10,000 recorded trade sides each month (excluding inbound RIO trades).


II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, MCC included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. MCC has prepared summaries, set forth in section (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule change is to extend the waiver of account maintenance and trade recording fees for trades in the Chicago Basket through March 31, 1994. The proposed rule change is consistent with Section 17A of the Act in that it provides for the equitable allocation of reasonable fees and other charges among participants using MSTC's facilities.

(B) Self-Regulatory Organization's Statement on Burden on Competition

MCC believes that no burden will be placed on competition as a result of the proposed rule change.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No comments were received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii)4 of the Act and subparagraph (o)(2) of Rule 19b-45 thereunder because it establishes or changes a due, fee, or other charge of the self-regulatory organization. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submission should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington DC 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication relating to the proposed rule change between the Commission and any person, other than those that

may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of MCC. All submissions should refer to File No. SR–MCC–93–10 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, Pursuant to delegated authority.8
Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94–3482 Filed 2–14–94; 8:45 am]
BILLING CODE 8010–01–M


Self–Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to a Reduction of NSCC’s Trade Comparison and Trade Recording Service Fees

February 8, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), notice is hereby given that on December 28, 1993, the National Securities Clearing Corporation (“NSCC”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared substantially by NSCC. NSCC amended the proposal on December 19, 1993.2 The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self–Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change reduces NSCC’s trade comparison and trade recording service fees.

II. Self–Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. NSCC prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self–Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Under the proposal, NSCC is reducing its trade comparison and trade recording service fees and the associated minimum and maximum fees participants will be charged. Currently, the trade comparison and trade recording fees are $0.25 and $0.20 per 100 shares, respectively. Under the revised fee structure, the fees will be $0.18 and $0.15, respectively. The maximum trade comparison fee is reduced from $10 to $7.02 and the minimum trade recording from $08 to $06. The maximum trade comparison fee is reduced from $1.875 to $1.35 and the minimum trade recording from $1.50 to $1.125. All fee changes became effective January 1, 1994. Higher trading volumes have resulted in significantly increased discounts being paid by NSCC to members. NSCC’s discount has been averaging 41.6%. With the foregoing changes, the expected discount will be approximately 32.2%.

The proposed rule change relates to the equitable allocation of reasonable dues, fees, and other charges among members and is therefore consistent with the Act and in particular with Section 17A thereunder.

(B) Self–Regulatory Organization’s Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have an impact on or impose a burden on competition.

(C) Self–Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments have been solicited or received. NSCC will notify the Commission of any written comments it receives.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change became effective pursuant to section 19(b)(3)(A)(ii) of the Act3 and Rule 19b–4(e)(2)4 thereunder by reason of a change in a fee, or other charge of the self–regulatory organization. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purpose of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submissions, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communication relating to the proposed change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal offices of NSCC. All submissions should refer to file number SR–NSCC–93–15 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegate authority.5
Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94–3478 Filed 2–14–94; 8:45 am]
BILLING CODE 8010–01–M


Self–Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Guidelines Regarding the Use of Rankings in Mutual Fund Advertisements and Sales Literature

February 9, 1994.


10 Letter from Susan J. Miller, Associate Counsel, NSCC, to Jerry Carpenter, Branch Chief, Division of Market Regulation, Commission (December 28, 1993).
hereby given that on November 22, 1993, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to adopt Guidelines Regarding the Use of Rankings in Mutual Fund Advertisements and Sales Literature. Below is the text of the proposed rule change. Proposed new language is italicized.

Guidelines for the Use of Rankings in Mutual Fund Advertisements and Sales Literature

I. Definition of "Ranking Entity"

For purposes of these guidelines, the term "Ranking Entity" refers to any entity that provides general information about mutual funds to the public, that is independent of the mutual fund and its affiliates, and whose services are not procured by the mutual fund or any of its affiliates to assign the fund a ranking. Examples of "Ranking Entities" include services such as Morningstar and Lipper and financial publications such as Money and Barron's.

II. Required Disclosures

A. Headlines/Prominent Statements

1. A headline or other prominent statement must not state or imply that a mutual fund is the best performer in a category unless it is actually ranked first in the category.

2. Prominent disclosure of the mutual fund's ranking, the total number of mutual funds in the category, the name of the category, and the period on which the ranking is based (i.e., the length of the period and the ending date; or, the first day of the period and the ending date), must appear in close proximity to any headline or other prominent statement that refers to a ranking.

B. All advertisements and sales literature containing a mutual fund ranking must disclose, with respect to the ranking:

1. the name of the category (e.g., growth funds);
2. the number of funds in the category;
3. the name of the Ranking Entity;
4. the length of the period and the ending date, or, the first day of the period and the ending date;
5. criteria on which the ranking is based;
6. for load funds, whether the ranking takes into account sales charges;
7. if fees have been waived or expenses advanced during the period on which the ranking is based, and the waiver or advancement had a material effect on the ranking, a statement to that effect; and
8. the publisher of the ranking data (e.g., "ABC Magazine, June 1993").

The disclosure required by B1, B2 and B3 must be set forth prominently in the body of the advertisement or sales literature.

C. If the mutual fund ranking consists of a symbol (e.g., a star system) rather than a number, the advertisement or sales literature also must disclose the meaning of the symbol (e.g., a four-star ranking indicates that the fund is in the top 30% of all mutual funds).

D. All advertisements and sales literature containing a mutual fund ranking must disclose that past performance is no guarantee of future results.

III. Time Periods

A. Any mutual fund ranking set forth in an advertisement or sales literature must be, at a minimum, current to the most recent calendar quarter ended prior to the submission for publication.

B. Except for money market mutual funds:

1. advertisements and sales literature must not use any ranking based on a period of less than one year.
2. a mutual fund ranking based on total return must be accompanied by rankings based on total return for the one, five and ten year periods (or life of the fund) supplied by the same Ranking Entity in the category and based on the same time period; and
3. a mutual fund ranking based on the current SEC standardized yield must be accompanied by rankings based on total return for the one, five and ten year periods (or life of the fund) supplied by the same Ranking Entity in the category and based on the same time period.

IV. Categories

A. The choice of category (including a subcategory of a broader category) on which the mutual fund ranking is based must be one that provides a sound basis for evaluating the performance of the fund.

B. Subject to the standards below, a mutual fund ranking must be based only on (1) a published category or subcategory created by a Ranking Entity or (2) a category or subcategory created by a fund or a fund affiliate, but based on the performance measurements of a Ranking Entity.

C. When the mutual fund ranking is based on a subcategory, the advertisement or sales literature must disclose the name of the full category and the fund's ranking and the number of funds in the full category. This requirement does not apply if the subcategory is (1) based solely on the investment objectives of the funds included and (2) created by a Ranking Entity. This disclosure could be included in a footnote.

D. The advertisement or sales literature must not use any category or subcategory that is based upon the mutual funds' asset size (whether or not it has been created by a Ranking Entity).

E. If an advertisement uses a category created by the mutual fund or a fund affiliate, including a "subcategory" of a category established by a Ranking Entity, the advertisement must prominently disclose:

1. the fact that the fund or its affiliate has created the ranking category;
2. the number of funds in the category;
3. the basis for selecting the category; and
4. the Ranking Entity that developed the research on which the ranking is based.

E. An advertisement or sales literature containing a headline or other prominent statement that proclaims a mutual fund ranking created by a fund or its affiliate must indicate, in close proximity to the headline or statement, that the mutual fund ranking is based upon a category created by the fund or its affiliate.

V. Multiple Class/Two-Tier Funds

Mutual Fund rankings for more than one class or fund with the same portfolio must be accompanied by prominent disclosure of the fact that the funds or classes have a common portfolio.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.
(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Ranking entities, mutual funds and fund affiliates categorize and rank mutual funds in various ways such as, for example, according to fund type, performance over a given period of years, total return, SEC standardized yield, with and without sales charges and risk/reward. Article III, Section 35(d)(2)(M) of the NASD Rules of Fair Practice1 sets forth the specific standard in communications with the public that a member who makes investment comparisons, directly or indirectly, must ensure that the purpose of the communication is clear and that the comparison is fair and balanced, including any material differences between the subjects of the comparisons. The use of mutual fund rankings prepared by ranking entities, mutual funds and fund affiliates to demonstrate mutual fund performance qualifies as such a comparison.

As the number of mutual funds has increased substantially in recent years, so have the number of mutual fund ranking entities. As the number of ranking entities has increased, the NASD has observed an increased reference to mutual fund rankings in fund advertisements and sales literature. In response to the increasing reference by mutual fund groups to such mutual fund rankings in mutual fund advertisements and sales literature, the NASD determined to provide guidance on the use of fund rankings and is proposing a comprehensive set of guidelines to be used when mutual fund advertisements and sales literature include references to mutual fund rankings.

Guidelines for Use of Rankings in Advertising and Sales Literature

Definition of Ranking Entity

The term “Ranking Entity,” for purposes of the Guidelines, refers to an entity that provides general mutual fund information to the public. It is independent of the fund and its affiliates2 and whose services are not used by the fund or its affiliates to assign the fund a ranking. The definition encompasses entities formed specifically to provide such information as well as financial publications and periodicals which include such a service in their publications.

Required Disclosures

The Guidelines contain certain required disclosures. All advertisements and sales literature containing a ranking must disclose the name of the mutual fund category, the number of funds in the category, the name of the Ranking Entity, the period on which the ranking is based, the criteria on which the fund is ranked, whether, for load funds, the ranking takes into account sales charges, a statement as to the material effect, if any, of fees waived or expenses advanced during the period for which the ranking is based, and the publisher of the ranking data. Disclosure of the publisher allows the reader to obtain further information, if desired.

Additionally, because prominent statements often command the same attention as headlines, the name of the mutual fund category, the total number of funds in the category, and the period on which the ranking is based must be disclosed in close proximity to any headline or prominent statement. Such statement or headline may not state or imply that a fund is ranked first in a category when it is not.

All advertising or sales literature using a ranking system consisting of a symbol must disclose the meaning of the symbol. Finally, all advertising and sales literature containing a ranking must disclose that past performance is no guarantee of future results.

Time Periods

The NASD believes that the use of rankings which are current reduces the possibility that such rankings will be deceptive or misleading. The NASD recognizes that different Ranking Entities provide rankings with varying frequencies, but believes that the industry should be provided with a minimum standard of what is current. Therefore, rankings should be at least current to the most recent calendar quarter, though use of more current ranking data would be permissible. The NASD believes that the current standard of the most recent calendar quarter is reasonable and not misleading.

The NASD is concerned about a member's ability to select a ranking based on a time period that would show the fund in the best light without providing balancing information. Thus, the NASD believes that, for all mutual funds except money market mutual funds, rankings based on a period of less than one year are not meaningful, could be misleading and, therefore, should not be used. Additionally, rankings based on either total return or the SEC standardized yield must be accompanied by rankings based on the total return for the one, five and ten year (or mutual fund life) periods supplied by the same Ranking Entity and must be based on the same time period. This requirement parallels the SEC requirement that performance information must be accompanied by one, five and ten year (or mutual fund life) total return performance figures.

Categories

Recognizing the many ways in which data on mutual fund performance can be presented, the NASD believes it is important to set standards for methods of fund categorization which provide a sound basis for evaluating the performance of a fund. Generally, advertisements and sales literature must use only categories or subcategories created by the Ranking Entities. Advertisements or sales literature using rankings based only on a subcategory must disclose the name of the full category, the fund's ranking and the number of funds in the full category, unless the subcategory is based solely on the investment objectives of the funds and is created by a Ranking Entity.

However, categories or subcategories created by a fund or fund affiliate may be used as long as performance is measured by the performance measurements of a Ranking Entity. Additionally, categories or subcategories created by a fund or its affiliate must also prominently disclose the fact that the fund or its affiliate has created the ranking category, the number of funds in the category, the basis for selecting the category, and the identity of the Ranking Entity that developed the research on which the ranking is based.

Headlines and prominent statements using a ranking created by a fund or its affiliate must also disclose in close proximity to the headline or prominent statement that the ranking is based on a category created by the fund or its affiliate.

Finally, advertisements or sales literature may not use any ranking category based on the fund's asset size since such information would not provide a meaningful basis upon which the fund's performance could be evaluated.

Multiple Class/Two-Tier Funds

Advertisements or sales literature containing rankings for more than one class or fund with the same portfolio must disclose the fact that the funds or classes have a common portfolio.
The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act in that the guidelines will work to protect investors and the public interest by establishing a baseline of standards to guide the use of mutual fund rankings in advertising and sales literature in promoting the sale of mutual funds and by preventing the misleading use of such rankings.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Guidelines, which are not subject to NASD member vote, were circulated to members in NASD Notice to Members 93-76 (November 1993). Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register, or within such longer period as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or
B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File Number SR–NASD–93–69 and should be submitted by March 8, 1994.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30–3(a)(12).

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94–3425 Filed 2–14–94; 8:45 am]
BILLING CODE 8010–01–M


Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Guidelines for Communications to the Public About Variable Life and Annuity Products

February 9, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), 15 U.S.C. 78s(b)(1), notice is hereby given that on January 6, 1994, the National Association of Securities Dealers, Inc. (“NASD” or “Association”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) and amended on February 8, 1994, the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to adopt Guidelines Regarding Communications With the Public About Variable Life and Annuity Products. Below is the text of the proposed rule change. Proposed new language is italicized.

Guidelines for Communications With the Public About Variable Life Insurance and Variable Annuities

The standards governing communications with the public are set forth in Article III, Section 35 of the NASD Rules of Fair Practice. In addition to those standards, these guidelines must be considered in preparing advertisements and sales literature about variable life insurance and variable annuities. The guidelines are applicable to advertisements and sales literature as defined in Section 35, as well as individualized communications such as personalized letters and computer generated illustrations, whether printed or made available on screen.

I. General Considerations

A. Product Identification

In order to assure that investors understand exactly what security is being discussed, all communications must clearly describe the product as either a variable life insurance policy or a variable annuity, as applicable. Member firms may use proprietary names in addition to this description. In cases where the proprietary name includes a description of the type of security being offered, there is no requirement to include a generalized description. For example, if the material includes a name such as the “XYZ Variable Life Insurance Policy,” it is not necessary to include a statement indicating that the security is a variable life insurance policy.

Considering the significant differences between mutual funds and variable products, the presentation must not represent or imply that the product being offered or its underlying account is a mutual fund.

B. Liquidity

Considering that variable life insurance and variable annuities frequently involve substantial charges and/or tax penalties for early withdrawals, there must be no representation or implication that these are short-term, liquid investments. Presentations regarding liquidity or ease of access to investment values must be balanced by clear language describing the negative impact of early redemptions. Examples of this negative impact may be the payment of contingent deferred sales loads and tax penalties, and the fact that the investor may receive less than the original invested amount.

With respect to variable life insurance, discussions of loans and withdrawals must explain their impact on cash values and death benefits.

C. Claims About Guarantees

Insurance companies issuing variable life insurance and variable annuities provide a number of specific guarantees. For example, an insurance company
may guarantee a minimum death benefit for a variable life insurance policy or the company may guarantee a schedule of payments to a variable annuity owner. Variable life insurance policies and variable annuities may also offer a fixed investment account which is guaranteed by the insurance company. The relative safety resulting from such a guarantee must not be overemphasized or exaggerated as it depends on the claims-paying ability of the issuing insurance company. There must be no representation or implication that a guarantee applies to the investment return or principal value of the separate account. Similarly, it must not be represented or implied that an insurance company’s financial ratings apply to the separate account.

II. Specific Considerations

A. Fund Performance Predating Inclusion in the Variable Product

In order to show how an existing fund would have performed had it been an investment option within a variable life insurance policy or variable annuity, communications may contain the fund’s historical performance that predates its inclusion in the policy or annuity. Such performance may only be used provided that no significant changes occurred to the fund at the time or after it became part of the variable product. However, communications may not include the performance of an existing fund for the purposes of promoting investment in a similar, but new, investment option (i.e., clone fund or model fund) available in a variable contract.

The presentation of historical performance must conform to applicable NASD and SEC standards. Particular attention must be given to including all elements of return and deducting applicable charges and expenses.

B. Product Comparisons

A comparison of investment products may be used provided the comparison complies with applicable requirements set forth under Article III, Section 35 of the NASD Rules of Fair Practice. Particular attention must be paid to the specific standards regarding “comparisons” set forth in subsection (d)(2)(M).

C. Use of Rankings

A ranking which reflects the relative performance of the separate account or the underlying investment option may be included in advertisements and sales literature provided its use is consistent with the standards contained in the Guidelines for the Use of Rankings in Mutual Fund Advertisements and Sales Literature.

D. Discussions Regarding Insurance and Investment Features of Variable Life Insurance

Communications on behalf of single premium variable life insurance may emphasize the investment features of the product provided an adequate explanation of the life insurance features is given. Sales material for other types of variable life insurance must provide a balanced discussion of these features.

E. Hypothetical Illustrations of Rates of Return in Variable Life Insurance Sales Literature and Personalized Illustrations

(1) Hypothetical illustrations using assumed rates of return may be used to demonstrate the way a variable life insurance policy operates. The illustrations show how the performance of the underlying investment accounts could affect the policy cash value and death benefit. These illustrations may not be used to project or predict investment results as such forecasts are strictly prohibited by the Rules of Fair Practice. The methodology and format of hypothetical illustrations must be modeled after the required illustrations in the prospectus.

An illustration may use any combination of assumed investment returns up to and including a gross rate of 12%, provided that one of the returns is a 0% gross rate. Although the maximum assumed rate of 12% may be acceptable, members are urged to assure that the maximum rate illustrated is reasonable considering market conditions and the available investment options. The purpose of the required 0% rate of return is to demonstrate how a lack of growth in the underlying investment accounts may affect policy values and to reinforce the hypothetical nature of the illustration.

The illustrations must reflect the maximum (guaranteed) mortality and expense charges associated with the policy for each assumed rate of return. Current charges may be illustrated in addition to the maximum charges.

Preceding any illustration there must be a prominent explanation that the purpose of the illustration is to show how the performance of the underlying investment accounts could affect the policy cash value and death benefit. The explanation must also state that the illustration is hypothetical and may not be used to project or predict investment results.

(2) In sales literature which includes hypothetical illustrations, member firms may provide a personalized illustration which reflects factors relating to the individual customer’s circumstances. A personalized illustration may not contain a rate of return greater than 12% and must follow all of the standards set forth in Section II, E, 1.

(3) In general, it is inappropriate to compare a variable life insurance policy with another product based on hypothetical performance as this type of presentation goes beyond the singular purpose of illustrating how the performance of the underlying investment accounts could affect the policy cash value and death benefit. It is permissible, however, to use a hypothetical illustration in order to compare a variable life insurance policy to a term policy with the difference in cost invested in a side product. The sole purpose of this type of illustration would be to demonstrate the concept of tax-deferred growth as a result of investing in the variable product. The following conditions must be met in order to make this type of comparison balanced and complete:

(a) the comparative illustration must be accompanied by an illustration which reflects the standards outlined in Section II, E, 1;

(b) the rate of return used in the comparative illustration must be no greater than 12%;

(c) the rate of return assumed for the side product and the variable life policy must be the same;

(d) the same fees deducted from the required prospectus illustration must be deducted from the comparative illustration;

(e) the side product must be illustrated using gross values which do not reflect the deduction of any fees; and

(f) the side product must not be identified or characterized as any specific investment or investment type.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.
As the number of variable life insurance and annuity products has increased substantially in recent years, so has the variety of ways in which information about such products is communicated to the public. Because the use of such communications is proliferating, and because what is being described in such communications is, in some cases, a complicated hybrid product containing both insurance and securities elements, the NASD has determined to provide guidance by proposing a comprehensive set of guidelines ("Guidelines") for the preparation and use of communications with the public regarding variable life insurance and variable annuities. The Guidelines incorporate past positions on variable products communications taken by the NASD, as well as certain positions taken by the staff of the SEC. The Guidelines also govern the preparation of, and communication with the public through, advertising and sales literature of variable products. The Guidelines are intended to provide a level of disclosure sufficient to assist investors in making fair and informed investment decisions.

**Guidelines for Communications With the Public About Variable Products**

The Guidelines of the proposed rule change set forth standards that must be considered, along with the standards set forth in Article III, Section 35 to the Rules of Fair Practice,2 in the preparation of advertising and sales literature about variable life insurance and annuities. For the purposes of these Guidelines, the terms "advertisements and sales literature" include not only the definitions of those terms as found in section 35, but also individualized communications such as personalized letters and printed or on-screen computer illustrations.

**General Considerations**

Communications concerning variable products must clearly identify the product as either a variable life insurance policy or a variable annuity. Where product type is identified in a proprietary name, it is not necessary to include a generalized statement identifying product type. Since variable products are not mutual funds, no such statement or presentation may indicate or imply that the product offered is or its underlying account is a mutual fund. (See Part I, A).

As products with potentially substantial tax penalties and charges for early withdrawal, variable products must not be presented by members as short-term, liquid investments. Any discussions or presentations concerning liquidity or accessibility to investment values must be balanced by the impact of early withdrawal, such as sales loads, tax penalties and potential loss of principal. Additionally, regarding variable life insurance products, a balanced presentation requires a discussion of the impact of loans and withdrawals on cash values and death benefits (See Part I, B).

Guarantees by insurance companies, such as a minimum death benefit, a schedule of annuity payments, or a fixed return on the investment account, all depend on the claims-paying ability of the issuing insurance company, and thus must not be exaggerated. Members are prohibited from representing or implying that the investment return or principal value of the separate investment account is guaranteed, or that an insurance company's financial ratings apply to the separate account (See Part I, C).

**Specific Considerations**

**Prior Fund Performance**

The proposed rule allows for variable product communications to the public to contain the historic performance of an existing fund that pre-dates the fund's inclusion in the variable policy or annuity, provided no significant changes occurred to the fund at the time of, or after, the inclusion. Communications to the public are prohibited for a variable product which contains a new, or "clone" fund as the underlying investment vehicle, but which promotes the performance history of an existing fund after which the new fund was modeled. All historic performance in communications to the public must conform to applicable NASD and SEC standards, including, in particular, elements of return and deduction of applicable charges and expenses (See Part II, A).

**Product and Performance Comparisons**

Product comparisons which are fair allow investors to make informed investment decisions. Article III, Section 35 (d) (2) (M) of the NASD Rules of Fair Practice sets forth the specific standard in communications with the public which requires a member who makes investment comparisons, directly or indirectly, to ensure that the purpose of the communication is clear and that the comparison is fair and balanced, including any material differences between the subjects of the comparisons. A comparison using variable products is permissible so long as the comparison meets the standards set forth under Subsection (d) (2) (M) (See Part II, B).

**Use of Rankings**

The use of variable products rankings prepared by ranking entities, variable products issuers and variable products issuer affiliates to demonstrate variable product performance also qualifies as a comparison under Subsection (d) (2) (M). A ranking which reflects the performance of the separate account or the underlying investment option is permissible in variable products advertising and sales literature so long as the use of such ranking meets the standards contained in the Guidelines for the Use of Rankings in Mutual Fund Advertisements and Sales Literature3 (See Part II, C).

**Hybrid Variable Products**

Variable life insurance allows purchasers to combine life insurance coverage and tax-deferred accumulation of excess premium payments in one contract. Because such products are designed to equally serve both insurance and investing needs, communications to the public on behalf of variable life insurance products must provide a balanced discussion of these features. However, since single premium variable life insurance is predominantly designed to meet investment needs, communications to the public regarding single premium variable life insurance may emphasize the investment features of the product so long as an adequate explanation of the life insurance features is given (See Part II, D).

**Hypothetical and Personalized Illustrations of Variable Life Products**

Hypothetical illustrations of variable life insurance products using assumed rates of return are permissible to show how the underlying investment accounts could affect the policy cash value and death benefit, but may not be used to predict or project investment results. Such illustrations must follow the methodology and form requirements for such illustrations in the prospectus. All illustrations must show a hypothetical 0% gross rate of return, and may show any additional

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such communications.

and by preventing the misleading use of promoting the sale of variable products with the public concerning variable life insurance and variable annuities in

to guide the use of communications by establishing a baseline of standards in that the Guidelines will work to protect investors and the public interest provisions of Section 15A(b)(6) of the Act, as amended.

provisions of Section II, complete, the comparative illustration (See Part II, E).

and deduction for maximum guaranteed mortality and expense charges. All illustrations of rates of return must reflect such maximum charges, though illustrations may reflect current charges in addition to maximum charges.

Sales literature which contains hypothetical illustrations may also provide a personalized illustration reflecting factors relating to the circumstances of an individual customer.

It is generally inappropriate and potentially misleading to compare a variable life insurance policy with another product, including a variable annuity, since the purpose of such a comparison would exceed the purpose of illustrating how underlying investment account performance affects the policy cash value and death benefit. However, it is permissible to use a hypothetical illustration comparing a variable life policy to a term policy with the difference in premium invested in a side fund, where the sole purpose of such a comparison would be to demonstrate the concept of tax-deferred growth as a result of investing in the variable product. In order for such a comparison to be balanced and complete, the comparative illustration must reflect the standards in Section II, E, 1 of the proposed rule; use a rate of return no greater than 12% use the same rate of return for the variable product and the side fund; deduct the same fees from the required prospectus illustration; illustrate the side fund product using gross values which do not reflect the deduction of any fees; and, not characterize the side product as any specific investment or investment type (See Part II, E).

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act in that the Guidelines will work to protect investors and the public interest by establishing a baseline of standards to guide the use of communications with the public concerning variable life insurance and variable annuities in promoting the sale of variable products and by preventing the misleading use of such communications.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 94-3426 Filed 2-14-94; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-33603; File No. SR-NASD-93-66]


February 8, 1994.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on November 4, 1993, the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("SEC" or "Commission"), and amended on February 7, 1994, the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The NASD is proposing to amend Article III, Section 35 of the NASD Rules of Fair Practice to require filing of advertisements and sales literature relating to investment companies, to make the pre-filing requirement of Article III, Subsection 33(c)(2) of the Rules of Fair Practice and in Subsection 8(c)(1)(B) of the Government Securities Rules permanent, and to properly reference the "Advertising Regulation Department" throughout Article III, Section 35 of the Rules of Fair Practice and the Government Securities Rules. Below is the text of the proposed rule change. Proposed new language is italicized; proposed deletions are in brackets.

Rules of Fair Practice

Communications With the Public

Sec. 35

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[Amendment No. 1 superseded the original rule filing.

(c) Filing Requirements and Review Procedures

(1) Advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts and unit investment trusts) not included within the requirements of Subsection (c)(2) of this Section, and public direct participation programs (as defined in Article III, Section 34 of the Rules of Fair Practice) shall be filed with the Association's Advertising Regulation Department within 10 days of first use or publication by any member. Filing in advance of use is recommended. Members are not required to file advertising and sales literature which have previously been filed and which are used without change. Any member filing any investment company advertisement or sales literature pursuant to this Subsection that includes or incorporates rankings or comparisons of the investment company with other investment companies shall include a copy of the ranking or comparison used in the advertisement or sales literature.

(2) Advertisements concerning collateralized mortgage obligations registered under the Securities Act of 1933, and advertisements and sales literature concerning registered investment companies (including mutual funds, variable contracts and unit investment trusts) that include or incorporate rankings or comparisons of the investment company with other investment companies where the ranking or comparison category is not generally published or is the creation, either directly or indirectly, of the investment company, its underwriter or an affiliate, shall be filed with the Association's Advertising Regulation Department for review at least 10 days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed or expressly disapproved by the Association, shall be withheld from publication or circulation until any changes specified by the Association have been made or, in the event of disapproval, until the advertisement has been refiled for, and has received, Association approval. [This subsection (c)(1)(B) shall remain in effect for one year from November 16, 1993 unless modified or extended prior thereto by the Board of Governors.]

* * * * * Government Securities Rules * * * * * Communications With the Public Sec. 8 * * * * * (c) Filing Requirements and Review Procedures

(1) Members shall file advertisements for review with the Association's Advertising Regulation Department as follows:

* * * * *

(B) advertisements concerning collateralized mortgage obligations shall be filed with the Association's Advertising Regulation Department for review at least 10 days prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changed or expressly disapproved by the Association, shall be withheld from publication or circulation until any changes specified by the Association have been made or, in the event of disapproval, until the advertisement has been refiled for, and has received, Association approval. [This subsection (c)(1)(B) shall remain in effect for one year from November 16, 1993 unless modified or extended prior thereto by the Board of Governors.]

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. The NASD has prepared summaries, set forth in Sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

As the number of mutual funds has increased substantially in recent years, so has the number of mutual fund ranking entities ("Ranking Entities"). Ranking Entities, as well as mutual funds and fund affiliates, categorize and rank mutual funds by, for example, fund type, performance over a given period of years, total return, standardized yield calculated pursuant to Commission rules, the variations in sales charges, and risk/reward. References to such rankings in mutual fund advertisements and sales literature have also increased substantially in recent years as members have attempted to boost the sale of fund shares by touting the performance of various mutual funds.

The NASD Board of Governors believes that it is important for the Association to be able to review and regulate the use of ranking materials and the development of customized rankings in order to prevent the misleading use of such rankings. The NASD is, therefore, proposing to amend Articles III, Section 35(c) of the NASD Rules of Fair Practice to require that copies of mutual fund rankings and the data on which the rankings are based be submitted to the Association's Advertising Regulation Department. The proposed rule change requires members filing advertisements or sales literature for review which use or incorporate mutual fund rankings to include in the filing a copy of the ranking or comparison. The NASD also has proposed Guidelines for the Use of Rankings in Mutual Fund Advertisements and Sales Literature ("Guidelines") on which the NASD review will be based.2 Subsection 35(c)(1) is proposed to be amended to require that any member that files any investment company advertisements or items of sales literature pursuant to Subsection 35(c)(1) which include or incorporate rankings or comparisons of the investment company with other investment companies, shall include a copy of the ranking or comparison used in the advertising or sales literature. The requirements of this provision will permit the staff to immediately determine whether the use of the ranking complies with the Guidelines, and avoid the need for the NASD staff to research the ranking or attempt to obtain a copy of the source information in order to verify the accuracy of the material.

Subsection 35(c)(2), which currently requires certain advertisements to be filed by members 10 days prior to use, is proposed to be amended to require such pre-use filing for all investment company advertisements or items of sales literature which incorporates...

* On November 4, 1993, the NASD submitted a proposed rule change with the Commission File No. SR-NASD-93-69 for Commission approval. The Commission intends to publish notice of the Guidelines in the Federal Register concurrently with notice of the instant proposed rule change.
rankings or comparisons of the investment company with other investment companies where the ranking or comparison is not generally published or is the creation, directly or indirectly, of the investment company, its underwriter or an affiliate. The NASD is concerned about permitting ranking categories to be created by investment companies or their affiliates, rather than by a Ranking Entity, it recognizes that customized ranking may provide meaningful information to the investor. Such filing also must include a copy of the data, ranking or comparison on which the ranking or comparison is based.

The NASD is also proposing to amend Article III, Subsection 35(c)(2) of the Rules of Fair Practice and Subsection 8(c)(1)(B) of the Government Securities Rules to eliminate sunset provisions relating to collateralized mortgage obligations (“CMOs”). This change will make the pre-filing requirement for CMO advertisements permanent.

Finally, the NASD is proposing to modify references to the Advertising Department to reference the Advertising Regulation Department in Article III, Section 35 of the Rules of Fair Practice and the Government Securities Rules.

The NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act in that the rule ensures that the use of rankings of investment companies in advertising and sales literature is accurate and presents investors with fair and meaningful data upon which to make an informed investment decision.

With respect to the proposed elimination of the sunset provisions for the pre-filing of CMO advertisements, the Board believes that the positive regulatory benefits seen since implementation of the provision, i.e., the reduction in misleading advertising, warrants making the pre-filing requirement provision permanent.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

The NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

(C) Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (I) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self regulatory organization consents, the Commission will:

A. By order approve such proposed rule change, or
B. Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NASD. All submissions should refer to File Number SR-NASD-93-66 and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority. 17 CFR 200.30-3(a)(12).

Margaret H. McFarland,
Deputy Secretary.
[FR Doc. 94-3485 Filed 2-14-94; 8:45 am]
BILLING CODE 6010-21-M

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Restructuring of an Associate Clearinghouse of OCC

February 8, 1994
Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), notice is hereby given that on December 2, 1993, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by OCC. The Commission is publishing this notice to solicit comments from interested persons on the proposed rule change.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change will permit the restructuring of an associate clearinghouse of OCC which facilitates the issuance, clearance, and settlement of options on the Major Market Index ("XML") traded on the European Options Exchange ("EOE") and identical to and fungible with those traded on the American Stock Exchange ("AMEX").

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning the purpose of and basis for the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In August 1867, the Commission approved a proposal that enabled OCC

to issue, clear, and settle XMI options traded on the EOE that are identical to AMEX options by EOE Members. ACHA is both an associated clearinghouse and index clearing member of OCC. In addition to the IMA and OCC, ACHA also entered into a letter agreement, dated August 20, 1987, with the EOE and ACHA which further facilitates the clearance and settlement of XMI Options traded on the EOE.

ACHA has advised OCC that EOOCC intends to absorb all of its operations by assuming ACHA’s role as an associated clearinghouse and index clearing member of OCC. To effectuate this restructuring, ACHA has assigned to EOOCC all of its agreements, rights, and obligations under the ACA, as amended, and under the August 1987 letter agreement, as amended.

In accordance with the terms of the agreement, the respective parties thereto propose to execute assignments of or amendments to such agreements to facilitate EOOCC’s assumption of ACHA’s operations. OCC, consents to ACHA’s assignment of its agreements, obligations, and rights under the ACA to EOOCC and to ACHA’s assignment of the commitments under the letter agreement of August 1987 to EOOCC and EOE. Finally, OCC, AMEX, and EOE have amended the IMA to reference the existence of an associated clearinghouse agreement between OCC and EOOCC.

OCC believes that the proposed rule change is consistent with the purposes and requirements of Section 17A of the Act because it continues to promote the prompt and accurate clearance and settlement of transactions in XMI options in the United States and Europe and the safeguarding of funds relating thereto and does not significantly alter the structure for the clearance and settlement of XMI options in the United States and Europe.

B. Self-Regulatory Organization’s Statement on Burden on Competition

OCC does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder because it affects a change in an existing service of a registered clearing agency that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of the agency or for which it is responsible and (ii) does not significantly affect the respective rights or obligations of the clearing agency or persons using the service. At any time within sixty days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements

Please note that the Federal Register notice contains a detailed description of the proposed rule change, its rationale, and the expected impact on the market. The notice also includes a section on the burden on competition analysis, comments from stakeholders, and the effective date of the rule change. Interested parties are encouraged to submit comments to the SEC by March 8, 1994.
of which extended PTC’s registration until March 31, 1994. 4

PTC provides depository facilities for mortgaged-backed securities, primarily securities guaranteed by the Government National Mortgage Association (“GNMA”). PTC services include certificate safekeeping, book entry deliveries, an automated facility for the pledge or segregation of securities and other services related to the immobilization of securities certificates.

Interested persons are invited to submit written data, views, and arguments concerning the foregoing application within twenty-one days of the date of publication of this notice in the Federal Register. Such written data, views, and arguments will be considered by the Commission in granting registration or instituting any proceeding relating to the immobilization of securities certificates.

February 8, 1994

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), 5 notice is hereby given that on December 21, 1993, the Stock Clearing Corporation of Philadelphia (“SCCP”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in items I, II, and III below, which items have been prepared primarily by SCCP, a self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change amends SCCP’s trade recording fees for PACE trades. 6 The current PACE recording fees consist of a sliding scale with volume discounts. The proposed, effective January 3, 1994, is a flat fee of $0.30 per trade side with no volume discounts. SCCP has stated that the purpose of the fee change is to simplify its billing and to reflect more accurately the operating expenses of the recording service. SCCP states that the proposed rule change is consistent with Section 17A of the Act 7 and particularly with Section 17A(b)(3)(D) of the Act 8 in that it provides for the equitable allocations of reasonable dues, fees, and other charges among participants.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization’s Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

SCCP seeks to simplify its billing schedule by amending its trade recording fees for PACE trades by SCCP participants to a flat $0.30 per trade side. The new fee schedule is to become effective upon the monthly billing cycle that commences January 3, 1994. The current PACE recording fees are $0.30 per side for participants with 1 to 1,000 PACE trades per month, $0.27 per side for participants with 1,001 to 3,000 PACE trades per month, $0.24 per side for participants with 3,001 to 5,000 PACE trades per month, and $0.20 per side for participants with 5,001 or more PACE trades per month. SCCP states that the elimination of the discount schedule will simplify its fee structure and billing process and that it will reflect more accurately the operating expenses of the recording service.

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act and Rule 19b-4(c)(2) thereunder 9 because the proposal establishes or changes a due, fee, or other charge. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, the public interest for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. All submissions should be submitted by March 8, 1994.

Margaret H. McFarland, Deputy Secretary.

[FR Doc. 94-3484 Filed 2-14-94; 8:45 am]
BILLING CODE 8010-01-M

Self-Regulatory Organization; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Recording Fees for PACE Trades

February 8, 1994

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”), 3 notice is hereby given that on December 21, 1993, the Stock Clearing Corporation of Philadelphia (“SCCP”)...
available for inspection and copying in the Commission’s Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of SCCP. All submissions should refer to File No. SR-SCCP—93-06 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.7

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94-3480 Filed 2-14-94; 8:45 am]
BILLING CODE 8010-01-M

[Release No. 34–33600; File No. SR-SCCP—93-05]

Self-Regulatory Organization; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Provide for a Thirty-Three Percent Discount on Service Fees for the Period of November 29, 1993, to December 31, 1993

February 8, 1994.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),1 notice is hereby given that on December 21, 1993, the Stock Clearing Corporation of Philadelphia (“SCCP”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by SCCP, a self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change form interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change provides a discount of thirty-three percent for SCCP service fees for the billing period of November 29, 1993, to December 31, 1993. The discount applies to all SCCP service fees.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in item IV below. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Self-Regulatory Organization’s Statement of the Purpose of and Statutory Basis for, the Proposed Rule Change

SCCP seeks to discount by thirty-three percent all service fees charged by SCCP to its participants for the period of November 27, 1993, to December 31, 1993, which is SCCP’s final billing cycle for 1993. The discount is being provided in anticipation of continued record trading volume and related net revenues being achieved by SCCP through December.

The proposed thirty-three percent discount will apply to all service fees billable in December 1993, which will include all transaction related fees. The discount will not apply to fees that are not service related such as margin account interest, draft fees, and fees associated with the signature guarantee program or the lost and stolen securities program.

SCCP states that the proposed rule change is consistent with section 17A of the Act2 and particularly with Section 17A(b)(3)(D) of the Act3 in that it provides for the equitable allocations of reasonable dues, fees, and other charges among participants.

(B) Self-Regulatory Organization’s Statement on Burden on Competition

SCCP believes that the proposed rule change will neither have any impact nor impose any burden on competition.

(C) Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

SCCP has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act4 and Rule 19b-4(c)(2) thereunder5 because the proposal establishes or changes a due, fee, or other charge. At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written communications with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of SCCP. All submissions should refer to File No. SR-SCCP—93-05 and should be submitted by March 8, 1994.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.6

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 94-3481 Filed 2-14-94; 8:45 am]
BILLING CODE 8010-01-M

[Rel. No. IC-20065; 811-6630]

Dynamic America Growth Fund, Inc.; Application

February 8, 1994.

AGENCY: Securities and Exchange Commission (“SEC”).

ACTION: Notice of Application for Deregistration under the Investment Company Act of 1940 (the “ACT”).

APPLICANT: Dynamic America Growth Fund, Inc. (the “Fund”).

RELEVANT ACT SECTIONS: Section 8(f).

SUMMARY OF APPLICATION: Applicant seeks an order declaring that it has ceased to be an investment company.

FILING DATE: The application was filed on October 28, 1993, and amended on February 3, 1994.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing.


Interested persons may request a hearing by writing to the SEC's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on March 4, 1994, and should be accompanied by proof of service on applicant, in the form of an affidavit, or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested.

Persons who wish to be notified of a hearing, or the decision thereon, shall notify the SEC by writing to the SEC's Secretary and serving applicant with a certificate of service. The Proxy Statement also states that another important factor in the directors' decision was FMC's and the Fund's willingness to absorb the Fund's organizational costs, and FMC's willingness to reimburse each of the Fund's shareholders the difference between the liquidation value of the Fund shares owned by the shareholder and the amount the shareholder originally invested in the Fund.

3. Pursuant to the Plan of Complete Liquidation and Dissolution (Appendix "A" to the Proxy Statement) (the "Plan"), the shareholders would receive the "Liquidation Value" of the shares of the Fund's issued and outstanding common stock they owned on the date of distribution. The Liquidation Value means, as of the distribution date, the aggregate value of all the assets of the Fund on such date, less the aggregate amount of all the liabilities of the Fund on such date, divided by the total number of shares of common stock of the Fund on such date. The Plan also stated that each shareholder of the Fund will be reimbursed by FMC for the amount of the difference between the Liquidation Value and the amount the shareholder originally invested in the Fund.

4. Applicant filed with the SEC, on September 1, 1993, preliminary proxy materials for the shareholders meeting to approve the Plan. The proxy materials were distributed to applicant's shareholders on September 17, 1993. As stated in the "Certificate of Votes Cast," attached as part of Exhibit "D" to the application, on September 28, 1993, a majority of the outstanding voting securities of applicant approved the Plan, by a vote of 28,903.101 for and 0 against (with 404.716 abstentions). 5. All of applicant's assets were converted to cash before dissolution and were distributed out as such.

Immediately prior to liquidation, there was one class of common stock, with a net asset value per share of $8.82, and an aggregate value of $337,018.00 as of September 28, 1993, when applicant distributed all its assets to its shareholders at net asset value. Additional amounts were paid by FMC to certain shareholders if their cost basis (using FIFO) was greater than net asset value on September 28, 1993. Shareholders thus received total distributions of the greater of current net asset value or their cost basis.

6. Applicant's investment adviser paid applicant's up front organizational costs of $50,000.00 upon liquidation, and applicant's principal underwriter paid $3,566.00 of those costs. Applicant's underwriter is incurring any other expenses, primarily legal and accounting review, relating directly to the dissolution. The investment adviser has incurred any type of routine expenses, such as proxy solicitation, by its agreement to make each record-date shareholder whole upon the dissolution.

7. At the time of filing the application, applicant had no assets, outstanding debts or liabilities. No shareholder has no shareholders and is not a party to any litigation or administrative proceeding. Applicant is not engaged, nor does it propose to engage, in any business activities other than those necessary for the winding-up of its affairs.

8. Applicant intends to file for a Certificate of Dissolution with the SEC, and the decision thereon, shall notify the SEC by writing to the SEC's Secretary and serving applicant with a certificate of service.
Respondents—Recipients of services in the areas of consular, business interests, security, public information and authentication of documents.

Estimated number of respondents—11,680.

Average hours per response—15 minutes.

Total estimated burden hours—1,652.

44 U.S.C. 3504(b) does not apply, as no rulemaking is being conducted in connection with this information collection.

ADDITIONAL INFORMATION OR COMMENTS:
Copies of the proposed forms and supporting documents may be obtained from Gail J. Cook (202) 647-3532. Comments and questions should be directed to (OMB) Jefferson Hill (202) 395-3176.


Patrick F. Kennedy, Assistant Secretary for Administration.

Public Notice 1946

Shipping Coordinating Committee, Subcommittee on Safety of Life at Sea Working Group on Radiocommunications; Meetings

The Working Group on Radiocommunications of the Subcommittee on Safety of Life at Sea will conduct open meetings at 9:30 a.m. on April 27, 1994, and June 15, 1994. These meetings will be held in the Department of Transportation Headquarters Building, 400 Seventh Street, SW., Washington, DC 20593.

The purpose of these meetings is to prepare for the 40th Session of the International Maritime Organization (IMO) Subcommittee on Radiocommunications which is scheduled for early 1995, at the IMO headquarters in London, England.

Agenda items include preparation for the 40th Session, primarily related to the implementation of the Global Maritime Distress and Safety System (GMDSS).

Members of the public may attend these meetings up to the seating capacity of the room.

For further information and meeting room number, contact Mr. Ronald J. Grandmaison, U.S. Coast Guard Headquarters (G-STM), 2100 Second Street, SW., Washington, DC 20593-0001. Telephone: (202) 267-1399.


Geoffrey Ogden,
Chairman, Shipping Coordinating Committee.

[FR Doc. 94-3499 Filed 2–14–94; 8:45 am]
BILLING CODE 4710–07–M

[Public Notice 1946]

Shipping Coordinating Committee, International Maritime Organization (IMO) Legal Committee; Meeting

The U.S. Shipping Coordinating Committee (SHC) will conduct an open meeting at 10 a.m., on Tuesday, March 1, 1994, in room 4315 of U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC. The primary purpose of this meeting is to prepare for the 70th Session of the International Maritime Organization (IMO) Legal Committee to be held March 21 through 25, 1994, in London.

To facilitate the attendance of those participants who may be interested in only certain aspects of the public meeting, the first subject addressed will be the draft International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention). The second major subject, which will be considered at approximately 11:30 a.m., will be a discussion on revisions to the 1976 Convention on Limitation of Liability for Maritime Claims (‘76 LLMC).

The draft HNS Convention would impose strict liability on the shipowner for damages arising from hazardous substances up to a yet-to-be-determined limit of liability with a second-tier international fund available to provide compensation for catastrophic damages or when the shipowner, for one reason or another, could not pay. The second-tier international fund, modeled after the International Oil Pollution Compensation Fund, may be financed by levies imposed upon hazardous cargo shipments or by postincident collections.

The draft convention would provide compensation for environmental damage as well as personal injury and property damage from a broad range of substances including oils (those not covered under the oil regimes), bulk liquid cargo, bulk solid cargo, bulk gases, packaged cargo, and flammable residues.

At the 69th Session, the Legal Committee decided to recommend that a Diplomatic Conference be scheduled for early 1996. The Committee also began to distinctly lean towards certain features in the draft convention: a simplified two-tier structure with the second tier split into a few independent accounts entirely funded by postincident contributions from the bulk chemical industry (and perhaps some large volume types of container cargos) and definitions of HNS by reference to existing IMO codes. However, final decisions on these issues have not been made. Other important questions remain to be answered which include:

(1) Whether to proceed with a two-tier convention for the 1996 Diplomatic Conference or to concentrate on a single tier convention for the Conference and start on the second immediately after;

(2) How to define the entities responsible for making payments to the second tier international fund;

(3) Which substances would be included within the scope of the convention’s coverage for purposes of both compensating damage as well as for financing of the second-tier fund; and

(4) Whether postincident funding of the second-tier fund is appropriate for all types of HNS cargo.

The views of the public, and particularly those of affected maritime commercial and environmental interests, are requested.

The Legal Committee began work on the ’76 LLMC at the 69th Session. The Committee focused discussion on a draft protocol, submitted by the United Kingdom, which provides for raising the limits of liability and a streamlined tacit amendment procedure. Some delegations expressed interest in working on provisions to allow state parties to adopt their own limits, or opt out of limits altogether in cases of personal injury and death or for claims of passengers. Discussion on these topics and a decision on an accelerated work timetable are expected at the 70th session in March.

Although the United States has not ratified this convention, interests within the United States—such as owners of foreign flag vessels and passengers on foreign flag vessels—may be affected by changes to this convention. The views of the public are requested.

Members of the public are invited to attend the SHC meeting, up to the seating capacity of the room. For further information or to submit views concerning the subjects of discussion, contact either Captain David J. Kantor or Lieutenant Lee A. Handford, U.S. Coast Guard (G-LMI), 2100 Second Street, SW., Washington, DC 20593, telephone (202) 267-1527, telefax (202) 267-4496.
DEPARTMENT OF TRANSPORTATION

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ended February 4, 1994

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation’s Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

<table>
<thead>
<tr>
<th>Application</th>
<th>Docket Number</th>
<th>Date filed</th>
<th>Parties</th>
<th>Subject</th>
</tr>
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<tbody>
<tr>
<td>Northwest to provide service between the United States and Vietnam.</td>
<td>49388</td>
<td>January 31, 1994</td>
<td>Members of the International Air Transport Association</td>
<td>Docket Number: 49388.</td>
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<tr>
<td>Office of the Secretary</td>
<td>Wet Lease Approvals Under Part 207</td>
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<td>The Department has recently become aware of instances in which U.S. air carriers may have violated the requirements of part 207 of the Department’s rules (14 CFR part 207) regarding the prior approval of long-term wet leases to foreign carriers.</td>
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<td>Section 207.10 of the Department’s rules (14 CFR 207.10) requires that U.S. carriers obtain a statement of authorization prior to performing service for a foreign air carrier pursuant to a long-term wet lease. A long-term wet lease is defined as a lease under which the lessor provides aircraft and crews for a term that either (a) lasts more than 60 days, or (b) is part of a series of such leases that amounts to a continuing arrangement lasting more than 60 days.</td>
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<td>Confusion has arisen over when extensions or renewals of non-exclusive, short-term leases, resulting in terms of longer than 60 days, trigger the approval requirements of section 207.10. While the original intention of the lessor or lessee may not be to engage in a lease of extended duration, a variety of unforeseen circumstances, such as delays in new aircraft delivery to the lessee, may result in continuation of leases beyond the 60-day short-term limit. In other instances, the desire on the part of the lessee to maintain flexibility may preclude a long-term agreement.</td>
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<td>For purposes of clarifying the Department’s enforcement policy under part 207, we wish to take this opportunity to state that U.S. carriers must submit wet leases with foreign carrier lessees, whether or not they are exclusive, to the Department for prior approval under §207.10 whenever it becomes apparent that the combined term of the original wet lease and any extensions or renewals will exceed 60 days. The Department’s Office of Aviation Enforcement and Proceedings has advised us that, while instances in the recent past involving a series of leases violating §207.10 have resulted in warning letters to the carriers, future violations may be grounds for formal enforcement action including the assessment of civil penalties. If you have questions regarding this matter, please contact the U.S. Air Carrier Licensing Division, Office of Regulation, Aviation at (202) 366–2390, or the Office of Aviation Enforcement and Proceedings, Office of the General Counsel at (202) 366–9349.</td>
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We will serve a copy of this notice on all U.S. and foreign air carriers and will publish a copy in the Federal Register.

Issued in Washington, D.C., on February 9, 1994.

Paul L. Gretch,
Director, Office of International Aviation.

[F.R. Doc. 94-3513 Filed 2-14-94; 8:45 am]
BILLING CODE 4910-82-P

Federal Aviation Administration

Noise Exposure Map Notice; Mansfield Lahm Municipal Airport; Mansfield, OH

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces its determination that the noise exposure maps submitted by the City of Mansfield for Mansfield Lahm Municipal Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96-193) and 14 CFR part 150 are in compliance with applicable requirements.

EFFECTIVE DATE: The effective date of the FAA's determination on the noise exposure maps is January 11, 1994.

FOR FURTHER INFORMATION CONTACT: Barbara A. Hammes, Federal Aviation Administration, Great Lakes Region, Detroit Airports District Office, DET ADO-670.7, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111, (313) 487-7298.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA finds that the noise exposure maps submitted for the Mansfield Lahm Municipal Airport are in compliance with applicable requirements of part 150, effective January 11, 1994.

Under Section 103 of the Aviation Safety and Noise Abatement Act of 1979 (hereinafter referred to as “the Act”), and airport operator may submit to the FAA noise exposure maps which meet applicable regulations and which depict non-compatible land uses as of the date of submission of such maps, a description of projected aircraft operations, and the ways in which such operations will affect such maps. The Act requires such maps to be developed in consultation with interested and affected parties in the local community, government agencies, and persons using the airport.

An airport operator who has submitted noise exposure maps that are found by the FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing non-compatible uses and for the prevention of the introduction of additional non-compatible uses.

The FAA has completed its review of the noise exposure maps and related description submitted by the City of Mansfield for Mansfield Lahm Municipal Airport. The specific maps under consideration are the noise exposure maps: “Mansfield Lahm Municipal Airport—Existing Noise Exposure Map” and “Mansfield Lahm Municipal Airport—Future (1994) Noise Exposure Map” following Chapters IV and V, respectively, of the submission. The FAA has determined that these maps for Mansfield Lahm Municipal Airport are in compliance with applicable requirements. This determination is effective on January 11, 1994. The FAA's determination on an airport operator's noise exposure maps is limited to a finding that the maps were developed in accordance with the procedures contained in appendix A of FAR part 150. Such determination does not constitute approval of the applicant's data, information or plans, or a commitment to approve a noise compatibility program or to fund the implementation of that program.

If questions arise concerning the precise relationship of specific properties to noise exposure contours depicted on a noise exposure map submitted under Section 103 of the Act, it should be noted that the FAA is not involved in any way in determining the relative locations of specific properties with regard to the depicted noise contours, or in interpreting the noise exposure maps to resolve questions concerning, for example, which properties should be covered by the provisions of section 107 of the Act. These functions are inseparable from the ultimate land use control and planning responsibilities of local government. These local responsibilities are not changed in any way under part 150 or through the FAA's review of noise exposure maps. Therefore, the responsibility for the detailed overlaying of noise exposure contours onto the map depicting properties on the surface rests exclusively with the airport operator which submitted those maps, or with those public agencies and planning agencies with which consultation is required under section 103 of the Act. The FAA has relied on the certification by the airport operator, under Section 150 of FAR part 150, that the statutorily required consultation has been accomplished.

Copies of the noise exposure maps and of the FAA's evaluation of the maps associated with the determination are available for examination at the following locations:

Federal Aviation Administration: Great Lakes Region; Airports Division Office, 2300 East Devon Avenue, room 269, Des Plaines, Illinois 60018
Federal Aviation Administration, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111
Mansfield Lahm Municipal Airport, 2000 Harrington Memorial Road, Mansfield, Ohio 44903

Questions may be directed to the individual named above under the heading, FOR FURTHER INFORMATION CONTACT.

Issued in Belleville, Michigan, on January 11, 1994.

Dean C. Nitz,
Manager, Detroit Airports District Office, Great Lakes Region.

[F.R. Doc. 94-3450 Filed 2-14-94; 8:45 am]
BILLING CODE 4910-13-M

Receipt of Noise Compatibility Program and Request for Review; Kalamazoo/Battle Creek International Airport, Kalamazoo, MI

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice.

SUMMARY: The Federal Aviation Administration (FAA) announces that it is reviewing a proposed noise compatibility program that was submitted for Kalamazoo/Battle Creek International Airport under the provisions of Title I of the Aviation Safety and Noise Abatement Act of 1979 (Pub. L. 96-193) (hereinafter referred to as “the Act”) and 14 CFR part 150 by the Kalamazoo County Board of Commissioners. This program was submitted subsequent to a determination by the FAA that associated noise exposure maps submitted under 14 CFR part 150 for Kalamazoo/Battle Creek International Airport were in compliance with applicable requirements effective March 1, 1993. The proposed noise compatibility program will be approved or disapproved on or before May 17, 1994.

EFFECTIVE DATE: The effective date of the start of the FAA's review of the noise compatibility program is November 18, 1993. The public comment period ends March 18, 1994.

FOR FURTHER INFORMATION CONTACT:
Ernest P. Gubry, Community Planner, Federal Aviation Administration, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111. Comments on the proposed noise compatibility program should also be submitted to the above office.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA is reviewing a proposed noise compatibility program for Kalamazoo/Battle Creek International Airport which will be approved or disapproved on or before May 17, 1994. This notice also announces the availability of this program for public review and comment.

An airport operator who has submitted noise exposure maps that are found by the FAA to be in compliance with the requirements of Federal Aviation Regulations (FAR) part 150, promulgated pursuant to Title I of the Act, may submit a noise compatibility program for FAA approval which sets forth the measures the operator has taken or proposes for the reduction of existing non-compatible uses and for the prevention of the introduction of additional non-compatible uses.

The FAA has formally received the noise compatibility program for Kalamazoo/Battle Creek International Airport, effective on November 18, 1993. It was requested that the FAA review this material and that the noise mitigation measures, to be implemented jointly by the airport and surrounding communities, be approved as a noise compatibility program under section 104(b) of the Act. Preliminary review of the submitted material indicates that it conforms to the requirements for the submittal of noise compatibility programs, but that further review will be necessary prior to approval or disapproval of the program. The formal review period, limited by law to a maximum of 180 days, will be completed on or before May 17, 1994.

The FAA’s detailed evaluation will be conducted under the provisions of 14 CFR part 150, §150.33. The primary considerations in the evaluation process are whether the proposed measures may reduce the level of aviation safety, create an undue burden on interstate or foreign commerce, or be reasonably consistent with obtaining the goal of reducing existing non-compatible land uses and preventing the introduction of additional non-compatible land uses. Interested persons are invited to comment on the proposed program with specific reference to these factors. All comments, other than those properly addressed to local land use authorities, will be considered by the FAA to the extent practicable. Copies of the noise exposure maps, the FAA’s evaluation of the maps, and the proposed noise compatibility program are available for examination at the following locations: Federal Aviation Administration, Detroit Airports District Office, Willow Run Airport, East, 8820 Beck Road, Belleville, Michigan 48111; Kalamazoo/Battle Creek International Airport, 5235 Portage Road, Kalamazoo, Michigan 49002.

Questions may be directed to the individual named above under the heading, FOR FURTHER INFORMATION CONTACT.

Issued in Belleville, Michigan, on November 18, 1993.

Dean C. Nitz,
Manager, Detroit Airports District Office, FAA Great Lakes Region.

FOR FURTHER INFORMATION CONTACT:
Issued in Belleville, Michigan, on November 18, 1993.

Research, Engineering and Development Advisory Committee; Flight Service Technology Subcommittee

Pursuant to Section 10(A)(2) of the Federal Advisory Committee Act (Pub. L. 92-362; 5 U.S.C. App. I), notice is hereby given of a meeting of the Flight Service Technology Subcommittee of the Federal Aviation Administration Research, Engineering and Development Advisory Committee to be held on Tuesday, March 8, 1994, at 9:30 a.m. The meeting will take place at the Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC, in the MacCracken Room on the tenth floor.

The agenda for this meeting will include a review and discussion of current and future technology associated with pre-flight weather, flight plan filing, and in-flight information services, and a discussion of technological options for providing these services in the year 2000 and beyond. The Subcommittee will consider recommendations relating to the provisioning of these services by government and industry.

Attendance is open to the interested public but limited to space available. With the approval of the Subcommittee Chairman, members of the public may present oral statements at the meeting. Persons wishing to present oral statements, obtain information, or plan to access the building to attend the meeting should contact Mr. Carl McCullough, ASE-10, at (202) 287-8595, or Ms. Jan Peters, ASD-3, at (202) 287-8543 in the Office of the Associate Administrator for System Engineering and Development, 800 Independence Avenue, SW., Washington, DC 20591.

Members of the public may present a written statement to the subcommittee at any time.

Issued in Washington, DC, on February 10, 1994.

Martin T. Pezesky,
Executive Director, Research, Engineering and Development Advisory Committee.

[Docket No. 94-2]

Request for Public Participation in the Development of an Intelligent Vehicle-Highway Systems (IVHS) National Program Plan

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Reopening of comment period.

SUMMARY: The Department of Transportation published a notice in the Federal Register on December 16, 1993 (58 FR 65814), in which the agency sought public participation in the development of the National Intelligent Vehicle-Highway Systems (IVHS) Program Plan (the Plan). The comment period closed on January 31, 1994. In response to a request for an extension of the comment period, the FHWA is reopening the comment period until February 25, 1994.

DATES: Comments on the October 1993 draft of the National IVHS program Plan are due February 25, 1994. Comments received after that date will be considered to the extent possible.

ADDRESSES: Comments should be sent (preferably four copies) to: Docket Clerk, Docket No. 94–2, room 4232, United States Department of Transportation, Federal Highway Administration, HCC-10, 400 Seventh Street, SW., Washington, DC 20590. To obtain a copy of the October 1993 draft IVHS National Program Plan, please provide a self-addressed label to: Federal Highway Administration, HTV–10, 400 Seventh Street, SW., room 3400, Washington, DC 20590.

When requesting a copy of the Plan, please submit a brief outline including your name, the name of your organization (if applicable), a statement of your primary interest in the National IVHS Program Plan, a telephone number, and a fax number.

FOR FURTHER INFORMATION CONTACT: Gary Euler, Chief, Program Management and Systems Engineering Division, Federal Highway Administration [FHWA Docket No. 94–2]
The Plan will describe the systematic need to be accomplished to reach commercial product development that services, including the research, development, operational testing, and commercial product development that need to be accomplished to reach deployment of these services. Because the Plan is being developed with the user as the focus, the Department is the Plan is being developed with the

An incomplete working first draft of the Plan (October 1993) is now available. The second draft is scheduled to be available in May 1994. The final Plan is scheduled to be available in November 1994. In developing the second and final drafts of the Plan, the Department of Transportation will be working cooperatively with other organizations, including IVHS AMERICA.

The development of the IVHS Program Plan is an open process, and the Department is also interested in improving its overall outreach activities on the program planning effort. The success of the IVHS program depends on the active participation of the stakeholders—public officials from State and local governments, consumer groups, vehicle manufacturers and other private sector entities, transit authorities, toll authorities, small businesses, academic institutions, associations, and individual citizens.

To facilitate stakeholder participation, the Department intends to hold forums to facilitate the direct and interactive participation of the public in the development of the IVHS Program Plan. The Department is also requesting suggestions on the most appropriate, effective means for conducting these forums. Recommendations for additional outreach activities may be included in comments on the October 1993 working draft or may be submitted separately to the Docket.

The FHWA received a request from the Advocates for Highway and Auto Safety dated January 3, 1994, requesting an extension to the comment period because it encompassed the holiday season when staff availability for review was very limited. After carefully considering the request, the FHWA decided to allow additional time for comments in order to receive greater public participation in the development of the National IVHS Plan. The comment period is hereby reopened and extended to February 25, 1994.

Research and Special Programs Administration

Office of Hazardous Materials Safety; Modifications for Modification of Exemptions or Applications to Become a Party To an Exemption

AGENCY: Research and Special Programs Administration, DOT.

ACTION: List of applications for modification of exemptions or applications to become a party to an exemption.

SUMMARY: In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation’s Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite processing.

S:

In accordance with the procedures governing the application for, and the processing of, exemptions from the Department of Transportation’s Hazardous Materials Regulations (49 CFR part 107, subpart B), notice is hereby given that the Office of Hazardous Materials Safety has received the applications described herein. This notice is abbreviated to expedite processing.

Comments must be received on or before March 2, 1994.

ADDRESS COMMENTS TO: Dockets Unit, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590.

Comments should refer to the application number and be submitted in triplicate. If confirmation of receipt of comments is desired, include a self-addressed stamped postcard showing the exemption number.

FOR FURTHER INFORMATION: Copies of the applications are available for inspection in the Dockets Unit, room 4426, Nassif Building, 400 7th Street SW., Washington, DC.

Application No. and Applicant

Modification of exemption

7835-X Air Products and Chemicals, Inc., Allentown, PA (See Footnote 1) ....... 7835
9758-X Camping Gaz International, Paris, France (See Footnote 2) ....... 9758
9758-X Watson & Company, San Diego, CA (See Footnote 3) ....... 9758
10048-X Air Products and Chemicals, Inc., Allentown, PA (See Footnote 4) ....... 10048
10256-X Condyme I, Inc., West Liberty, OH (See Footnote 5) ....... 10256
10441-X ETSS of Ohio, Inc., Tipp City, OH (See Footnote 6) ....... 10441
10739-X Hill Brothers Chemical Co., Phoenix, AZ (See Footnote 7) ....... 10739
10878-X Tankoon FRP Inc., Boisbriand, Que, CN (See Footnote 8) ....... 10878
10911-X The Pallet Reefer Company, Houma, LA (See Footnote 9) ....... 10911
10913-X Aco-Assmann of Canada Ltd., Pickering, Ontario, Canada (See Footnote 10) ....... 10913
11073-X E.I. du Pont de Nemours and Company, Wilmington, DE (See Footnote 11) ....... 11073

(1) To modify exemption to authorize Poisonous Gases, Zone A, Division 2.3 to be shipped in enclosed trailer with Division 2.1, 5.1 and Class 3 and 8 material.

(2) To modify the exemption to provide for additional cartridge designed with minimum wall thickness of 0.010 inch for use in transporting Division 2.1 material.

(3) To modify exemption to provide for additional cylinders identical to those authorized except they are equipped with a thinner wall thickness.

(4) To modify the exemption to provide for additional classes of hazardous materials authorized to be shipped in non-DOT specification cargo tanks.

(5) To modify exemption to provide for additional cylinders for use in transporting flammable gas, n.o.s., Division 2.1.
(6) To authorize party status and modify exemption to provide for various classes of hazardous waste for shipment in bulk pack quantities overpacked with DOT specification containers.

(7) To modify exemption to eliminate monitoring requirement of tank cars during unloading of chlorine, Division 2.3.

(8) To modify exemption to remove 12-year service life limitation for non-DOT specification fiberglass cargo tanks designed for shipment of corrosive material.

(9) To authorize certain hazardous materials requiring temperature control to be shipped in refrigerated units by highway only.

(10) To modify exemption to provide for additional design changes to non-DOT specification portable tank for use in transporting Division 5.1 and Class 8.

(11) To reissue exemption originally issued on an emergency basis to offer for transportation DOT Class 1 refrigerated units by highway only.

(12) To modify exemption to provide for additional design changes to non-DOT specification portable tank for use in transporting Division 5.1 and Class 8.

To authorize tank cars equipped with 2" valve hose under 30 psig pressure to remain connected during unloading of hydrochloric acid, Class B. (mode 1)

To authorize the transportation of detonating cord, Class 1, in plastic bags as alternative inner packaging overpacked as specified in CFR. (modes 1, 3, 4, 5)

<table>
<thead>
<tr>
<th>Application No. and applicant</th>
<th>Regulation(s) affected</th>
<th>Nature of exemption thereof</th>
</tr>
</thead>
<tbody>
<tr>
<td>11022-N Newport News Shipbuilding and Dry Dock Company, Newport News, VA</td>
<td>49 CFR 173, 49 CFR 172</td>
<td>To authorize the intra-plant transportation across a public street, of various classes of hazardous materials in quantities not to exceed 55 gallons to be transported as non-regulated. (mode 1)</td>
</tr>
<tr>
<td>11203-N McDonnell Douglas Aerospace, Huntington Beach, CA</td>
<td>49 CFR 173.61, 177.848</td>
<td>To authorize the transportation of third stage components of space craft containing one or more hazardous materials in specially designed non-DOT specification containers. (mode 1)</td>
</tr>
<tr>
<td>11204-N Vulcan Chemicals, Birmingham, AL</td>
<td>49 CFR 174.67(j)</td>
<td>To authorize tank cars equipped with 2&quot; valve hose under 30 psig pressure to remain connected during unloading of hydrochloric acid, Class B. (mode 2)</td>
</tr>
<tr>
<td>11206-N Western Atlas International, Houston, TX</td>
<td>49 CFR 173.62, Packing Method E-124, PPR-33</td>
<td>To authorize the transportation of detonating cord, Class 1, in plastic bags as alternative inner packaging overpacked as specified in CFR. (modes 1, 3, 4, 5)</td>
</tr>
</tbody>
</table>
This notice of receipt of applications for new exemptions is published in accordance with part 107 of the Hazardous Materials Transportation Act (49 U.S.C. 1806; 49 CFR 1.53(e)).

Issued in Washington, DC, on February 9, 1994.


[FR Doc. 94-3476 Filed 2-14-94; 8:45 am]
BILLING CODE 4910-60-M

[Notice No. 94-1]

Safety Advisory: Service Life of Composite Cylinders Used in a Self-Contained Breathing Apparatus (SCBA) or in Other Services

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Safety advisory notice, correction.

SUMMARY: This document makes a correction to a safety advisory notice published in the Federal Register on November 18, 1993 [Notice No. 93-22; 58 FR 60899], by adding two DOT Exemptions, which were inadvertently omitted from the list of affected exemptions. Beginning with the summary, the notice is reprinted as follows:

This is to notify persons using composite cylinders manufactured and authorized under DOT exemptions that those cylinders have a 15-year service life limit. The service life limitation applies to cylinders based on RSPA's fiber-reinforced-plastic (FRP) cylinder standards for metal-lined fiber-reinforced-composite cylinders which form part of an SCBA or are used in other services. The cylinders typically have service pressures of between 2,000 and 4,500 psig. Composite cylinders marked with a DOT exemption number that are older than 15 years should be removed from service. Such cylinders may have reduced strength without any visual indication of damage.

FOR FURTHER INFORMATION CONTACT: James K. O'Steen or Charles H. Hochman, telephone (202) 366-4545, Office of Hazardous Materials Technology, Research and Special Programs Administration, U.S. Department of Transportation, Washington, DC 20590-0001. Office hours are: 8:30 a.m. to 5 p.m., Monday through Friday.

SUPPLEMENTARY INFORMATION: RSPA has recently received numerous letters concerning the service life of certain cylinders used in Self-Contained Breathing Apparatus (SCBAs). The letters express the concerns of fire departments and others with the 15-year service life limitation on FRP composite cylinders which form part of an SCBA. Commenters are particularly concerned with the cost of replacing the cylinders after 15 years. These cylinders are manufactured and authorized for transportation under DOT exemptions.

An FRP composite cylinder is composed of an inner metallic liner over-wrapped with fiber filaments, most commonly fiberglass or kevlar, bonded together with a plastic resin. The large forces produced by the high pressure inside such a cylinder are restrained by the inner liner and the thousands of fiber filaments windings around the inner vessel. In a composite cylinder used for an SCBA, a large portion of the strength of the cylinder is provided by the fiber filaments.

Because fiber filaments provide much of the strength of an FRP cylinder, the useful life of an SCBA cylinder is greatly dependent on the properties of fiber filaments. Two of these properties are susceptibility to brittle fracture and stress rupture.

Brittle fracture. Fiber filaments are very strong but brittle. Once a crack starts in a filament, the crack continues to grow until the filament breaks. Unfortunately, filaments cannot be manufactured without some microscopic cracks. Cracks are also caused by in-service damage and pressure cycling. As cracks in a filament grow and a filament breaks, the filament's load is transferred to adjacent filaments. With increasing load, cracks in other filaments grow faster, additional filaments break, and load transfer increases. As the process accelerates with time, the bursting strength of the cylinder may be reduced and the cylinder could rupture in service.

Stress rupture is an actual reduction of fiber strength that occurs with time when the fiber is under load. Stress rupture varies greatly with material type; fiberglass is more susceptible to stress rupture than carbon fiber. In structures made of a material subject to stress rupture, such as fiberglass, the load level on filaments eventually exceeds their strength and the cylinder may rupture at the marked service pressure with potentially lethal consequences.

Because brittle fracture damage and stress rupture may occur without any visual indication of damage, cannot be
found by available non-destructive tests, and produce a general reduction in a cylinder’s strength over time, a maximum life was established to prevent cylinder rupture in service. The 15-year restriction was based on technical data presented by the cylinder manufacturers in support of their exemption requests, and is consistent with the service life limitation found in a position paper, “Basic Considerations for Composite Cylinders,” developed and published by the Compressed Gas Association.

Only one manufacturer of SCBA has requested that DOT amend its exemption to extend the cylinder service life from 15 years to 18 years. RSPA technical staff performed an extensive technical review of the manufacturer’s information that resulted in a denial of the request. RSPA concluded that the test data presented in support of an increased service life indicated a trend toward accelerated loss in cylinder burst strength and an increasing probability of cylinder failure, and did not support a service life extension.

RSPA is aware of, and concerned about, the financial burden associated with limiting the service life of composite cylinders, but RSPA must weigh this burden against the safety risk of a cylinder failure to firefighters and other users. For example, a Coram, New York firefighter was killed earlier this year (1993) by the rupture of a composite cylinder which was more than 15 years old. While the cause of that rupture was neither brittle fracture nor stress rupture, it is an example of the severe consequences of a composite cylinder failure.

Based on the above information, RSPA has retained the 15-year service life limitation on composite cylinders. At a minimum, persons finding composite cylinders that are older than 15 years should remove those cylinders from service. Composite cylinders are authorized for SCBA and other services under the following exemptions:

- DOT-E 7218
- DOT-E 8391
- DOT-E 9716
- DOT-E 7235
- DOT-E 8487
- DOT-E 10019
- DOT-E 7277
- DOT-E 8716
- DOT-E 10147
- DOT-E 7769
- DOT-E 8725
- DOT-E 10256
- DOT-E 8023
- DOT-E 8814
- DOT-E 10345
- DOT-E 8059
- DOT-E 8965
- DOT-E 10637
- DOT-E 8115
- DOT-E 9634
- DOT-E 10905
- DOT-E 8162
- DOT-E 9659
- DOT-E 11005


Alan I. Roberts,
Associate Administrator for Hazardous Materials Safety.

[FR Doc. 94–3474 Filed 2–14–94; 8:45 am]
BILLING CODE 4910–02–P

DEPARTMENT OF THE TREASURY
Public Information Collection Requirements Submitted to OMB for Review


The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980. Public law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

Office of Thrift Supervision
OMB Number: 1550–0023.
Form Number: OTS Form 1313;
Monthly Cost of Funds Survey Systems Worksheet; Officer’s Certification.
Type of Review: Revision.
Title: Thrift Financial Report (TFR).
Description: The Office of Thrift Supervision (OTS) collects financial data from insured institutions and their subsidiaries in order to assure their safety and soundness as depositories of the personal savings of the general public. The OTS monitors financial positions and interest-rate risk so that adverse conditions can be remedied properly. The respondents are savings institutions.

Respondents: Businesses or other for-profit, Savings Institutions.
Estimated Number of Respondents/Recordkeepers: 1,768.
Estimated Burden Hours Per Respondent/Recordkeeper: 20 hrs., 41 mins.
Frequency of Response: Monthly, Quarterly.
Estimated Total Reporting/Recordkeeping Burden: 365,215 hours.

Clearance Officer: Colleen Devine (202) 906–6025, Office of Thrift Supervision, 2nd Floor, 1700 G. Street, NW., Washington, DC 20552.


Lois K. Holland,
Departmental Reports Management Officer.

[FR Doc. 94–3435 Filed 2–14–94; 8:45 am]
BILLING CODE 4910–25–P

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1960. Public Law 96-511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

Form Number: IRS Form 8569.
Title: Type of Review: Extension.
OMB Number: 1545-0973.
Frequency of Response: Annually.
Estimated Number of Respondents: 500.
Estimated Burden Hours Per Respondent: 20 minutes.
Estimated Total Reporting Burden: 167 hours.

AGENCY: U.S. Customs Service, Treasury.
ACTION: Extension of comment period.
SUMMARY: This notice extends the period of time within which interested members of the public may submit comments concerning the proposed change of position regarding the classification of different sized camera lenses imported in the same shipment with an equal number of 35mm camera bodies under the Harmonized Tariff Schedule of the United States (HTSUS). The comment period is being extended another 30 days.
DATES: Comments are requested on or before March 7, 1994.
ADDRESSES: Comments (preferably in triplicate) may be addressed to the Regulations Branch, U.S. Customs Service, Franklin Court, 1301 Constitution Avenue, NW., Washington, DC 20229 and inspected at Franklin Court, 1099 14th Street, NW., suite 4000, Washington, DC.
FOR FURTHER INFORMATION CONTACT: David W. Spence, Office of Regulations and Rulings (202) 482-7030.
SUPPLEMENTARY INFORMATION: A document was published in the Federal Register (58 FR 19442) on December 7, 1993, proposing to change the position of the Customs Service regarding the classification of different sized camera lenses imported in the same shipment with an equal number of 35mm camera bodies under the Harmonized Tariff Schedule of the United States (HTSUS). Customs solicited comments on the proposal and comments were due on February 7, 1994.

Customs has received a request to extend the comment period so that adequate time is allowed to properly address this issue which could have a serious economic impact on the camera and lens buying public. The request is granted. The comment period is extended 30 days.

All comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), between 9 a.m. and 4:30 p.m. on normal business days, at the address stated above.


Harvey B. Fox,
Director, Office of Regulations & Rulings.

FederaL Law Enforcement Training Center

Notice of Meeting

AGENCY: Advisory Committee to the National Center for State and Local Law Enforcement Training.
SUMMARY: The agenda for this meeting includes: the introduction of new members and special guests and opening remarks by the Director of the Federal Law Enforcement Training Center and Committee Co-chairs; updates on the GREAT program, Airborne Counterdrug Operations Training, Medicaid Fraud, Rural Drug Training Program, Advanced Drug Operations Training Program, and Hate Bias Crime; discussion of Subcommittee formed at the last meeting; and presentations on Office of Justice Programs, BJAC Simulated Police Consortium, and the National Center Fellowship.

AGENCIES: Department of Justice, Room 1627, Tenth & Constitution Avenue Northwest, Washington, DC 20530.
FOR FURTHER INFORMATION CONTACT: Hobart M. Henson, Director, National Center for State and Local Law Enforcement Training, Federal Law
Fiscal Service

[Dept Cir. 570, 1993 Rev., Supp. No. 8]

Surety Companies Acceptable on Federal Bonds; The Great Lakes Reinsurance Co.

A Certificate of Authority as an acceptable surety on Federal Bonds is hereby issued to the following company under Sections 9304 to 9308, Title 31, of the United States Code effective December 31, 1993. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1993 Revision, on page 35824 to reflect this addition: The Great Lakes Reinsurance Company. Business Address: Wall Street Plaza, 88 Pine Street, New York, NY, 10005-1894. Phone: (212) 809-1061. Underwriting Limitation b/: $5,362,000.

Certificates of Authority expire on June 30, each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1 in the Department Circular 570, which outlines details as to underwriting limitations, areas in which licensed to transact surety business and other information. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1993 Revision, at page 35815 to reflect this change.

Questions concerning this notice may be directed to the Department of the Treasury, Financial Management Service, Funds Management Division, Surety Bond Branch, Washington, DC 20227, telephone (202) 874-6507.

Charles F. Schwan III,
Director, Funds Management Division, Financial Management Service.

SURETY COMPANIES ACCEPTABLE ON FEDERAL BONDS; MUTUAL SERVICE CASUALTY INSURANCE CO.

A Certificate of Authority as an acceptable surety on Federal Bonds is hereby issued to the following company under Sections 9304 to 9308, Title 31, of the United States Code, effective December 31, 1993. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1993 Revision, on page 35805 to reflect this addition: Mutual Service Casualty Insurance Company. Business Address: P.O. Box 64035, St. Paul, MN, 55164-0035. Phone: (612) 631-7000. Underwriting Limitation b/: $7,476,000.

Surety Licenses b/: AL, AZ, AR, CA, CO, DC, FL, GA, ID, IL, IN, IA, KS, KY, LA, MD, MA, MI, MN, MS, MO, MT, NE, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY. Incorporated in: Minnesota.

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the companies remain qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1 in Treasury Department Circular 570, with details as to underwriting limitations, areas in which licensed to transact surety business and other information. Copies of the Circular may be obtained from the Surety Bond Branch, Funds Management Division, Financial Management Service, Department of the Treasury, Washington, DC 20227, telephone (202) 874-6602.

Charles F. Schwan III,
Director, Funds Management Division, Financial Management Service.

SURETY COMPANIES ACCEPTABLE ON FEDERAL BONDS; NORTH STAR REINSURANCE CORP.

North Star Reinsurance Corporation, a Delaware corporation, has formally changed its name to Signet Star Reinsurance Company, effective August 30, 1993. The Company was last listed as an acceptable surety on Federal bonds at 58 FR 35808, July 1, 1993. A Certificate of Authority as an acceptable surety on Federal Bonds is hereby issued under Sections 9304 to 9308 of Title 31 of the United States Code, to Signet Star Reinsurance Company, New Castle, Delaware. This new Certificate replaces the Certificate of Authority issued to the Company under its former name. The underwriting limitation of $11,539,000 established for the Company as of July 1, 1993, remains unchanged until June 30, 1994.

Certificates of Authority expire on June 30, each year, unless revoked prior to that date. The Certificates are subject to subsequent annual renewal as long as the Company remains qualified (31 CFR part 223). A list of qualified companies is published annually as of July 1 in the Department Circular 570, which outlines details as to underwriting limitations, areas in which licensed to transact surety business and other information. Federal bond-approving officers should annotate their reference copies of the Treasury Circular 570, 1993 Revision, at page 35815 to reflect this change.

Questions concerning this notice may be directed to the Department of the Treasury, Financial Management Service, Funds Management Division, Surety Bond Branch, Washington, DC 20227, telephone (202) 874-6507.

Charles F. Schwan III,
Director, Funds Management Division, Financial Management Service.

Surety Companies Acceptable on Federal Bonds; Mutual Service Casualty Insurance Co.

Surety Companies Acceptable on Federal Bonds; North Star Reinsurance Corp.

Internal Revenue Service

Art Advisory Panel of the Commissioner of Internal Revenue

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of determination for reestablishment for the Art Advisory Panel.

SUMMARY: It is in the public interest to continue the existence of the Art Advisory Panel.

FOR FURTHER INFORMATION CONTACT: Karen Carolan, CC:AP-AS, 901 D Street, SW., room 224, Box 68, Washington, DC 20024, telephone: (202) 401-4128 (not a toll free number).

Pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. (1982), the Commissioner of Internal Revenue announces the reestablishment of the following advisory committee:

Title. The Art Advisory Panel of the Commissioner of Internal Revenue.

Purpose. The Panel assists the Internal Revenue Service by reviewing and evaluating the acceptability of property appraisals submitted by the taxpayers in support of the fair market value claimed on works of art involved in Federal Income, Estate or Gift taxes in accordance with sections 170, 2031, and 2512 of the Internal Revenue code of 1986.

In order for the Panel to perform this function, Panel records and discussions must include tax return information. Therefore, the Panel meetings will be
closed to the public since all portions of the meetings will concern matters that are exempted from disclosure under the provisions of section 552(b)(c) (3), (4), (6) and (7) of Title 5 of the U.S. Code. This determination, which is in accordance with section 10(d) of the Federal Advisory Committee Act, is necessary to protect the confidentiality of tax returns and return information as required by section 6103 of the Internal Revenue Code.

Statement of Public Interest. It is in the public interest to continue the existence of the Art Advisory Panel. The Secretary of the Treasury, with the concurrence of the General Services Administration, has approved reestablishment of the Panel. The membership of the Panel is balanced between museum directors and art dealers to afford differing points of view in determining fair market value.

Fifteen days after publication of this notice in the Federal Register, the Department of the Treasury, will file a copy of the committee’s charter with the Senate Finance Committee and the Committee Ways and Means Committee of the U.S. House of Representatives. The Department of the Treasury will also furnish a copy of the charter to the Library of Congress and the General Services Administration.

Authority for this panel will expire two years from the date the charter is filed with the appropriate congressional committees unless, prior to the expiration of its charter, the Panel is renewed.

The Assistant Secretary (Management) has determined that this document is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required. Neither does this document constitute a rule subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

George Muñoz,
Assistant Secretary (Management).

[FR Doc. 94-3467 Filed 2-14-94; 8:45 am]
BILLING CODE 4830-01-M
UNITED STATES POSTAL SERVICE BOARD OF
GOVERNORS

Notice of Vote to Close Meeting

At its meeting on February 7, 1994, the Board of Governors of the United States Postal Service voted unanimously to close to public observation its meeting scheduled for March 7, 1994, in Washington, DC. The members will discuss preparations for the rate case filing.

The meeting is expected to be attended by the following persons: Governors Alvarado, Daniels, del Junco, Dyhrkopp, Mackie, Pace, Setrakian and Winters; Postmaster General Runyon, Deputy Postmaster General Coughlin, Secretary to the Board Harris, and General Counsel Elcano.

The Board determined that pursuant to section 552b(c)(3) of Title 5, United States Code, and section 7.3(c) of Title 39, Code of Federal Regulations, this portion of the meeting is exempt from the open meeting requirement of the Government in the Sunshine Act (5 U.S.C. 552b(e)(3)) because it is likely to disclose information in connection with proceedings under Chapter 36 of Title 39, United States Code (having to do with postal ratemaking, mail classification and changes in postal services), which is specifically exempted from disclosure by section 410(c)(4) of Title 39, United States Code.

The Board has determined further that pursuant to section 552b(c)(10) of Title 5, United States Code, and section 7.3(j) of Title 39, Code of Federal Regulations, the discussion is exempt because it is likely to specifically concern participation of the Postal Service in a civil action or proceeding involving a determination on the record after opportunity for a hearing. The Board further determined that the public interest does not require that the Board’s discussion of the matter be open to the public.

In accordance with section 552b(f)(1) of Title 5, United States Code, and section 7.5(a) of title 39, Code of Federal Regulations, the General Counsel of the United States Postal Service has certified that in her opinion the meeting may properly be closed to public observation pursuant to section 552b(c)(3) and (10) of Title 5, United States Code; section 410(c)(4) of Title 39, United States Code; and section 7.3(c) and (j) of Title 39, Code of Federal Regulations.

Requests for information about the meeting should be addressed to the Secretary of the Board, David F. Harris, at (202) 268-4800.

David F. Harris,
Secretary.
[FR Doc. 94–3567 Filed 2–10–94; 4:58 pm]
Part II

Department of Transportation

Federal Aviation Administration
Federal Highway Administration
Federal Railroad Administration
Federal Transit Administration
Research and Special Programs Administration

Limitation on Alcohol Use by Transportation Workers; Notice
**DEPARTMENT OF TRANSPORTATION**

**Federal Aviation Administration**

**Federal Highway Administration**

**Federal Railroad Administration**

**Federal Transit Administration**

**Research and Special Programs Administration**

** Rin Nos. 2120-AE43; 2125-AC85; 2130-AA43; 2132-AA38; 2137-AC21.**

**Limitation on Alcohol Use by Transportation Workers**

**AGENCIES:** The Federal Aviation Administration (FAA), the Federal Highway Administration (FHWA), the Federal Railroad Administration (FRA), the Federal Transit Administration (FTA) and the Research and Special Programs Administration (RSPA), DOT.

**ACTION:** Final rules; common preamble.

**SUMMARY:** This document is a common preamble to five alcohol misuse prevention program final rules being published by several operating administrations (OAs) of the Department of Transportation (FAA, FHWA, FRA, FTA, and RSPA) elsewhere in today's issue of the Federal Register. Four of these rules are required by the Omnibus Transportation Employee Testing Act of 1991 (“the Act”), which requires alcohol and drug testing programs in the aviation, motor carrier, rail, and transit industries in the interest of public safety; FAA, FHWA and FRA also are relying on their other general safety authority as a basis for issuing these rules. RSPA is applying similar,

but more limited, requirements to the safety-sensitive employees in the pipeline transportation industry using existing statutory authority. The five rules generally have the same requirements and common language to the extent possible, in recognition of the common elements of the statute and the problem being addressed. This will ease compliance for those companies, employers and third-party service providers that may be subject to, or performing testing under, the rules of more than one of the OAs. Intended substantive differences (where industry-specific differences are necessary or to comport with existing regulatory format or statutory requirements) are explained in the preambles to the individual OA rules.

In general, the rules prohibit covered employees from performing safety-sensitive functions: (1) When test results indicate an alcohol concentration of 0.04 or greater; (2) Within four hours after using alcohol; (3) While using alcohol on the job; (4) During the 8 hours following an accident if their involvement has not been discounted as a contributing factor in the accident or until they are tested; and (5) If they refuse to submit to required alcohol tests. Employers have to remove from a safety-sensitive function any covered employee who violates any of these prohibitions until he or she has met the conditions for returning to a safety-sensitive function. If an employee is found to have an alcohol concentration of 0.02 or greater but less than 0.04 or if the employee is under the influence of or impaired by alcohol, as indicated by behavior, speech and performance indicators of alcohol misuse, and a reasonable suspicion alcohol test result cannot be obtained, the employee will have to be removed from safety-sensitive duties for 8 hours or until a test result below 0.02 is obtained. Four of the rules require employers to conduct pre-employment, reasonable suspicion (the term used in the Act, which is comparable to the term “reasonable cause” testing used in the DOT OAs’ existing drug rules and in the DOT advance notice of proposed rulemaking (ANPRM) on alcohol testing discussed below), post-accident, random, return-to-duty and follow-up alcohol testing. These rules also establish a performance standard for adjusting the initial 25 percent random alcohol testing rate for each transportation industry (except RSPA).

RSPA’s rule requires only reasonable suspicion, post-accident, return-to-duty and follow-up testing. Most of RSPA’s comments opposed the proposed alcohol prevention program; others supported it with various modifications tailored to the specific needs of the pipeline industry. Those in opposition noted that RSPA is not covered by the Act and that we do not have data indicating that there is a problem in the pipeline industry to support the costly imposition of the proposed program. They also perceived pipeline safety risks as different from those in other forms of public transportation, since pipelines do not carry people. Some commenters urged that we conduct a pilot program until we obtain sufficient data to make a decision on whether imposition of the program is justified. The lack of data cited by some commenters could result as easily from the lack of testing and industry alcohol prevention programs as from the absence of an alcohol problem in the pipeline industry. Our primary job in these rules is to implement the Act, which we have done in the other four OA rules. But to be sure we are providing a margin of safety where the Act does not exist, we are establishing an alcohol prevention program, including reasonable suspicion and post-accident testing, for the pipeline industry. Pipeline safety, obviously, is very important. While pipelines do not carry people, they carry dangerous materials that could do tremendous damage to people and property if someone affected by alcohol makes mistakes. Therefore, for safety reasons, we have decided to impose an alcohol misuse prevention program on the pipeline industry. We will monitor the data from the testing that is conducted to determine whether any further action is warranted. The rule will still ensure that pipeline employees are subject to the same alcohol misuse prohibitions, consequences and educational efforts that apply to other transportation industry employees. Pipeline operators, of course, can conduct other types of alcohol testing under their own authority.

The rules will provide more flexibility to use different testing technologies for screening tests than we proposed in the OA notices of proposed rulemaking (NPRMs). When, in the future, we evaluate and approve a device as meeting NHTSA model specifications and we have established rules setting forth the procedures for its use, employers may use the device. However, at the present time, only evidential breath testing (EBT) devices on the National Highway Traffic Safety Administration’s (NHTSA) Conforming Products List (CPL), including those without printers, meet these specifications and will have procedures in place at the time the five OA final
reduce alcohol and other drug use relating to motor vehicle and highway prevention final rules also impose issues and determine how to identify. Before we issue a final rule, we is addressed in a separate NPRM proposal, including testing procedures, available. The blood alcohol testing situations where an EBT is not readily reasonable cause and post-accident employer to conduct a blood test in (NHTSA develops programs relating to motor vehicle and highway safety, some of which are designed to reduce alcohol and other drug use among drivers.) NHTSA has published elsewhere in today's Federal Register proposed model specifications for additional alcohol screening devices, which could lead to their approval for future use in conducting screening tests under these rules.

We also are considering requiring the employer to conduct a blood test in reasonable cause and post-accident situations where an EBT is not readily available. The blood alcohol testing proposal, including testing procedures, is addressed in a separate NPRM published elsewhere in today's Federal Register. Before we issue a final rule, we need to resolve specimen collection issues and determine how to identify those laboratories that we can rely on to accurately analyze blood samples for alcohol concentration.

All of the OA alcohol misuse prevention final rules also impose reporting and recordkeeping requirements and provide for dissemination of alcohol misuse information to employees, supervisor training, and referral of employees to substance abuse professionals (SAPs) for evaluation.

This document is a common preamble jointly issued by each of the five OAs and provides the background for and an overview of the general, common elements of their rules. It is incorporated as part of the preamble for each individual OA's rule; additional modal-specific preambles have been issued by each of the OAs to provide an explanation of any differences from, or additions to, the common language. The following related documents appear in today's Federal Register:

(1) This common preamble;
(2) An Office of the Secretary (OST) final rule on alcohol testing procedures and conforming changes to the existing drug testing procedures that is incorporated by reference into the OA alcohol misuse prevention final rules;
(3) An Office of the Secretary (OST) NPRM on blood alcohol testing requirements and procedures that would be incorporated by reference into the OA alcohol misuse prevention final rules, if they become final; (4) The modal-specific OA alcohol misuse prevention final rules for: FAA; FHWA (also includes changes to its existing drug rule mandated by the Act, including extension of its rule to persons required to hold a commercial drivers license (CDL), including intrastate truck and motor coach operations); FRA (also includes changes to its existing drug rule); FTA; and RSA;
(5) FAA and FHWA NPRMs seeking public comment on application of alcohol and drug testing requirements to foreign operators in the United States in the aviation and motor carrier industries. A similar FRA ANPRM issued December 15, 1992, is being withdrawn by a notice published elsewhere in today's Federal Register. Foreign railroad operators have very limited operations in the U.S. and already comply with FRA's existing substance abuse requirements;
(6) An FTA final rule that imposes on recipients of Federal funding in the transit industry drug testing requirements similar to those in the other transportation industries (it also contains MIS requirements discussed below);
(7) An FAA NPRM proposing conforming changes to its existing drug testing rule to implement the requirements of the Act and for other purposes; and
(8) A DOT-wide common preamble with rule language from 6 OAs that proposes a performance standard for adjusting the random drug testing rate for the current random drug testing programs in the aviation, motor carrier, rail, pipeline and maritime industries and the new drug testing program for the transit industry. The proposals contain safeguards that would ensure maintenance of an adequate level of deterrence and detection of illegal drug use.

Related Management Information System (MIS) final rules issued by FAA, FHWA, FRA, RSA and the U.S. Coast Guard (USCG) that require employers to submit annual drug testing program information (USCG rule also contains alcohol requirements) were published December 23, 1993 (58 FR 68194 et seq.). FTA's final drug testing rule contains its MIS requirements. Similar MIS programs for alcohol are established in the OA alcohol rules. Regulatory assessments that analyze the costs and benefits of and the alternatives considered for each of the final rules and NPRMs published in today's Federal Register have been placed in the individual rulemaking dockets.

Table of Contents
Background
The Omnibus Transportation Employee Testing Act of 1991
Regulatory History
ANPRM
The Public Hearing on Breath Test Device Capability
The NPRMs
Summary of Comments
The Public Meeting
The National Airline Commission
The Existing Safety Problem
General Information and Definitions
The Effects of Alcohol
The Alcohol Problem—Generally
National Health Care Reform
Alcohol Misuse in the Transportation Industry
General
Aviation
Motor Carriers
FHWA Pilot Project
Rail
Transit
Pipeline
Legal Authority/issues
Background
General
The Americans with Disabilities Act and DOT Drug and Alcohol Testing
The Family and Medical Leave Act of 1993
Overview of the Operating Administrations' Final Rules
Purpose
Applicability
Alcohol Testing Procedures
Definitions
Preemption of State and Local Laws
Other Requirements Imposed by Employers
Requirement for Notice
Starting Date for Alcohol Testing Programs
Prohibitions
Alcohol Concentration
On-duty Use
Pre-duty Use
Use Following an Accident
Refusal to Submit to a Required Alcohol Test
Tests Required
General
Pre-employment Testing
Post-accident Testing
Random Testing
Consortia/Random Testing Pools
Random Alcohol Rate Performance Standard
Implementation Issues
Reasonable Suspicion Testing
Behavior and Appearance
Return-to-duty Testing
Follow-up Testing
Retesting of Covered Employees with an Alcohol Concentration of 0.02 or Greater, but Less than 0.04
Handling of Test Results. Record Retention, and Confidentiality
Retention of Records
Reporting of Results in a Management Information System
Access to Facilities and Records
Consequences for Employees Engaging in Alcohol-Related Conduct
Removal from Safety-sensitive Function/ Required Evaluation and Testing
Other Alcohol-related Conduct
Use of Back Extrapolation
Alcohol Misuse Information, Training, and Referral
Employer Obligation to Promulgate a Policy on Alcohol Misuse
Self-Identification/Peer-Referral Programs
Training for Supervisors
Employee Training
Referral, Evaluation, and Treatment
Other Issues
Flexible Approaches
Motor Carrier Safety Assistance Program (MCSAP Option)
Multi-Agency Coverage
International Issues
Regulatory Analyses and Notices
General
Paperwork Reduction Act
Appendix A to Common Preamble— Bibliography

Background
The Omnibus Transportation Employee Testing Act of 1991

On October 28, 1991, President Bush signed the Omnibus Transportation Employee Testing Act of 1991 ("the Act"), (Pub. L. 102-143, Title V). The Act requires the Department to prescribe regulations within one year that require testing of safety-sensitive employees in the aviation, highway, rail, and transit industries and in the Federal Aviation Administration for use, in violation of law or Federal regulation, of alcohol and drugs listed in the Controlled Substances Act. The Act preempts inconsistent State and local laws, except certain State criminal laws, in the aviation, highway, and transit industries and requires that the regulations be consistent with U.S. international obligations. It specifically mandates, among other things, privacy in collection techniques, incorporation of the Department of Health and Human Services' (DHHS) mandatory guidelines for drug testing and comparable safeguards for alcohol testing, quantified confirmation of any positive screening result, collection of split samples of body fluid specimens, confidentiality of test results, and scientifically-random selection of employees to be tested. It requires pre-employment, random, post-accident, and reasonable suspicion testing; periodic testing is discretionary. Regulations prescribed under the Act must include provisions for the identification of, and opportunity for treatment for, covered employees in need of assistance due to misuse of alcohol or illegal use of controlled substances. The Act states that current Federally-mandated programs are unaffected by the new statutory requirements.

At the time of enactment of the Act, several OAs already had implemental programs designed to address the use and misuse of drugs and alcohol by transportation workers, and the Department had published an ANPRM to explore whether additional steps were warranted concerning alcohol misuse by employees in the DOT-regulated transportation industries (54 FR 46326, November 2, 1989). In 1988, six of the Department's OAs—FAA; FHWA; FRA; FTA (formerly the Urban Mass Transportation Administration, (UMTA)); USCG; and RSPA—issued drug testing rules for members of their regulated industries (53 FR 47002 et. seq., Nov. 21, 1988). (The FTA rule was vacated by a Federal appellate court in January 1990 on the grounds that the agency lacked statutory authority to issue nationwide standards requiring drug testing.) The drug testing rules generally apply to persons performing safety-sensitive functions in commercial transportation operations. The Department also published in 1988, and revised in 1989, a Department-wide drug testing procedures rule (49 CFR part 40) that governs testing under all the OA rules (53 FR 47002, Nov. 21, 1988; 54 FR 49854, Dec. 1, 1989). As noted above, the Act requires certain changes to the existing drug testing rules (e.g., it requires split samples and extends coverage to persons required to obtain a CDL, generally intrastate truck and motorcoach operations under the FHWA rule). It also directs FTA to issue a drug testing rule. In addition to the requirements discussed above, the Act requires alcohol and drug testing for safety-sensitive FAA employees. Air traffic controllers are the largest group of employees subject to this testing (they are already subject to drug testing under an existing DOT policy). In addition, DOT employees and other Federal agency employees in positions requiring a CDL are subject to coverage under the FHWA rule. The Department will issue a DOT Order (an internal program document) to conform the Department's drug testing program for its own employees to the requirements of the Act and to implement a similar alcohol misuse prevention program.

Regulatory History
ANPRM

During the drug testing rulemakings, we noted that, although alcohol is a drug, the solution to the alcohol problem may be very different from that concerning other drugs, such as cocaine or marijuana, and we would address it in a separate rulemaking. For that reason, with one exception, the OAs did not include alcohol among the list of substances to be tested for under the drug testing regulations. (The Coast Guard, which is not covered by this rulemaking, has mandatory post-accident alcohol testing and authorized reasonable cause (suspicion) alcohol testing. FRA had previously included alcohol in its post-accident testing mandate and had authorized alcohol testing for reasonable cause.)

On November 2, 1989, the Department published an advance notice of proposed rulemaking (ANPRM) to solicit public comment on whether the Department's existing regulatory requirements and programs were sufficient to respond to the hazards of alcohol misuse in DOT-regulated transportation industries and to determine what additional action, if any, should be taken. The ANPRM set forth a number of options for reducing alcohol misuse in DOT-regulated industries, if further action was deemed necessary. Over 225 comments were filed in response to the ANPRM; these comments were considered in developing the NPRMs.

The Public Hearing on Breath Test Device Capability

After the enactment of the Act, to enable better evaluation and comparison of the capabilities of different alcohol testing methods, the Department of Transportation conducted a public hearing on November 18, 1991, to obtain specific information from the manufacturers of breath test devices. Our purpose was to examine the current or feasible capabilities of equipment to handle the problems of testing in the transportation industry, particularly verification of the identity of tested individuals and the validity of the test result. At the hearing, the Department noted that attempts to tamper with the test and refusals to acknowledge the test result may be problems because an immediate result is available. The Department also indicated that it would need to ensure accurate test results without adding prohibitive costs to any proposed program.

Representatives of eight manufacturers assured DOT officials that existing technology can keep adequate, verifiable records of tests. They claimed that they could incorporate safeguards against tampering with adjustments to hardware and software, such as the assignment of a serial number to each test. They pointed out, however, that currently
available equipment alone cannot provide an indisputable verification procedure or replace trained human supervision of the testing process. The Department believes that the testing procedures set forth in the separate final rule establishing new alcohol testing procedures for 49 CFR part 40 published in today’s Federal Register provide adequate safeguards for breath testing in response to the above concerns.

The NPRMs

On December 15, 1992, the Department published eighteen separate documents, including fourteen NPRMs and four ANPRMs, that proposed programs in several DOT-regulated transportation industries to reduce alcohol misuse and to amend existing industry drug testing programs (57 FR 59382 et seq., December 15, 1992). These included: A common preamble and an OST NPRM on alcohol testing procedures and conforming drug testing changes (part 40), both of which were incorporated by reference into the FAA, FHWA, FRA (also included drug changes), FTA, and RSPA NPRMs proposing alcohol misuse prevention programs; FAA, FRA, and FHWA ANPRMs on application of those requirements to foreign operators in the United States; an FTA NPRM proposing an anti-drug program for the transit industry; FAA, FHWA, FRA, RSPA, and USCG NPRMs proposing the new MIS (FTA drug NPRM included its MIS proposal); an FHWA NPRM proposing statutorily-mandated changes to its existing drug rule, including extending coverage to intrastate truck and motorcoach operations; and a DOT-wide ANPRM that sought comment on less costly alternatives to the current industry random drug testing requirements, particularly changes to the random drug testing rate. The alcohol misuse prevention NPRMs proposed prohibitions on alcohol misuse, related consequences, several types of alcohol testing, reporting and recordkeeping requirements, dissemination of alcohol information, supervisor training and referral of employees to a substance abuse professional (SAP) for evaluation.

Summary of Comments

Since there are common requirements, bases and purposes for the rules, each DOT organization (term includes OAs and OST) involved may have relied upon comments submitted to the dockets of the other participating DOT organizations in developing its final rule. Where a DOT organization has relied upon a comment directed to the docket of another DOT organization, it will make available a copy of that comment. Comments addressing issues common to all of the OAs’ alcohol prevention programs generally are addressed throughout this common preamble. Comments on OA-specific issues and the draft economic analyses have been addressed in the preambles to the OA rules. Comments on testing procedures, foreign application, drug testing rules and the drug testing random ANPRM have been addressed in the preambles to those documents. Approximately 700 comments were filed in response to the NPRMs in the various OA alcohol misuse prevention rule dockets. (Some commenters filed identical comments to more than one DOT organization.) Commenters included local, State and Federal governmental agencies, trade associations, employers, employees, labor unions, medical professionals, substance abuse professionals and individuals. Most of the comments were filed by employers, followed by trade associations and governmental bodies. The majority of the commenters had a mixed reaction to the proposed alcohol misuse prevention programs and suggested changes on a variety of issues. Some commenters applauded the efforts of Congress and the Department to reduce accidents and save lives by removing from our nation’s transportation systems employees in safety-sensitive positions who misuse alcohol. However, approximately one-third of the commenters opposed the specific proposals and only a small percent (less than 5 percent) were enthusiastic about them. A significant number of medical professionals made the effort cited its high cost unsupported by data indicating that there is a serious problem in their industry. Other commenters did not believe that mandatory alcohol testing will effectively deter or eliminate alcohol use among covered employees. As discussed below, many of the requirements of these rules are mandated by the Act and the Department has no authority to modify or ignore them.

In addition to soliciting written comments, the Department held three public hearings on part 40 and the OA alcohol misuse prevention and anti-drug rules in Washington, DC; Chicago; and San Francisco in February and March 1993. OST and all OAs, except USCG, which proposed only MIS requirements, participated in these hearings. The hearings, which ran for two days in each location, consisted of one day of testimony on part 40 and general issues and a second day for breakout sessions on OA concerns. Approximately eighty people presented testimony at those hearings. (Some commenters made presentations at more than one hearing.) Transcripts of all the hearings and any written materials submitted at the hearings are available in the appropriate rulemaking dockets. All comments received at those hearings have been fully considered in developing the final rules.

The Public Meeting

In February 1993, the Department held a public meeting to facilitate presentation and discussion of relevant information on workplace random testing and its impact on drug use deterrence. Over 20 participants presented papers and sparked discussions that ranged from mathematical models of drug testing rates and their impact on drug use to program data from corporations using random drug testing as part of a drug-free workplace strategy. The results of the meeting were inconclusive. The participants presented no definitive data that identified optimal random testing rates for achieving maximum deterrence of drug use. Many corporate representatives expressed views that favored reducing required random testing rates; however, they did not support their views with specific data on the causal or correlative relationship between random testing rates and drug use deterrence. The discussions also covered the corollary issue of detection of drug abusers who are not deterred by workplace drug prevention policies or programs. These issues also are relevant to alcohol random testing rates discussed later in this document.

The National Airline Commission

In April 1993, President Clinton established the National Commission to Ensure a Strong Competitive Airline Industry (also known as the National Airline Commission). Its charter was to review the financial condition of the airline industry and to make recommendations to assist the industry in recovering from the financial and operational difficulties it had faced during the last several years. The National Airline Commission met with industry, labor, and government representatives in a number of public meetings before drafting its final recommendations. Specific to this rulemaking, the Commission observed that “high pre-employment alcohol testing rates do not need to be adopted, and any random alcohol testing of airline employees should be at no more than a 10 percent rate.”
The Existing Safety Problem

General Information and Definitions

Throughout this document, we have generally relied on or referred to the results of many studies concerning alcohol. Parenthetical references to these studies are included in the text; their full names are listed alphabetically in a bibliography in Appendix A. Copies of these studies have been placed in OST rulemaking docket 46574. It is important to note that the test data we have are not complete; often the database includes only those tests that were performed. Post-accident tests are conducted after some accidents, but not others, depending upon current regulatory requirements, the availability of testing personnel, and location and timing of accidents. When they are conducted, they may occur hours after the accident (e.g., in the railroad industry it takes an average of 5 hours before the post-accident tests can be conducted). Also, data are not comparable among the transportation modes, because of differences in reporting requirements, databases, and time periods. In addition, the referenced studies generally used different parameters and are therefore not comparable to each other.

Many of the words relating to alcohol are used interchangeably in our society, which may cause some confusion. In this document, we use the terms "driving while intoxicated" (DWI) and "driving under the influence" (DUI) to refer to the same thing: Violation Of an alcohol-concentration standard defining intoxication. "Zero tolerance" refers to an alcohol-concentration standard of 0.00, or in some cases, 0.01 or 0.02. Limits on current testing technology establish the limit of detection at 0.02 concentration for accuracy and precision. "Impairment" and "under the influence" refer to the effect of alcohol ingestion on the performance of a safety-sensitive function, without regard to a specific alcohol concentration.

The Effects of Alcohol

The potential effects of alcohol misuse are substantial in terms of lives lost, injuries and environmental and property damage. Alcohol misuse claims at least 100,000 lives annually, 25 times as many as all illegal drugs combined. In 1992, 39,325 deaths occurred on our nation's highways, of which 36 percent involved a legally intoxicated driver or non-occupant (e.g., pedestrian), and another 9 percent involved a driver or non-occupant with at least some alcohol (with an alcohol concentration over 0.01). Alcohol is involved in 45 percent of total highway fatalities. (National Highway Traffic Safety Administration, "Traffic Safety Facts 1992—Alcohol").

Ethanol (the psychoactive component of alcoholic beverages) is a central nervous system depressant. It has been widely recognized for years that consumption of alcohol can degrade performance of demanding or delicate tasks. There is less agreement, however, about how much alcohol must be ingested before a significant degradation of performance occurs. Studies have indicated that the effects of alcohol vary among individuals, and, even for a given individual, alcohol will have varying effects depending on such factors as motivation, fatigue, and previous experience with alcohol (Zero Alcohol, 1987; Ryder, 1981; Landauer, 1983; Listner, 1983). One reason for the substantial variation among individuals is that ingestion of a specified quantity of alcohol may not necessarily produce the same alcohol concentration in each, even if they have the same body weight (Zero Alcohol, 1987).

In one study, for example, it was found that a given body-weight-adjusted dose of ethanol could produce a range of alcohol concentrations of 0.036 to 0.095 (O'Neill, 1983). In addition, alcohol appears to enter the bloodstream at different rates in different people (Zero Alcohol, 1987). In another study, subjects were given controlled doses and had equal amounts of food in their system. Nevertheless, the time required to reach the peak alcohol concentration varied from 15 to 90 minutes after ingestion (Wilson, 1984).

There also are performance differences between individuals that are unrelated to their blood alcohol concentration. It appears that highly skilled professionals may be better able to compensate for the physiological effects of alcohol than persons who are less skilled, particularly at lower alcohol concentrations. In two studies comparing the effect of alcohol on the performance of racing drivers and ordinary drivers on a closed track, the skill of the ordinary drivers showed some degradation at an alcohol concentration of 0.05, while the racing drivers showed no impairment until they reached substantially higher alcohol concentrations (Forney, 1961). Similarly, in a comparison of nonprofessional and professional pilots at alcohol concentrations of 0.04, 0.08, and 0.12, the nonprofessionals made more errors in tracking, while the professionals' tracking ability did not decrease even at the highest alcohol concentration (Billings, 1972). The study noted, however, that the professional pilots committed more procedural errors than normal after alcohol consumption. Compounding factors, such as drugs and unexpected challenges, also are likely to affect results in a real-world situation.

Most States have adopted an alcohol concentration of 0.10 as the definition of intoxication in connection with laws imposing civil or criminal penalties for driving under the influence for non-commercial as well as for commercial operators. Some use it as a rebuttable presumption of a violation; others as a per se violation. Ten states have lowered their alcohol concentration standards to 0.08; and a number of states have adopted or are in the process of considering adoption of the existing 0.04 FHWA alcohol concentration standard for commercial drivers established by previous rulemaking. States with alcohol concentration standards for operating commercial vessels or aircraft typically use 0.10.

As indicated above, however, a number of laboratory studies have shown that performance on some tasks can begin to degrade at alcohol concentrations well under 0.10 (Moskowitz, 1973; Draw, 1959; Landauer, 1983; NHTSA, 1988). Some studies have suggested that performance degrades in a linear fashion, beginning with the lowest levels tested (Moskowitz, 1985; Draw, 1959). Blood alcohol concentrations (BAC) lower than 0.05 have been associated with increases in errors in tasks requiring divided attention, and it appears that cognitive performance is decreased for most individuals at BAC's of 0.04 or less (Zero Alcohol, 1987; Evans, 1974). Low alcohol concentrations have also been shown to affect a driver's stopping distance and to increase errors in steering (Laurell, 1977). There is no definitive answer to how much the risk of accident occurrence increases as a result of the performance deficit, but some relationship can be assumed. Those OAs in the Department that have set existing alcohol concentration standards for transportation workers (FAA, FHWA, FRA and Coast Guard) generally have used 0.04 as the prohibited concentration.

In its most recent edition of "Fatality Facts," the Insurance Institute for Highway Safety notes that "even at BACs as low as 0.02%, alcohol affects driving ability and crash likelihood. The probability of a crash begins to increase significantly at 0.05% BAC and climbs rapidly after about 0.08%. For drivers with BACs above 0.15% on weekend nights, the likelihood of being killed in a single-vehicle crash is more than 380
times higher than it is for nondrinking drivers.”

The Alcohol Problem—Generally

The National Institute on Alcohol Abuse and Alcoholism (NIAAA) reported in 1987 that two of every three adults in the United States drink, but 10 percent of those drinkers consume half of the nation’s beer, wine and liquor. The National Institute on Drug Abuse (NIDA) reported that an estimated 17 million U.S. adults are alcoholics, which is about six times higher than the number of cocaine users. (NIDA study, 1989). While it is difficult to estimate the precise cost to society from alcohol misuse, there is no doubt that the cost is enormous. The potential effects of alcohol misuse are substantial in terms of lives lost, personal injuries, property damage, business losses (lost productivity, absenteeism, increased health care costs, etc.) and environmental damage.

According to a Research Triangle Institute study performed for the Department of Health and Human Services, the overall economic cost to American society from alcohol misuse was $89.5 billion in 1980. This amount represents direct costs, such as medical treatment, and indirect costs, such as lost wages and reduced productivity. In 1987, the NIAAA estimated the economic costs to society of alcohol misuse to be nearly $117 billion a year, including $18 billion from premature deaths, $66 billion in lost productivity, and $13 billion for rehabilitation. Assuming the base numbers are still the same, inflation presumably has increased the cost in current dollars.

The National Academy of Sciences (NAS) recently released a study of drug use in the American workforce. The study reviewed the existing research literature on (1) the effects of drug and alcohol use on workplace performance and productivity, (2) the effectiveness of workplace interventions, and (3) the scope of alcohol and other drug use. The study concluded that more epidemiological and longitudinal research is needed and that the current research literature does not provide definitive conclusions about the scope of use, the specific effects of drug and alcohol use on work performance tasks, and the effectiveness of workplace interventions such as drug and alcohol testing and employee assistance programs. We believe that the existing research literature supports the actions that we are taking here and that data gathered as a result of these rules will provide useful additional information concerning these issues.

National Health Care Reform

Secretary of Transportation Federico Peña recently set a goal of reducing alcohol-related highway fatalities from 45 percent to 43 percent of total highway fatalities by 1997. He noted that alcohol-related traffic fatalities decreased by 20 percent between 1990 and 1992 due to increased alcohol awareness among teenagers and tougher enforcement measures that reduced impaired driving by repeat offenders. Motor vehicle accidents are a major health problem. They are the primary cause of death for the American population between 5 and 34 years of age, and account for half the total of injury deaths. More people are injured or die in motor vehicle-related accidents each year than from heart disease, cancer, and strokes combined. Alcohol involvement is the single largest factor in motor vehicle deaths and injuries, which as a whole cost the nation $14 billion in health care costs each year; any reduction in impaired driving would directly contribute to reducing health care and other economic costs.

The Department estimates that reducing highway alcohol-related fatalities to 43 percent of total fatalities and reducing related injuries by a proportionate amount would save 1,200 lives annually and save U.S. taxpayers $282 million in health care costs annually. Obviously, reducing alcohol-related fatalities and injuries in other transportation industries would further reduce those costs.

The measures contained in these rules and the Department’s partnership with industry and State and local governments to educate the public about impaired driving are part of a broad Department effort to reduce accidents and injuries resulting from alcohol misuse in each of the transportation industries, which will, in turn, reduce health care costs under President Clinton’s health care reform initiative. Increased detection of alcohol misusers and their diversion into the health care system could increase health care costs in the short term, since individuals with serious alcohol problems tend to neglect health care until intervention. This increase would be mitigated to a certain extent by a decrease in alcohol-related absenteeism. However, long term health care costs should decrease because early intervention prevents more serious and more costly health problems later.

Alcohol Misuse in the Transportation Industry

General

The Department’s previous alcohol misuse prevention efforts have developed unevenly and vary across the transportation industries. The existing OA rules focus on alcohol in terms of: Its effect on an individual’s medical qualifications; prohibitions against on-duty use; operating while under the influence; use during defined pre-duty periods; and sanctions for violations of the Federal regulatory scheme, as well as sanctions for violations of State alcohol laws. Alcohol testing, with limited exceptions, has been left to State enforcement. (Current FRA rules require post-accident and authorize reasonable cause testing. The FAA requires crewmembers to submit to tests upon request by State and local officials and to furnish the results to the Administrator. The Coast Guard also has existing requirements concerning alcohol misuse, including some testing.) Each of the following sections briefly describes the existing OA rules on alcohol and contains available Departmental data on the alcohol problem in each segment of the transportation industry.

Aviation

The current FAA regulations prohibit a person from acting or attempting to act as an aircraft crewmember if he or she is under the influence of alcohol, has consumed any alcohol beverage within the prior 8 hours, or has an alcohol concentration of 0.04 or greater. The FAA may medically disqualify a pilot with a history of drug dependence, alcoholism, or mental problems.

In 1987, the Department’s Inspector General checked the National Driver Register (NDR) against records in the Florida Department of Motor Vehicles; it found that nearly 8,000 FAA-certified pilots in Florida had been convicted of drunk-driving offenses. Recent legislation allowed FAA and the rail industry to use the NDR to locate and review individual driving records to screen qualifications of airline pilots and locomotive engineers. The FAA was unaware of these DUI convictions because the pilots had not reported them to the FAA as required. The FAA then issued a DUI enforcement policy and a rule that includes, among other matters, a process for examining driving records. Pilots with 2 or more drug- or alcohol-related driving offenses within 3 years are subject to FAA certificate revocation action.

In 1991, the FAA began checking the NDR to identify pilot certificate holders who had drunk-driving convictions. Of pilots seeking medical recertification during the period May 1991 through May 1993, 5.79 percent had at least one DWI conviction reported. The total number of pilots (for scheduled and
non-scheduled airlines) who had one or more DWI’s was 4.386, or 6.4 percent. There is no research that directly links impaired driving behavior to commercial aviation performance; however, impaired driving behavior is often associated with alcohol abuse and/or alcoholism.

There has never been an accident involving a large U.S. passenger airline in which the probable cause was attributed to alcohol use. However, in 1990, three Northwest Airlines pilots were convicted of flying while intoxicated between Fargo, ND, and Minneapolis, MN. Two hours after the flight ended, the crew captain’s alcohol concentration was found to be 0.13; he testified that he drank 20 rum and cokes the night before the 6 a.m. flight. Starting in the early 1970’s, the Air Line Pilots Association and the major airlines, in cooperation with the FAA, developed a program to identify alcoholic pilots, so that they could be treated and, as appropriate, returned to duty. More than 1,500 pilots have been through this program, with a relapse rate of approximately 10 percent. Since the program provides for stringent surveillance of treated pilots, there has been no compromise of safety. Nevertheless, the existence of such an extensive program and the occurrence of the Northwest pilots incident demonstrate that the air carrier industry is not immune to the problem of alcohol misuse.

The National Transportation Safety Board (NTSB) has collected the following data concerning the relationship between alcohol and aviation accidents: From 1975 through 1986, eleven part 135 carriers (all except one were commercial air taxi/commuter air carriers) were involved accidents in which alcohol was determined to be a factor. As noted above, there have been no part 121 or part 135 (large or air taxi/commuter air carrier) accidents in which alcohol has been determined to be a cause.

Virtually all commenters to the FAA docket claimed that, in light of the current financial state of the airline industry, DOT should not mandate an overzealous random alcohol testing program that is not statistically justified. As we noted above, we are constrained by the requirements of the Act. To the extent possible, we have tried to provide flexibility to employers that will enable them to make cost-conscious decisions for their specific circumstances. With respect to our lack of data, it is difficult to know whether the lack of a large U.S. passenger aircraft accident caused by alcohol is due to the fact that it has never happened or because we have no required testing and could not determine that alcohol was involved.

### Motor Carriers

Currently, drivers found to be under the influence of alcohol or drugs are disqualified from operating a commercial motor vehicle (CMV). FHWA regulations prohibit the use of alcoholic beverages within four hours of reporting to work and also prohibit a driver from driving while having any measurable alcohol concentration or any detected presence of alcohol in his or her system. This effectively amounts to a zero alcohol limitation for CMV operators. In addition, a driver will not be considered physically qualified to drive a motor vehicle if, among other things, the driver has no current clinical diagnosis of alcoholism.

Accident statistics indicate that nearly half of the fatally injured noncommercial motor vehicle drivers had a measurable amount of alcohol in their blood (usually 0.10 or more) compared with about 15 percent of fatally injured drivers of medium and heavy trucks. Moreover, as the chart below indicates, for those truck drivers who had been drinking before an accident, the highest accident rate was among those consuming the most alcohol. Drivers of heavy and medium trucks with measurable alcohol concentrations are involved in about 750 fatal crashes annually, along with another 7,700 crashes resulting in personal injuries and 4,750 crashes involving only property damage (Zero Alcohol, 1987).

<table>
<thead>
<tr>
<th>AC (N)</th>
<th>Percentage of all fatal truck accidents</th>
<th>Percentage of the 15% of truck drivers who had alcohol in their blood</th>
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<td>3.2</td>
<td>21</td>
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In 1990, the NTSB published the results of a study of alcohol (and other drugs) used by CMV operators in fatal-to-the-driver, heavy truck accidents. Thirteen percent of the fatally injured drivers tested positive for alcohol. (Another 20 percent of the drivers tested positive for other drugs.) We also know that the cost of accidents to employers is substantial, over and above the lives lost, whether CMV accidents are caused by alcohol or something else. The National Safety Council estimates that an on-the-job accident is four times more costly than one that occurs in a personal vehicle, with an average cost to employers of $168,000 for a fatal accident and $6,900 for a non-fatal accident. The impact of on-the-job accidents caused by alcohol on employer costs is quite significant.

**FHWA Pilot Project.** The Act required the Secretary of Transportation to conduct a pilot program for the purpose of testing drivers on a random basis to determine if a driver has used alcohol or a controlled substance in violation of law or federal regulation. The pilot testing program was administered as part of the FHWA Motor Carrier Safety Assistance Program (MCSAP) and implemented in four States for a period of one year. At the completion of the pilot program, the Department will issue a report of the program, including recommendations concerning the desirability and implementation of a MCSAP-administered random testing program. FHWA began the implementation of the required pilot project in Fiscal Year 1993 (October 1, 1993—September 30, 1994). (N.B.: the Fiscal Year for the Federal government may differ from that used by other entities.) Preliminary data from the pilot program show 88 breath test results of 0.02 alcohol concentration or greater or of 43,170 tests conducted (0.2 percent). However, in two States (Minnesota and New Jersey) submitting to the breath test was voluntary and from 5 to 10 percent of drivers randomly selected declined to take a breath test.

### Rail

Current FRA regulations prohibit on-the-job use of, possession of, or impairment by, alcohol, or having an alcohol concentration of 0.04 or more, for employees covered by the Hours of Service Act. Workers who report for duty under the influence can be identified, removed from the workplace, and referred for assistance under Operation RedBlock or other similar peer prevention substance abuse programs operated by the railroad industry. The covered employee can be referred for assistance by a peer, a supervisor or himself/herself.

As part of the post-accident testing conducted under its current rules, FRA has gathered the following data. From February 1986, when mandatory FRA post-accident blood testing for alcohol began, through December 1992, 23 employees tested positive for alcohol (0.5 percent of employees tested). However, the number of positive
findings has declined from 6 (1.0 percent of all persons tested) in 1989, to 10.3 percent of all persons tested) in 1992. Since 1986, alcohol appears to have played a causal role in 11 accidents/incidents involving four deaths, three injuries, and property damage in excess of $3.3 million. In one, the engineer tested positive at an alcohol concentration of 0.16, and alcohol was found by the NTSB to be a contributing factor to the accident. The incident caused $1.58 million damage and the death of the engineer. In another accident, eight injuries and $194,000 in damages resulted, and a dispatcher tested positive at 0.15 alcohol concentration. In a 1990 accident, an engineer tested positive with an alcohol concentration of 0.05 after his train passed a stop signal and collided with another train, resulting in one injury and nearly $500,000 in property damage. In 1991, two brakemen were killed, one by a train when struck during a switching operation and the other when he fell from the side of a train. Post-mortem toxicology revealed alcohol concentrations of 0.04 and 0.08, respectively.

Reasonable cause breath testing under the FRA program or pursuant to railroad authority, the general safety authority, or national railroad safety commission has produced the following results: 11 of 348 persons so identified tested positive in 1986 (3.2 percent); 24 of 593 tested positive in 1987 (4.0 percent); 46 of 1005 tested positive in 1988 (4.6 percent); 31 of 973 tested positive in 1989 (3.2 percent); 32 of 2662 tested positive in 1990 (1.2 percent); 37 of 2798 tested positive in 1991 (1.3 percent); and 30 of 2850 tested positive in 1992 (1.2 percent). FRA regulations define a “positive” breath test as one indicating an alcohol concentration of 0.02 or above. The significance of these results with respect to measuring prevalence in the population is difficult to determine. It should be expected that a higher percentage of reasonable suspicion tests will be positive, since prohibited use or impairment had already been identified or suspected.

Transit

FTA does not have any existing regulations concerning alcohol. Its primary mission is to provide grants for the financing and improvement of transportation systems. Many of FTA’s grants, however, are subject to other Federal requirements on alcohol use. All commuter rail operations funded by FTA, for example, are subject to FRA regulations. Ferry operations that receive FTA funds are subject to USCG safety, drug and alcohol regulations, as well as the FTA drug and alcohol testing rules published today.

The need for alcohol testing of transit employees was highlighted by a December 28, 1990, accident in Boston, Massachusetts, where a transit operator, with an alcohol concentration above 0.10, crashed a trolley car, injuring 33 people. In addition, the Senate Committee on Commerce, Science, and Transportation’s report on S. 676, No. 102-54 (May 2, 1991), noted that, in Philadelphia alone, transit operators have tested positive for drug or alcohol use in six major accidents between 1986 and 1990, involving at least 183 injuries and three deaths. (Separate figures for drug and alcohol involvement were not provided.) On August 28, 1991, a New York City Transit Authority motorman later found to have an alcohol concentration of 0.16, and nearly $500,000 in property damage in excess of $3.3 million. In December 1991, a New York City Transit Authority motorman, after passing a stop signal and collided with a subway train resulting in 5 deaths and 171 injuries; this accident led to the prompt passage of the Act. Following issuance of the 1988 FTA anti-drug rulemaking, some industry members indicated that alcohol is a more serious problem than drugs.

An FTA document entitled, “Substance Abuse in the Transit Industry” November 1991, was based upon a transit agency survey and an employee survey. It revealed that responding transit managers perceived alcohol as the major substance of misuse and that 58 percent of the transit systems test for alcohol. Employee knowledge of coworker alcohol misuse was extensive; about 70 percent of employees surveyed had some knowledge, either through hearsay or by direct observation, of alcohol impairment of colleagues in the workplace during the previous year. About six percent of the safety-sensitive employees reported alcohol use during or just before duty. Another 15 percent of the safety-sensitive employees reported less frequent alcohol consumption, but at a nearly similar volume as those employees noted above. When comparing these data with those contained in the “National Household Survey on Drug Abuse: Population Estimates 1988” and the comparable 1990 NIDA survey, it appears that reported alcohol use in the transit industry is slightly lower than that reported for the general population.

Pipeline

RSPA has no specific regulations for alcohol. It does have a general regulation on health of pipeline workers at liquefied natural gas plants. Pipeline operators must look for any physical condition that would impair performance, including any observable disorder or condition that is discoverable by a professional examination.

We have no specific data on alcohol-related accidents or lost productivity data in this area; however, a number of the commenters in the anti-drug rulemaking seemed to believe that alcohol is a more pervasive problem than drugs in the pipeline industry. We also are aware that many companies in the pipeline industry are known to have alcohol prevention programs. We do not have statistics or data on the prevalence of the problem in the industry, but we cannot assume that pipeline workers are immune from the problem and must err on the side of safety. The largest single cause of pipeline accidents is excavation damage by people digging into pipelines (people not regulated by RSPA).

Legal Authority/Issues

Background

The following legal analysis was included in the common preamble to the proposed DOT alcohol testing rules published in the Federal Register of December 15, 1992, (See 57 FR 59389–59391) and is republished with this document for ease of reference. Since that time, there have been no significant case law developments to raise any doubts concerning the Department’s stated belief that existing legal precedents support this rulemaking. To the contrary, the case law addressing the constitutionality of alcohol and drug testing is even more settled. Of particular note in this regard is a recent Federal district court ruling that random testing of commercial motor vehicle operators for alcohol and controlled substances pursuant to a one-year pilot study in four States, as mandated by section 5(b) of the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143, title V, codified at 49 U.S.C. app. 2717 note, comports with the Fourth Amendment of the U.S. Constitution and is not an unreasonable search and seizure. Owner-Operator Independent Drivers Association, Inc. v. Peña, No. 93–1427, U.S. District Court for the District of Columbia, November 1, 1993.

General

The Omnibus Transportation Employee Testing Act of 1991 is a direct statutory mandate for alcohol testing in the aviation, motor carrier, rail, and transit industries. In addition to this authority, the general safety authority relied on for issuing the drug testing rules described above also provides a
basis for issuing alcohol misuse prevention rules by FAA, FHWA, FRA, and RSPA. Although the existing case law addressing the constitutionality of employee alcohol testing programs remains more sparse than that for drug testing, the existing legal precedents support this rulemaking effort to require alcohol testing in the regulated transportation industries.

Consistent with court findings in the area of government-mandated drug testing of employees, alcohol testing mandated by the government is considered a search within the meaning of the Fourth Amendment to the U.S. Constitution. See, Schmerber v. California, 384 U.S. 757, 767-768 (1966) ("compelled intrusions into the body for blood to be analyzed for alcohol content" must be considered a Fourth Amendment search); Skinner v. Railway Labor Executives' Association, 489 U.S. 616-617 (1989) ("Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis ... implicates ... concerns about bodily integrity and, like the blood-alcohol test ... considered in Schmerber, should also be deemed a search.")

In deciding whether a particular search comports with Fourth Amendment protections, courts must determine that under all the particular circumstances the search itself is "reasonable." As the leading case on bodily fluid testing, Skinner, makes clear, issuance of a warrant or the existence of probable cause or individualized suspicion is not a minimum essential requirement in establishing the reasonableness of a search under an administrative testing program.

In Skinner, the Supreme Court upheld regulations issued by the Federal Railroad Administration governing drug and alcohol post-accident and reasonable cause testing of railroad employees (49 CFR part 219). The Court concluded that the testing procedures and methods of procuring blood, breath, or urine for testing as set forth in subparts C and D of the FRA regulations "pose only limited threats to the justifiable expectations of privacy of covered employees." 489 U.S. at 629. In specifically focusing on the privacy implications of breath alcohol tests, the Court also pointed out that:

The breath tests authorized by subpart D of the regulations [testing for reasonable cause] are even less intrusive than the blood tests prescribed by subpart C [post-accident toxicological testing]. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in an employee's bloodstream and nothing more. Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. * * * In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns. Id. at 625-626.

While the Court indicated that the collection of urine samples requires employees "to perform an excretory function traditionally shielded by great privacy, [thus] raising concerns not implicated by blood or breath tests[,]" it pointed out that the FRA collection procedures significantly reduced the degree of personal privacy intrusion. Id. at 626. The Court also examined the overall privacy expectations of covered railroad workers subject to the FRA testing regulations. It concluded that these expectations "are diminished by reason of ['covered employees'] participation in an industry that is regulated pervasively to ensure safety * * * Id. at 627.

By contrast, the Court found that the government's interests in seeking to determine the cause of an accident or incident, deterring alcohol and illegal drug use by rail employees, and safeguarding the general public are compelling. Under these circumstances, the Court held that alcohol and drug testing pursuant to the FRA regulations are reasonable within the meaning of the Fourth Amendment. Also, the Court found that the government's justification in testing for misuse of alcohol—a legal substance—was entitled to no less weight than its justification for testing for drugs, the possession of which is unlawful. Thus, as the Court pointed out, the FRA-prescribed toxicological tests were not designed "to assist in the prosecution of employees, but rather to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." Id. at 621-622, 633 (quoting FRA regulations at 49 CFR 219.1(a)).

The alcohol testing requirements for transportation industry workers published by each of the OAs in today's Federal Register are consistent with the Court's views in Skinner. Given the overwhelming public safety considerations associated with alcohol testing programs and the limited degree of intrusion into individual privacy interests engendered by the tests, the required testing programs would be constitutionally permissible under the Fourth Amendment.

Also, the requirement that an employer perform random alcohol testing that is performance-related, i.e., related closely in time to an employee's actual performance of safety-related duties, further demonstrates the reasonableness of the rules for Fourth Amendment purposes by ensuring that testing for misuse of alcohol is clearly related to the employee's performance of these duties. With respect to use of particular testing devices or methods, we note that, as a number of courts have pointed out, the reasonableness of a testing program does not necessarily turn on the existence of other alternatives that might be less intrusive. See American Federation of Government Employees v. Skinner, 885 F.2d 884, 897 (1990), cert. denied, 495 U.S. 923-924 (1990).

The lack of a demonstrated substance abuse problem among the workforce in a particular industry should not, of itself, pose insurmountable constitutional impediments to a testing program for that workforce. This point was made clear by the Supreme Court in National Treasury Employees Union v. Von Raab, 446 U.S. 566, 674-675 (1989), which was decided the same day as Skinner. In Von Raab, the Court upheld urinalysis testing for illegal drugs of U.S. Customs Service employees slated for promotions into positions that involved either interdicting illegal drugs or carrying a firearm. Despite the Commissioner of Customs' stated belief that "Customs is largely drug-free," the Court concluded that there was little reason to suspect that the Customs Service was "immune" from society's pervasive drug abuse problem and held that the testing program was constitutionally defensible as a means to ensure that employees promoted to these sensitive positions are drug-free. Id., at 660, 674. It stated that the government does not have to first establish that a specific industry has a problem. ("It is sufficient that the government have a compelling interest in preventing an otherwise pervasive societal problem from spreading through the particular context.") Id. note 3 at 675.

Skinner and Von Raab established the analytical framework for courts to resolve constitutional challenges to various employee substance abuse testing programs. Not surprisingly, Federal courts reviewing anti-drug abuse regulations issued by the Department have relied extensively on these two decisions in upholding drug testing of safety- and security-sensitive workers in industries regulated by the
Department. See, Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), cert. denied, 503 U.S. 1111 (1991) (upholding constitutionality of Federal Aviation Administration regulations requiring random drug testing of flightcrew members, maintenance personnel, and other categories of employees in the commercial aviation industry);
International Brotherhood of Teamsters v. Department of Transportation, 932 F.2d 1292 (9th Cir. 1991) (upholding constitutionality of Federal Highway Administration regulations requiring random, biennial, pre-employment and post-accident drug testing of commercial motor vehicle drivers operating in interstate commerce);
Railway Labor Executives' Association v. Skinner, 934 F.2d 1096 (9th Cir. 1991) (upholding constitutionality of Federal Railroad Administration's regulations requiring random drug testing of railroad workers in safety-sensitive positions); International Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990), and United Steelworkers of America v. Skinner, 768 F. Supp. 30 (D. RI 1991) (upholding constitutionality of Research and Special Programs Administration's regulations requiring random, pre-employment, and post-accident drug testing of safety-sensitive employees engaged in natural gas, liquefied natural gas, and hazardous liquid pipeline operations.) See also, Transportation Institute v. Coast Guard, 727 F. Supp. 648 (D.D.C. 1989) (upholding constitutionality of Coast Guard regulations requiring pre-employment, periodic, post-casualty, and reasonable cause drug testing for merchant marine personnel; however, regulations requiring random drug testing of all vessel crewmembers were found to violate the Fourth Amendment because the safety-sensitive duties performed by this entire class of employees was not evident. Although the court noted that random testing for employees could be constitutionally acceptable, it held that the Coast Guard had not adequately described the safety-sensitive functions of the covered employees to allow the court to establish the necessary nexus. The missing safety nexus was established in a subsequent Coast Guard final rule implementing random drug testing). Even pre-Skinner and Von Raab court decisions addressing the constitutionality of various employee alcohol testing programs have concluded that such testing comports with the Fourth Amendment. Thus, a state regulation requiring jockeys to submit to mandatory warrantless breath alcohol tests on each racing day was found to be constitutionally permissible. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.). cert. denied, 479 U.S. 986 (1986). Similarly, alcohol and drug testing during a pre-employment physical examination, work-related examination, return to work after unscheduled absence, or on the basis of reasonable suspicion or involvement in an accident or incident was upheld in the case of transit employees directly involved in the operation, maintenance, and decisionmaking of a public transit system. Amalgamated Transit Union, Local 933 v. City of Oklahoma City, 710 F. Supp. 1321 (W.D. Okla. 1988). Accord, Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, 691 F. Supp. 898 (W.D. Pa. 1988) (mandatory drug and alcohol testing during annual physical examination does not violate Fourth Amendment).
Also, several more recent Federal court decisions upheld employee alcohol testing in the wake of Skinner. Thus, in Transport Workers Union, Local 234 v. Southeastern Pennsylvania Transportation Authority, 863 F.2d 1110 (3d Cir. 1988), vacated and remanded, 492 U.S. 902 (1989), aff'd on remand sub nom. United Transportation Union v. Southeastern Pennsylvania Transportation Authority, 884 F.2d 709 (1989), the U.S. Court of Appeals for the Third Circuit upheld, inter alia, random breath testing of transit operating employees. See also, Tanks v. Greater Cleveland Regional Transit Authority, 930 F.2d 475 (6th Cir. 1991) and Holloman v. Greater Cleveland Regional Transit Authority, 741 F. Supp. 677 (N.D. Ohio 1990), aff'd, 930 F.2d 918 (6th Cir. 1991) (upholding transit authority's drug and alcohol testing program requiring testing of blood, saliva, and urine in the face of challenges by two bus drivers subjected to random, post-accident, and periodic testing); Moxley v. Metropolitan Transit Agency, 722 F. Supp. 977, 980 (W.D. NY 1989) (upholding constitutionality of transit authority's drug and alcohol testing program and noting that "the Government's interest in the efficient and proper operation of the workplace is at a zenith where public's [sic] lives depend on the reliable and sober performance of Government employees").
Consistent with the Supreme Court's analysis in Skinner and Von Raab and lower court decisions, if the Congress determines that there is a need for properly-administered alcohol testing to ensure that employees in transportation industries are not adversely affected by alcohol while performing safety-sensitive functions, that need would outweigh the privacy interests of these employees and, thus, would be constitutionally permissible.
The Americans with Disabilities Act and DOT Drug and Alcohol Testing

The Americans with Disabilities Act of 1990 (ADA) (Pub. L. 101-36) does not, in any way, preclude or interfere with employers' compliance with the Department's drug and alcohol testing regulations. However, title I of the ADA, which prohibits discrimination against a "qualified individual with a disability," may affect the personnel actions an employer might wish to take with respect to some individuals who test positive for alcohol or drugs or otherwise violate the prohibitions of the Department's drug and alcohol rules.
Title I covers employers who have fifteen or more employees for more than 20 calendar weeks in a year (section 101(5)(A)). (Until July 26, 1994, only employers with 25 or more such employees are covered.) Covered employers may not discriminate against a qualified individual with a disability with respect to applications, hiring, advancement, discharge, compensation, or other terms, conditions or privileges of employment (section 102(a)).
Before discussing the effect title I may have on employer personnel actions following a positive DOT-mandated drug or alcohol test or other violations of DOT drug and alcohol rules, it is important to note the specific ADA provisions that address DOT drug and alcohol rules. The ADA specifically authorizes employers covered by DOT regulations to require their employees to comply with the standards established in those regulations, including complying with any rules that apply to employment in safety-sensitive positions as defined in the DOT regulations. (section 104(c)(5)(C)). By authorizing employers to require employees to comply with the standards in DOT rules, this provision authorizes compliance not only with testing provisions of the rules but also of other drug and alcohol-related provisions that affect safety-sensitive employees (e.g., pre-duty abstinence, on-the-job use). The legality under the ADA of employer compliance with DOT drug and alcohol requirements other than those concerning testing is underlined by several other provisions of title I. An employer may prohibit the use of drugs and alcohol in the workplace, may require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs in the workplace, and may require that employees conform to the requirements of the
Drug-Free Workplace Act (Pub. L. 100–690, title V, subtitle D) (section 104(c)(1–3)).

Concerning drug and alcohol testing and its consequences, the statute further provides that nothing in Title I shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to (1) test employees of such entities, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and (2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c). (Subsection (c) includes the statutory language cited above.) (section 104(a)). These ADA provisions clearly specify that the ADA does not interfere with the compliance by covered employers with DOT regulations concerning drug and alcohol use, including requirements for testing and for removing persons who test positive from safety-sensitive functions. Under the ADA, an employer is not viewed as “discriminating” for following the mandates of DOT drug and alcohol rules.

In considering the effects on the personnel actions that employers choose to take after a safety-sensitive employee tests positive for drugs or alcohol or otherwise violates DOT drug or alcohol rules, it is important to note that the ADA’s prohibition of employment discrimination applies only with respect to a “qualified individual with a disability.” The ADA specifically provides that an employer or applicant who is currently engaging in the illegal use of drugs is not a “qualified individual with a disability” (section 104(a)). The ADA does not protect such an employee from adverse personnel actions. For purposes of the ADA, the drugs that trigger this provision are those the use, possession or distribution of which is prohibited by the Controlled Substances Act (section 101(b)). The five drugs for which DOT mandates tests fit this definition (alcohol is not a drug covered by the Controlled Substances Act).

What does “currently engaging” in the illegal use of drugs mean? According to the Equal Employment Opportunity Commission (EEOC), whose rules carry out “Title I, the term “currently engaging” is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks of, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. (56 FR 35745–46, July 26, 1991.) It is clear that an individual who has a positive result on a DOT-mandated drug test is currently engaging in the illegal use of drugs. Therefore, under Title I, an employer may discharge or deny employment to an individual who has a positive result on a DOT-mandated drug test.

This provision that an individual who is currently engaging in the illegal use of drugs is not a “qualified Individual with a disability” does not apply, of course, if the individual is erroneously regarded as engaging in the illegal use of drugs. In addition, if an individual, even a former user of illegal drugs, is not currently engaging in the illegal use of drugs and (1) has successfully completed a rehabilitation program or otherwise has been successfully rehabilitated, or (2) is participating in a supervised rehabilitation program, the individual can continue to be regarded as a “qualified individual with a disability,” if the individual is otherwise entitled to this status (section 104(b)). An employer may seek reasonable assurance that an individual is not currently engaging in the illegal use of drugs (including requiring a drug test) or in or has completed rehabilitation. Some employers (EEOC uses the example of a law enforcement agency) may also be able to impose a job qualification standard that would exclude someone with a history of drug abuse if it can show that the standard is job-related and consistent with business necessity (56 FR 35746, July 26, 1991).

Unlike the situation with respect to the current use of illegal drugs, the use of alcohol contrary to law, Federal regulation, or employer policy does not deprive an individual of status as a “qualified individual with a disability” that he or she would otherwise have under title I. An individual is protected by title I, however, only if the individual has a disability in the first place. (This is also true with respect to a former drug user or any other individual who seeks the protection of the ADA.) To have a disability, an individual must have a “physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such impairment, or being regarded as having such an impairment” (section 121). While, as the EEOC notes in its title I regulation, “individuals disabled by alcoholism are accorded the same protections accorded other individuals with disabilities” (56 FR 35752, July 26, 1991), not all individuals who use alcohol in violation of law, Federal regulation, or employer policy are “disabled by alcoholism.”


The logic of the ADA, and EEOC’s regulatory provisions implementing the statute, suggest that, in determining whether an employee or applicant who has a positive result on a DOT-mandated alcohol test or otherwise violates a DOT alcohol rule is disabled by alcoholism, the employer would answer two questions. First, does the individual have a physical or mental impairment? e.g., is the individual an alcoholic? (People who test positive for alcohol are not necessarily alcoholic.) This question would probably have to be answered with the assistance of a physician or substance abuse professional. Second, if the individual is an alcoholic, does this impairment substantially limit a major life activity or is it (even erroneously) regarded as substantially limiting a major life activity? This question would have to be answered on a case-by-case basis, following EEOC’s guidance (see 56 FR 35740–44, July 26, 1991). Under DOT’s alcohol prevention rules, these determinations will be made by or in cooperation with the substance abuse professional that the rules require to be involved following a positive test or rule violation.

The determination of whether an individual is a qualified individual with a disability is made in two steps: (1) Whether the individual has the appropriate education, experience, skills, and licenses, and meets the other prerequisites of the position; and (2) whether the individual can perform the essential functions of the job desired or held with or without reasonable accommodation. Essential functions are the functions that the individual is holding the position must be able to perform unaided or with reasonable accommodation. Several factors are considered in determining whether a job
function is essential, including whether the employer actually requires employees in this position to perform the function, whether the position exists to perform the function, whether there are other employees who could perform the function, and whether there is a high degree of expertise or skill required to perform the function.

If the individual is qualified and determined to be disabled by alcoholism, then the employer may not discriminate against the individual on the basis of his or her disability and, if job performance and behavior are not affected by alcoholism, must make "reasonable accommodations" to the individual's known physical or mental limitations, unless the employer can demonstrate that doing so would impose an "undue hardship" on the employer's business.

The selection of an appropriate "reasonable accommodation" is done on a case-by-case basis, as EEOC guidance provides (see 56 FR 35744, July 26, 1991). Reasonable accommodation for an individual disabled by alcoholism could include such actions as referral to an Employee Assistance Program or other rehabilitation program, provision of rehabilitation services, and giving an employee sufficient time to demonstrate that rehabilitation had been successful. See, e.g., Washington v. Department of the Navy, 30 M.S.P.R. 323 (1986); Swafford v. Tennessee Valley Authority, 18 M.S.P.R. 481 (1983).

Even when an individual is disabled by alcoholism, however, the employer is not required to provide a reasonable accommodation that creates an "undue hardship." Undue hardship involves significant difficulty or expense in, or resulting from, providing an accommodation. EEOC describes an undue hardship as "an accommodation that would be unreasonable for the employer to provide." This concept takes into account the financial resources of the employer (e.g., an accommodation that would be reasonable for a large business may be an undue hardship for a small business). But the concept is not limited to financial difficulty. For example, if a small trucking company determined that the accommodation that one of its drivers needed for an alcoholism-related disability was lengthy in-patient rehabilitation, the company not only might find the accommodation beyond its financial resources but also too disruptive of its operations (i.e., a temporary replacement would have to be hired or the work of the firm be reduced significantly).

Under title I, an employer may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance or behavior as it holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of the employee (Section 104(c)(4)). For example, if, as the result of alcoholism, an employee is chronically late or absent, or makes frequent job errors, the employee would be subject to personnel action on the same basis as any other employee who exhibited similar behavior for other reasons. (However, if the alcoholic employee were subjected to personnel actions that were not used against non-alcoholic employees who were chronically late or absent, or made frequent job errors, then the alcoholic employee might have a cause of action under the ADA.) The employer is not precluded from accommodating this alcoholic employee, but is not required to do so.

It should also be pointed out that the ADA does not preclude an employer from disciplining or dismissing an employee who commits a violation of the employer's conduct and performance standards, even if the individual is an alcoholic or has another disability. For example, a violation of a DOT operating administration's alcohol misuse rules (e.g., a test demonstrating a prohibited alcohol concentration) could be a violation of the employer's performance and conduct rules, for which the employer's policy could call for the employee's dismissal. This result would not violate the ADA.

There are also situations in which meeting qualification standards of DOT safety rules, or having a valid license or certificate from a DOT operating administration, is an essential job qualification. If a truck driver does not meet FHWA qualification standards to obtain a Commercial Driver's License from a State, or if a pilot does not qualify for an FAA medical certificate, that individual is not a "qualified" individual with a disability, even if the reason for the failure to meet DOT qualifications is a condition that an employer might be required to accommodate under the ADA. The legislative history of the ADA specifically recognizes this special status for DOT qualification standards (see Senate Report 101-116 at 27, August 30, 1989).

Another issue that has been raised in context of the relationship between the ADA and alcohol testing concerns whether an alcohol test is a "medical examination." Non-regulatory guidance issued by the EEOC suggests that "a test to determine an individual's blood alcohol level would be a 'medical examination' and only could be required by an employer in conformity with the ADA." It should be pointed out that this statement does not, on its face, apply to breath testing (or other methods that do not involve blood samples) for alcohol. The EEOC has not determined whether it views breath testing for alcohol as a "medical examination."

The Department of Transportation takes the position that alcohol testing under the program required by these rules is not properly viewed as a required medical examination. It is not the collection of a breath or body fluid sample that makes a test "medical" in nature. The tests in question are solely for the purpose of determining whether an employee has violated a DOT-mandated safety requirement. The tests are not used for any diagnostic or therapeutic purpose. They are not intended to ascertain whether an employee has any medical condition, and they will not be used for such a purpose. Under these circumstances, the policies underlying the ADA provisions on medical examinations do not apply. Because of the uncertainty that may be created by the EEOC guidance, however, it is useful to consider the implications of regarding alcohol tests as "medical examinations." (The Department is working with the EEOC to resolve this uncertainty.)

Even if alcohol tests are considered to be "medical examinations" for ADA purposes, the effects on compliance with DOT-mandated alcohol testing would be minimal. "Medical examinations" are permitted by the ADA if made after a conditional offer of employment. The pre-employment testing approach set forth in the rules clearly fits this model. For this reason as well as for reasons of efficiency, the Department believes that conducting pre-employment testing after an offer of employment, but before the first performance of a safety-sensitive function, has much to recommend it. In addition, EEOC has stated to the Department that, because of the statutory requirement in the Omnibus Transportation Employee Testing Act of 1991 for pre-employment testing, EEOC does not object to pre-offer alcohol testing under the DOT rules mandated by the statute. Other types of testing mandated by these rules, such as reasonable suspicion, post-accident, and random testing, are likewise acceptable under the ADA. (See 29 CFR 1630.15(e), which makes compliance with the requirements of Federal law or
regulation a defense to an allegation of discrimination under Title I of the ADA.) Congress passed the Omnibus Act more than a year after it passed the ADA, and the former statute's specific mandates for various types of testing clearly, as a matter of statutory interpretation, would prevail over any contrary inferences anyone would attempt to draw from the more general provisions of the latter.

A related issue concerns the confidentiality of the records of alcohol tests. To the extent that an alcohol test is regarded as a medical examination, the records of the test would be "treated as a confidential medical record" under the ADA (see Section 102(c)(3)(B) of the ADA). Under this provision, records of a medical examination are required to be kept in a separate medical file. The purpose of any requirement for confidentiality of a medical record is to safeguard the employee's right of privacy with respect to personal medical information. An employee may, of course, waive such a right. (As a general matter, medical confidentiality provisions allow a patient to permit medical information to be provided to third parties.) The DOT rules, by requiring the employee to consent, in writing, to the provision of test records to subsequent employers or third parties, are fully consistent with normal medical confidentiality waiver practices and with the ADA. It would clearly be anomalous to view a medical records confidentiality provision as prohibiting an employee from voluntarily agreeing that a previous employer, or physician, could send a medical record to a current employer or physician.

The Family and Medical Leave Act of 1993

The Family and Medical Leave Act of 1993 (FMLA) provides certain protections for employees with "serious health conditions." These protections include time off for treatment of these conditions and reinstatement in the employee's position or an equivalent position. Under Department of Labor (DOL) regulations implementing FMLA, "treatments for * * * substance abuse are serious health conditions if all conditions of the regulation are met" (29 CFR 825.114(c)). The inclusion of substance abuse treatment under the DOL regulations has raised some concerns about the potential effect of FMLA requirements on DOT drug and alcohol testing requirements.

As is the case with the ADA, the FMLA does not conflict with DOT drug and alcohol rules. FMLA requirements do not prevent an employer from testing employees as required by DOT rules: nor do they excuse employees from testing requirements or prohibitions on the use of drugs or the misuse of alcohol. They do not interfere with DOT's requirement that an individual who tests positive may not perform safety-sensitive functions again until the conditions established by DOT rules have been met. (We would point out that, just as every employee who tests positive for alcohol or drugs does not necessarily have a "disability" for ADA purposes, such an employee does not necessarily have a "serious health condition" for FMLA purposes.)

DOT drug and alcohol rules do not prescribe what personnel actions, if any, an employer may take with respect to an individual who tests positive. In certain circumstances, Federal law (e.g., the ADA), State law, or labor-management agreements may constrain the discretion that employers would otherwise exercise with respect to such personnel actions. The FMLA may create additional constraints in some situations.

The scope of additional constraints on employer personnel actions stemming from the FMLA is limited. The statute applies only to employers with 50 or more employees. The statute's protections apply only to employees who work for such an employer at least 1250 hours during a 12-month period. DOL's rules establish a number of procedural requirements that employees must meet to avail themselves of the FMLA's protections. DOL also sets some substantive limits on the applicability of FMLA protections to treatment for substance abuse:

Treatment of substance abuse may also be included, such as where a stay in an inpatient treatment facility is required. On the other hand, absence because of the employee's use of the substance, without treatment, does not qualify for leave. It should be pointed out that the inclusion of substance abuse as a "serious health condition" does not prevent an employer from taking employment action against an employee who is unable to perform the essential functions of the job—provided the employer complies with the ADA and does not take action against the employee who has exercised his or her right to take FMLA leave for treatment of that condition. (58 FR 31799; June 4, 1993.)

The Department will work with DOL to resolve any questions that arise concerning the relationship of DOT drug and alcohol testing requirements and FMLA requirements.

Overview of the Operating Administrations' Final Rules

Purpose

The OAs covered by the Act and RSPA are establishing alcohol misuse prevention programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions in their industries. Generally, the OA rules prohibit any alcohol misuse that could affect performance of a safety-related function, including (1) Use on the job; (2) Use during the four hours (in most cases) before performance of a safety-sensitive function; (3) Having prohibited concentrations of alcohol in the system while performing safety-sensitive functions; (4) Use during the 8 hours following an accident if the employee's involvement has not been discounted as a contributing factor in the accident or until the employee tests below 0.02; and (5) Refusal to take a required alcohol test. The rules require pre-employment (except for RSPA), reasonable suspicion, random (except for RSPA), post-accident, return-to-duty and follow-up testing for alcohol. The rules also establish a performance standard for adjusting the initial 25 percent random alcohol testing rate for each transportation industry (except for RSPA). Published elsewhere in today's Federal Register is a proposal to establish a somewhat different performance standard for adjusting the random drug testing rate for each transportation industry.

The part 40 procedural final rule published elsewhere in this Federal Register provides for two tests to ensure accuracy: A screening and a confirmation test. It provides more flexibility to use different testing technologies for screening tests than we had proposed. However, until additional devices can be evaluated and approved as meeting DOT precision and accuracy criteria and procedures for their use are established, the screening tests must be conducted using breath testing devices on the NHTSA CPL, which includes devices with and without printers. Evidential breath testing devices that provide printed results and sequential numbering of tests must be used for confirmation tests. We are separately proposing to permit blood testing in reasonable cause and post-accident situations where an EBT is not readily available. The primary purpose of the testing provisions is to deter and detect misuse of alcohol.

Following a finding that an employee has misused alcohol, as determined...
through testing or other means, the rules generally require the employee’s removal from safety-related functions and provide a bifurcated system of consequences:

(1) Following a determination that the employee has violated prohibitions in these rules, the employer must remove the employee from and cannot return the employee to a safety-sensitive function until, at a minimum,

(a) The employee undergoes evaluation, and where necessary, treatment,

(b) A substance abuse professional determines that the employee has successfully complied with any recommended course of treatment, and

(c) The employee tests at least 0.02 on a return-to-duty test.

(2) An employee with an alcohol concentration of 0.02 or greater but less than 0.04 is not permitted to perform safety-sensitive functions for

(a) A minimum of eight hours (except FHWA), or

(b) Until a retest shows that the employee’s alcohol concentration has dropped below 0.02.

The rules also impose reporting and recordkeeping requirements and provide for alcohol misuse information, for employees, supervisor training, and referral of employees to a substance abuse professional (SAP) for evaluation.

There are some differences among the OA final rules. For example, some OAs have regulatory authority over employers/companies only; others have regulatory authority over employees. Also, employees holding a license or certificate may be subject to agency action against their license or certificate under other rules in addition to the consequences established for violations of these rules. See the individual OA rule preambles for an explanation of any differences from the general requirements discussed above.

Applicability

The existing OA drug rules generally cover persons who perform safety-sensitive functions in commercial transportation. Initially, they affected approximately 4 million persons and include, for example, commercial truck/ bus drivers, pilots, pipeline employees, licensed and documented mariners and others serving on board a vessel with a licensed operator, and railroad workers subject to the Hours of Service Act. An FTA final rule published elsewhere in today’s Federal Register adds drug testing for such workers as transit bus and subway operators. In accordance with the mandates of the Act, the FHWA rule adopting the alcohol provisions described in this common preamble extends their coverage as well as the coverage of the existing FHWA drug rules to persons required to obtain a CDL, including intrastate truck and motor coach operators. This includes drivers and employers not currently covered by the Federal Motor Carrier Safety Regulations (FMCSRs) such as: Federal, State and local government agencies, and church and civic organizations. As a result, the total number of persons covered by the alcohol and drug testing rules has increased to over 7 million. (Maritime industry personnel are covered by the drug rules, but not by these alcohol rules (other than certain ferry boat personnel), although USCG does have some alcohol testing requirements and intoxication standards already in effect.)

In the common preamble to the NPRMs, we asked whether there is any rationale for covering a different population for alcohol testing than drug testing; no one provided such a rationale. The same employees who would cause safety problems if they are using illegal drugs would cause problems if they misuse alcohol. Consequently, the Department continues to believe that the basis for imposing alcohol misuse prevention requirements should be the performance of safety-sensitive functions. Each OA rule defines “covered employee” with respect to its industry and generally covers the same population under its alcohol prevention program. Numerous commenters addressed the categories included in the OAs’ definitions of “covered employee.” Please refer to the specific OA preamble for the OA’s disposition of those comments.

Although the term “security” is used with respect to aircraft passengers and baggage screeners, that term is redundant and unnecessary; these persons are performing what the FAA defines as safety-sensitive functions—maintaining aircraft security—as opposed to simply having a security clearance (which results in coverage of many Federal employees under government drug testing programs). The OA rules focus on function rather than a defined job or position. An individual’s job may encompass several different functions, some of which are not safety-sensitive. Since alcohol is a legal substance, alcohol use is relevant only to the extent it affects performance of a safety-related function. As a safety regulatory matter, for example, we are not concerned if an aircraft mechanic has a drink before or while performing functions that are not safety-related (as long as no other rule is violated); if the mechanic is receiving all-day training on retirement planning along with non-safety employees and the other employees can have a drink at lunch, the mechanic may also.

Alcohol Testing Procedures

Each of the OA final rules requires employers to ensure that all alcohol testing conducted under these rules complies with the procedures for alcohol testing contained in the amended 49 CFR part 40 entitled “Procedures for Transportation Workplace Drug and Alcohol Testing” issued by DOT elsewhere in today’s Federal Register. Each OA final rule incorporates the new 49 CFR part 40 by reference. Since all of those OAs publishing final rules today require alcohol testing conducted by their covered employers to comply with the part 40 testing procedures, the DOT is issuing these procedures separately in order to avoid their unnecessary duplication in each OA rule.

Part 40 requires both screening and confirmation tests for alcohol. The rules require that screening tests with a result of 0.02 alcohol concentration or greater be confirmed by an EBT listed on the NHTSA CPL, which also is capable of printing out each test result and air blank (test of ambient air), and sequentially numbering each test. This provides an immediate confirmed result, which enables immediate removal of the employee who has misused alcohol and also provides a printed record of the result that will prevent disputes about the accuracy and integrity of the testing process. EBTs are reliable and highly accurate at detecting low alcohol concentrations and their use is possible in all transportation settings envisioned in those industries for which the OAs are issuing rules today.

Breath testing devices have been in use a long time; all States accept evidential breath test device results as credible evidence of an individual’s violation of a law establishing a per se prohibited blood alcohol concentration, so long as the devices are properly calibrated and operated by trained personnel. Each device on the NHTSA CPL, with or without printed results, has been accepted by at least one State for use in court proceedings in that State. (Acceptance by a State of a particular device is not, however, necessary for the use of that device in that State for purposes of the DOT testing program.) In addition, part 40 establishes training requirements for breath alcohol technicians (BATs), maintenance and calibration requirements in a quality assurance plan for EBTs, and additional testing
procedures to protect the integrity of the process.

In response to the comments received, the Department believes that greater flexibility to use different testing technologies would benefit employers, especially for testing in remote locations and tests for which employers do not control the timing or “triggering” event—reasonable suspicion and post-accident. At the same time, the Department believes that any devices used in the testing program must meet the precision and accuracy criteria established by part 40 that the Department has determined are necessary to the integrity and success of these programs and to ensure protection for employees. Only EBTs on the CPL, including those without printers, currently meet these criteria; those without printers can be used for screening tests but part 40 requires that a logbook be kept with each such device to provide an additional check for the occurrence of a test and its result.

In addition to the changes concerning EBTs without printers, part 40 will, in the near future, provide more flexibility to use different testing technologies for screening tests than we proposed in the OA NPRMs. NHTSA will develop model specifications (using precision and accuracy criteria), evaluate additional screening devices against them and periodically publish a conforming products list of those additional screening devices (not exclusively breath testing devices) that meet the model specifications. We expect that publication of the model specifications will encourage manufacturers to develop products that meet them. NHTSA will approve those devices that meet its criteria for use in our alcohol testing programs. Please note that the Department also will have to undertake separate rulemaking proceedings to establish procedures for the use of any devices after they are approved. The proposed NHTSA model specifications are published elsewhere in today’s Federal Register. NHTSA expects to begin evaluation of screening devices after the final model specifications are published. The device manufacturers also would have to certify that they meet existing Food and Drug Administration (FDA) good manufacturing practices and labeling requirements. The timing for the NHTSA approval of screening devices will depend on the volume of devices submitted for approval. The Department is continuing to coordinate with the FDA and other appropriate agencies to determine if additional product evaluations for alcohol screening devices will be necessary.

We also are considering requiring blood alcohol testing in those reasonable cause and post-accident situations where an EBT is not readily available. It would provide increased flexibility to employers to use blood testing where an EBT is available, but would be difficult or expensive to transport to the test site. One benefit of requiring blood alcohol testing in these limited situations is that employers would not have to make EBTs available in as many locations as otherwise would have been necessary. This would also mean that an employer must conduct a blood test where a test would otherwise not occur because an EBT is unavailable. The blood alcohol testing proposal, including blood alcohol testing procedures, is addressed in a separate NPRM published elsewhere in today’s Federal Register. Before we issue a blood alcohol testing final rule, we need to resolve specimen collection issues and determine how to identify those laboratories that we can rely on to test blood samples accurately. The NPRM also seeks comment on other issues, such as safeguards for employees and procedures for shipping and documentation of blood samples.

Please refer to the part 40 preamble for discussion of other testing methods that are not appropriate for use in these programs at this time, such as urine, saliva, or non-alcohol-specific devices for “performance” or “fitness-for-duty” testing. The flexibility provided by part 40 will enable reconsideration of alcohol-specific testing devices for future use if the device or method meets our precision and accuracy standards and other requirements.

Definitions

Some of the definitions, such as those defining accident, covered employee, and safety-sensitive function, among others, will be different in each OA final rule based on differences in the individual regulated industries. Other definitions, such as alcohol, are identical in all of the OA final rules. In response to comments, we have changed the definition of alcohol to include other low molecular weight alcohols, such as methyl and isopropyl alcohols that could be used as intoxicants, in addition to ethyl alcohol. This will avoid arguments that a positive reading on a testing device could reflect the presence of other non-prohibited alcohols. They also should be prohibited since they have the same adverse effect. Alcohol concentration in all of the rules means the alcohol in a volume of breath and presents in terms of grams of alcohol per 210 liters of breath as indicated by an evidential breath test under these rules. For example, a breath alcohol concentration of 0.04 means 0.04 grams (four one-hundredths of one gram) of alcohol in 210 liters of expired deep lung air. This breath standard is analogous to a blood alcohol concentration of 0.04.

The definition of alcohol use means consumption of any beverage, mixture, or preparation, including any medication, containing alcohol. Some commenters suggested an exception for medication if the employee notifies the employer and the employee’s physician that they strongly opposed such an exception. (See FAA preamble to its alcohol prevention rule for discussion of this issue in the context of the more severe consequences for certain aviation employees imposed by the Act.) Alcohol-based drugs could be used to satisfy alcohol needs rather than medical needs, if permitted. Since ingestion of a given amount of alcohol produces the same alcohol concentration in an individual whether the alcohol comes from a mixed drink or cough syrup, the Department is applying the prohibitions in these rules to the use of any substance containing alcohol, such as prescription or over-the-counter medication or liquor-filled chocolates. Allowing an exception for medication would make it very difficult, if not impossible, to enforce the rules. We believe there are now non-alcohol alternatives for all non-prescription medications. In addition, prescription medications containing alcohol may have a greater impairing effect due to the presence of other elements, e.g., antihistamines. We are not aware of prescription medications used (over a long term) that cannot be formulated in an alcohol-free preparation and that would themselves be safe to use while at work. Therefore, we have decided to prohibit the use of all medications containing alcohol during, and in the four hours prior to (eight hours for FAA), the performance of a safety-sensitive function. Several commenters opposed a prohibition on the possession of medication containing alcohol. We do not impose such a prohibition in these rules. However, DOT agencies already have existing regulations tailored to their industries that prohibit or impose conditions on the possession of medications containing alcohol while on the job.

The definition of substance abuse professional (SAP), as proposed, encompassed licensed physicians, limited to medical doctors and doctors of osteopathy; as well as licensed or certified psychologists, social workers and employee assistance professionals;...
Generally, the OA rules preempt any State or local requirement if it is not possible to comply with both the Federal and the State or the local requirements, or if compliance with the State or the local requirement will frustrate the Federal requirement. For example, a State requirement prohibiting the alcohol testing of transit employees is preempted. Also a local requirement for a blood test (outside the limited exception proposed elsewhere in today's Federal Register—assuming the proposal will be adopted) to confirm alcohol use by a commercial truck driver is preempted since it will frustrate accomplishment of the Federal rule by adding additional complicated procedures that may make it difficult to fully and accurately comply with the DOT procedures and by adding costs that may make compliance impossible for many companies. The rules do not 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 rule applies specifically to transportation employees or employers or to the general public. One commenter asked whether a State could adopt and enforce the same alcohol prevention requirements as those we establish here. Since the same rules would not burden or conflict with the Federal program, a State would be free to do so.

The purpose of preemption is to avoid the confusion and expense of inconsistent requirements for employers or testing entities that operate in several States and to prevent interference with the functioning of the Federal program by extraneous, burdensome requirements that may defeat its purpose and benefits by making effective implementation difficult or impossible (e.g., by requiring that employers pay for any rehabilitation or requiring confirmation tests beyond those required by DOT). Because of the nationwide application of the Federal program and the interstate nature of the operations covered, even minor requirements in the aggregate may become unduly burdensome. For this reason, we intend to scrutinize closely State and local requirements under this preemption authority. Comments on preemption are specifically addressed in the OA preambles.

**Preemption of State and Local Laws**

The Act contains an express preemption of State and local requirements that are inconsistent with the Federal alcohol rules applicable to the aviation, highway, and transit industries. Through its implementation of the Hazardous Materials Transportation Act (HMTA), the Department has long interpreted statutory preemption under an inconsistency standard by using a two-pronged test. The test was derived from Supreme Court decisions on preemption under the Constitution, has been followed successfully by the Department, and has been upheld by court decisions on preemption under the HMTA. In 1990, at the request of the Department, Congress recognized this long-standing interpretation by incorporating it into the statutory preemption provision of the HMTA. (49 U.S.C. App. 1004) The final rules adopt this interpretation of the inconsistency standard for preemption by incorporating the two-pronged test.

**Requirement for Notice**

Before performing an alcohol test under these rules, the employer must notify the employee being tested that the alcohol test being administered is required by these rules. The notice can be oral, written or as specifically provided in an OA regulation. An employer shall not falsely represent that the requirement and those that opposed we received on this issue were evenly divided between those that supported the requirement and those that opposed it. Generally, we think the required alcohol testing form is sufficient to constitute adequate notice.

**Starting Date for Alcohol Testing Programs**

Most commenters seemed satisfied with the proposed implementation schedule. Several larger employers requested additional time to develop their programs, enter into service provider contracts and to complete collective bargaining; some large employers believed that it would be fairer if all employers had to implement their programs in one year. The attached OA final rules establish the specific implementation schedules for each industry. The schedules are similar to those proposed in the NPRMs and those used in the DOT drug testing rules. Generally, large employers will have the better part of one year from the...
effective date of the final rules in which to implement the requirements and small employers have nearly two years. To accommodate the annual reporting requirements, large employers must implement these programs on January 1, 1995 and small employers must implement these programs on January 1, 1996. Each OA final rule defines employer size and notes variations justified by industry differences; FAA and FRA have a three tier phase-in for covered employers and contractors. The timetables generally allow smaller employers to join alcohol misuse programs already established by larger employers or consortia, which should reduce their costs. Consideration and appropriate mitigation of the rules' impacts on smaller employers is required by the Regulatory Flexibility Act and Executive Order 12866, "Regulatory Planning and Review." We believe it appropriate for small employers to have more time since their size alone may make it more difficult to implement an alcohol misuse prevention program within one year (lack of expertise, resources, etc.). Our experience in the drug testing area shows that these implementation schedules provide sufficient time for larger employers to establish their programs.

All employers must have an alcohol misuse program in place January 1, 1996. Thus, employers that begin to operate after the effective date of these rules must have their programs in place by the deadline according to size or by the time one of the other OA initiates their operation, whichever is later. These timetables also take into account the time needed by the manufacturers to produce the required modifications to breath test devices or to develop alternative devices. In addition, they will allow time to develop conforming products lists (CPLs) for other screening devices and to complete the blood alcohol testing rulemaking.

**Prohibitions**

The OAs are establishing the following combination of prohibitions designed to prevent any adverse alcohol effect on a covered employee during performance of safety-sensitive functions.

**Alcohol Concentration**

Unlike some other drugs, alcohol is a legal substance with legally and socially acceptable uses for persons 21 years of age and older. The Department already has some prohibitions on alcohol misuse. Those OAs that traditionally have regulated employee safety-related conduct in commercial transportation (FAA, FHWA, FRA and USCG) have selected a 0.04 alcohol concentration as the per se standard for determining whether an individual is under the influence of alcohol, and prohibit any use of alcohol on the job. Some OA's (FAA, FHWA and USCG) subject certain persons to pre-duty abstinence periods. FHWA rules require that commercial vehicles be equipped with any measurable amount or detectable presence of alcohol be placed out-of-service for a 24-hour period. Until adoption of these rules, RSAP and FTA did not have alcohol concentration prohibitions, primarily because neither directly regulates employees.

Today's final rules prohibit covered employees from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while having an alcohol concentration of 0.04 or greater. It is not possible to relate a given alcohol concentration definitively to impairment in specific individuals. However, as noted earlier, the presence of any alcohol can have an adverse effect on an individual. As a result, the rules define alcohol concentration in terms of breath testing measurement and specifically relate a violation of this prohibition to the alcohol concentration as indicated on the breath testing device. In addition, no employer who actually knows that an employee has that concentration can permit the employee to perform or continue to perform safety-sensitive functions.

Commenters addressing the proposed breath alcohol concentration standard generally supported one of three choices: a 0.04 alcohol concentration standard that triggers the full sanctions of the rule with no consequences attached to lower levels; a similar 0.02 standard; or the proposed 0.02/0.04 standard with its bifurcated consequences.

Most commenters supported a 0.04 alcohol concentration standard. These commenters noted that this standard has been in place in aviation, maritime, and railroad regulations for a number of years, and is the standard that the States are required to adopt for commercial motor vehicle drivers. Many commenters also noted that the evidence of impairment below 0.04 was equivocal, with as many or more studies finding no correlation that concentration as those that identified some impairment. Commenters further stated that the bifurcated system would be difficult to implement and hard for employees to understand. Finally, both labor organizations and employers stated that a likely consequence of a test result between 0.02 and 0.039 would be termination of employment under company authority. Labor organizations stated that this consequence would be unfair and that, if the final rules imposed a standard lower than 0.04, employers should be prohibited from terminating employees based on such a result.

We agree with commenters that an alcohol concentration of 0.04 represents the point at or above which impairment for most individuals rises dramatically, thus justifying its use as the standard for commercial transportation employees and for imposing full sanctions under the rules issued today. However, adoption of a "bright line" 0.04 alcohol concentration standard, while consistent with current regulations, does not address what to do with an employee who tests below 0.04. The existing rules that impose a 0.04 standard generally do not require testing unless there is a triggering event, so the problem of what to do with lower alcohol concentrations is not faced. In addition, when individuals exceed the standard, action is generally taken against a license or some other significant sanction is imposed. Under the rules the OAs are issuing today, we face the problem of whether a person who tests below 0.04 should be permitted to continue performing safety-sensitive functions. Studies about the effects of any alcohol raise our concern about the effects of lower alcohol concentrations on transportation employees. For example, the National Academy of Sciences (NAS) noted that several credible studies measuring task performance at low blood alcohol concentrations indicate that, "[a]lthough individual reactions to alcohol vary depending on * * * [various] factors * * *, sensory and cognitive performance is significantly reduced at or below 0.04 percent BAC." (Zero Alcohol, 1987) The study concluded that "across broad populations of drivers, BACs exceeding about 0.04 to 0.05 clearly increase the probability of causing a crash. * * *") When the driver's age and experience with alcohol are controlled for statistically, the risk of crash involvement increases at any recorded BAC above zero."

A recent NHTSA report to Congress stated that "[a]lthough the effects of alcohol on impairment and crash risk appear more dramatically above 0.05 or 0.06, for some drivers, any measurable alcohol puts them at increased risk." (Alcohol Limits, 1991) It noted that relatively few studies have looked at alcohol concentrations below 0.04; therefore, only a small number of studies have found clearly impairing effects for alcohol concentrations below 0.04 (commenters noted this as well).
NHTSA noted that individuals performing more complex tasks (especially those involving a subsidiary task requiring time sharing or divided attention) often show evidence of impairment at alcohol concentrations as low as 0.02. NHTSA concluded that one cannot specify an alcohol concentration above which all drivers are dangerous and below which they are safe or at "normal" risk.

The Transportation Research Board, in a study performed for the FHWA during its Commercial Driver's License rulemaking, recommended a 0.04 BAC as the concentration where the serious penalties should apply to commercial motor vehicle drivers, but it noted that some degree of impairment such as slowed reaction time, loss of coordination, and deterioration in judgment begins with any BAC above zero. (Zero Alcohol, 1987) FHWA, in fact, adopted this recommendation in promulgating its existing rules, from which we derived the bifurcated alcohol concentration standard proposed in the NPRMs. The FHWA rule imposes full sanctions for alcohol tests results of 0.04 and over. It requires removal of the employee from service for 24 hours for any alcohol test result between 0.00 and 0.04. Commercial motor vehicle operators engaged in interstate commerce have understood and complied with this bifurcated standard for several years, so other transportation industry employees should not have trouble understanding the standard. We do not believe that it is necessary to adopt a "bright line" 0.02 or 0.04 alcohol concentration standard to avoid confusion.

Commenters who supported a 0.02 standard generally favored a "zero tolerance" policy, and believed that the rules should set the standard at the lowest level of accurate detection. Many of these commenters stated that any person who would use alcohol sufficiently close in time to the performance of safety-sensitive duties to have any measurable alcohol concentration was acting in a manner contrary to safety and should be appropriately sanctioned. Additionally, like those commenters supporting a 0.04 standard, many commenters believed that a single standard would be easier to implement, understand, and enforce. We believe that the imposition of the relatively severe rule sanctions at the 0.02 "bright line" alcohol concentration proposed by some commenters is not justified. Although the available studies support removing the employee from safety-sensitive functions, the level of impairment or adverse effect does not warrant the additional actions required for concentrations of 0.04 and above. Employers will likely review employee test results between 0.02 and 0.04 on a case-by-case basis to determine any appropriate action under their own authority.

A few commenters supported one of two other positions: absolute zero tolerance, with anything over 0.00 resulting in a rule violation, or a standard similar to those used by the States for driving while intoxicated (0.08 or 0.10). They presented the former position as being most consistent with safety. The NTSB, in a report by the National Transportation Safety Board (NTSB) have favored setting an explicit policy of zero BAC. The NTSB said that "[i]t should be absolutely clear that no alcohol is acceptable in commercial transportation because research has demonstrated that low blood alcohol levels can produce impairment." Its comments on these rules reiterate this position. As several commenters who favored an 0.02 standard noted, adoption of an absolute zero standard is not possible, as discussed below, because of the current limits on testing technology. Commenters supporting the latter standard based on State law believed that it would sufficiently protect safety without unnecessarily infringing on employees' rights.

Adoption of either the 0.08 or 0.10 standard would provide employers with the greatest flexibility in ensuring that alcohol use at very low levels did not adversely affect safety while not requiring the more significant costs (evaluation, replacement, etc.) or stigma associated with a rule violation. These commenters did not believe that the provision would be difficult to understand or enforce. We agree with them.

Some commenters raised questions about relying on the NHTSA CPL for testing devices that must measure as low as 0.02. NHTSA's model specifications for devices on the CPL were developed for police use under criminal laws prohibiting alcohol concentrations of 0.10 and above. Although all of the EBTs on the CPL exceed existing requirements, on September 17, 1993, NHTSA published a notice modifying the model specifications for evidential breath testing devices to be consistent with the requirements of these rules and updating the list of conforming products (58 FR 48705). The new specifications establish evaluations for precision and accuracy of devices at the 0.0, 0.02, 0.04, 0.08 and 0.16 alcohol concentration.
concentrations. When the OAs proposed the rules being issued in final today, we were aware that NHTSA was going to take this action to respond to the ongoing efforts of States to lower prohibited alcohol concentrations to 0.08 in general and to 0.02 for drivers under 21 and to the prohibition on 0.04 alcohol concentration or greater for commercial drivers.

On-duty Use

The rules also prohibit a covered employee from using alcohol while performing safety-related functions and prohibit an employer who actually knows of such use from allowing the employee to perform or continue to perform safety-sensitive functions. The need for this prohibition is self-evident. Some commenters suggested an exception for medication if the employee notifies the employer and the employee’s alcohol concentration never reaches 0.02; others strongly opposed such an exception. As discussed above under the discussion on the definition of alcohol use, we have decided not to allow a medication exception in these rules.

Pre-duty Use

Commenters had a mixed reaction to the pre-duty use prohibition. Several opposed it as unnecessary due to the on-duty prohibition, intrusive on an employee’s private life (and legitimate ‘employee’s private life; a longer period would be more intrusive. The rules also prohibit an employer, who actually knows that the employee has used alcohol within that period of time, from allowing the employee to perform or continue to perform safety-sensitive functions. An employer cannot always be aware of an employee’s pre-duty behavior, but actual knowledge can come from the employer’s direct observation of the employee, a reliable witness or the employee’s admission of alcohol use. Generally, this prohibition is enforceable vis-a-vis the employer only in “actual knowledge” situations.

The FAA’s long-standing eight-hour pre-duty use prohibition for crewmembers will remain in effect. The applicability of the four-hour prohibition to “on-call” employees varies by industry. Please refer to the specific OA rules on this issue. Because duty tours often are not predictable in the rail industry, the four-hour period is shortened for unscheduled assignments to the interval between being “called to duty” and “reporting for duty.” RSQA’s rule provides an emergency exception to the prohibition on pre-duty use. For example, the only qualified employee in the area, who has used alcohol within the previous four hours, can be called to respond to an emergency call to perform the simple act of turning the valve to shut down a ruptured pipeline. The rule prohibits alcohol use after the employee has been notified to report for emergency duty. The exception does not support the employee’s continued performance of the safety-sensitive functions once safety is achieved or if a replacement employee is readily available. As discussed above under the discussion on the definition of alcohol use, we have decided not to allow a medication exception in these rules.

Use Following an Accident

Most commenters had problems with this prohibition, although many supported the concept. Several noted that it would be unenforceable because the employer often does not have control over the employee and is unnecessary where the employee is in “on-duty” status, since the on-duty prohibition applies. Numerous commenters pointed out that the prohibition is too difficult to apply to employees who do not know about the accident or to mechanics who may have worked on the vehicle involved in the accident. Those comments on mechanics are specifically addressed in the OA preambles.

Since it is important to determine whether alcohol is implicated in an accident, a covered employee who has actual knowledge of an accident in which his or her performance of a safety-sensitive function has not been discounted by the employer as a contributing factor to the accident is prohibited from using alcohol for eight hours following the accident. The prohibition ends eight hours after the accident (when a test is no longer required), once the covered employee has taken a post-accident test under these rules, or once the employer has determined that the employee’s performance could not have contributed to the accident.

While we recognize that there are some situations where it may be difficult to enforce, the prohibition is important. The Department is aware of accidents in which employees, who should have been tested, left the scene and then, when they were brought in for testing, alleged that they consumed alcohol after the accident. This rule prevents employees who know they are subject to testing from explaining “positive” findings on an alcohol test by alleging they had a drink after the accident, since such action also constitutes a rule violation. It also is useful for employees who do not know whether or not they remain in “on-duty” status after an accident to be aware of this prohibition. We are imposing an “actual knowledge” requirement, because, in some situations, the employee involved in an accident may not know of the accident.

For example, a mechanic makes a mistake that causes an accident a couple of hours later or half a continent away. If the mechanic is unaware of the accident, we agree with those commenters that do not believe a ban on drinking can be effectively enforced. However, if it is established that the mechanic did know of the accident and his or her potential involvement (e.g., was told by a supervisor) and performance of the safety-sensitive function was not too removed in time to make conducting a test futile, the mechanic would be prohibited from drinking. See the specific OA rules that limit the application of this prohibition to performance of a safety-sensitive function at or near the time of the accident or on the vehicle or aircraft involved. Also, the FRA rule does not...
include this requirement because under current FRA rules the employees involved remain in on-duty status after an accident.

Refusal to Submit to a Required Alcohol Test

The rules prohibit a covered employee from refusing to submit to required post-accident, random, reasonable suspicion or follow-up alcohol tests. The RSPA rule provision applies only to those types of tests it requires. This, in effect, provides that the employee must take those tests when required. The consequences for a refusal to submit to a required test are the same as if the employee had tested at 0.04 or greater or had violated any of the other prohibitions in these rules.

Failure to provide adequate breath for testing when required without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the alcohol testing form (if the employee did not take test) constitute a refusal to submit to testing. For further discussion of these points, see the preamble to part 40. A covered employee subject to a post-accident test who leaves the scene of the accident before being tested (except, for example, when necessary to receive medical treatment) and is not reasonably available for a test is deemed to have refused to submit to a required test. A refusal also can occur where an employee, who screens positive for alcohol, decides to admit alcohol misuse in violation of the rules and refuses the confirmation test. This situation is different from allowing employees to voluntarily “mark off” from duty when not threatened with a test under these rules, if they feel that they are unable to perform their jobs due to alcohol misuse. The employer must still confirm the positive screen to protect the integrity of the process and to comply with the statutory requirement for a confirmation test. In the absence of the confirmation test result, the employee could later disavow the admission and challenge the screen test result. The rules prohibit an employer from permitting an employee who refuses to submit to testing to perform or continue to perform safety-sensitive functions. In addition, the FRA rule prohibits anyone refusing a required test from engaging in covered service for nine months.

Some commenters, including the NTSB, wanted the penalty for a refusal to test to be removal from safety-sensitive functions for 24 hours. We disagree and intend to apply the full consequences of these rules to an employee's refusal to take required alcohol tests. Failure to treat a refusal as a positive has two major shortcomings: it eliminates deterrence since those misusing alcohol can simply refuse the test if caught and get only a “minor” penalty; in addition, simply removing them from safety-sensitive duties for 24 hours does not help fix the problem—the employee should be evaluated by a SAP before returning to a safety-sensitive function.

An applicant's or employee's refusal to submit to a pre-employment test or a return-to-duty test does not trigger consequences under the rules that result in the need for evaluation. In those cases, the applicant or employee is not in a safety-sensitive position and does not have to be removed from a safety-sensitive position. Since these tests are a condition precedent to starting or returning to safety-sensitive functions, the applicant or employee simply could not be hired or returned to duty.

Tests Required

General

The Act requires that the industry alcohol misuse prevention programs provide for pre-employment, reasonable suspicion, post-accident and random testing. Periodic tests, which generally are performed as part of required physical examinations for certification of some employees, are discretionary under the Act. The OA rules require the forms of testing mandated by the Act, as well as return-to-duty and follow-up testing; however, the Department has decided not to require periodic testing for alcohol. We agree with the commenter who questioned the value of periodic alcohol testing if the employee knows when the test is to be conducted.

The testing programs are designed for the deterrence and detection of alcohol misuse, which, in turn, promote our compelling interest in ensuring transportation safety. Whether conducted by breath, blood or other method, alcohol testing is considered a Federally-mandated “search”, under the Fourth Amendment. Accordingly, we are limiting alcohol testing to the specific time periods surrounding the performance of safety-related functions. That limitation provides the requisite nexus to ensuring proper performance of safety-related functions that is our primary concern and the principal purpose of these rules. The tests required by these rules will be conducted after a triggering event (pre-employment, post-accident, reasonable suspicion, return-to-duty, follow-up) and just before, during or just after performance of a safety-sensitive function (random). The determination (triggering event) that a reasonable suspicion test is necessary must occur during the time surrounding the performance of a safety-sensitive function. Many commenters raised practical and policy concerns about at least one of the different types of testing. These concerns are specifically addressed below in the discussions relating to each type of testing.

Pre-employment Testing

A substantial number of commenters were concerned about the costs of pre-employment tests and considered them silly “intelligence” tests and a waste of time. The National Airline Commission specifically recommended that “(n)ew pre-employment alcohol testing rules do not need to be adopted * * *”. The Act explicitly requires pre-employment testing for covered transportation industry employees, so we do not have the discretion to eliminate it from these programs. We recognize that, as the commenters noted, drinking off duty generally is legal and that alcohol remains in the body for only a short period of time. Often, a test result indicating alcohol use may only indicate bad judgment or bad timing (e.g., one notices an employment advertisement after having beer and a hamburger for lunch, immediately applies, and is tested) instead of alcohol misuse.

To make such a test more meaningful, we are requiring a covered employee to undergo alcohol testing any time prior to the first time the employee performs safety-sensitive functions for an employer. This could occur the first time that the employee performs a safety-sensitive function after being hired or after a transfer within the employer’s organization. Some commenters suggested that such tests only be required upon a conditional offer of employment. The rules give the employer the flexibility to test at any time during the hiring process, including before or after the employee receives a conditional offer of employment, or before (preferably just before) the employee starts performing safety-sensitive functions. (Please refer to earlier ADA section for discussion of treatment of alcohol testing as a medical test, which would have to be done after a conditional offer.) The new rule will enable the employer to avoid the cost of testing several applicants for each job, tie pre-employment tests to the performance of safety-sensitive functions and accommodate the statutory language requiring a pre-employment test for an “employee”, rather than an applicant. The former option will permit identification of
someone with alcohol in his/her system before incurring additional hiring expenses. For the above reasons, the definition of “covered employee” used in these rules includes applicants for a safety-sensitive function as well as current employees applying to move into a safety-sensitive function. Many commenters thought that the rules would require every employee to report for work early every day for a regularly scheduled or randomly-conducted pre-duty test. The pre-employment testing requirement does not apply each time the employee reports for safety-sensitive duties, only the first time. Some commenters were confused by the use of term “pre-duty” in “pre-employment/pre-duty” testing and to describe the prohibition on using alcohol during a time period before performing a safety-sensitive function. For that reason, we have changed the name of the test to “pre-employment”, but note that it covers both new and transferring employees.

The rules prohibit an employer from allowing an employee to perform safety-sensitive functions unless that employee has been pre-employment tested with a resulting alcohol concentration less than 0.04. If the pre-employment test result indicates an alcohol concentration of 0.02 or greater but less than 0.04, the employee cannot perform or be allowed to perform safety-sensitive functions until the alcohol concentration falls below 0.02 on a subsequent test or until the next scheduled duty period, if it is not less than eight hours following the test. Nothing in the rules prohibits an employer from later retesting an applicant with a positive result. The rules do not confer any rights or consequences upon applicants or employees who have a positive result on a pre-employment test.

Under the rules, an employer may elect not to administer a pre-employment test if the employee has had an alcohol test conducted under any OA alcohol misuse rule following part 40 procedures with a result less than 0.04 within the previous six months and the employer ensures that no prior employer of whom the employee has knowledge has records showing a violation of these rules within the previous six months. Generally, this means that, when checking with a prior employer to verify that the applicant had “passed” a previous alcohol test, the new employer also must verify that the prior employer has no records of a violation of a OA alcohol misuse rule. If the new employer knows the applicant had other employers within the last six months, the new employer must check them too.

This option provides the greatest flexibility for avoiding the constant retesting and related costs involved in an industry, such as trucking, which has a high employee turnover rate. Some commenters did not approve of the requirement to release previous test results to a new employer. We believe that it is important to include this option in these programs; therefore, we do not intend to allow employers to refuse to provide information on a former employee, so long as the request meets the requirements of these rules. Since the information can only be released with the employee/applicant’s permission, we do not believe there is a sound basis for the former employer refusing to release the information. An employer, of course, can choose to conduct pre-employment tests in lieu of reviewing information on past employment authorized by the employee and provided by a former employer.

One commenter asked that the proposed exception to pre-employment testing be extended to include negative test results from the previous 12 months, instead of the previous six months. We have decided not to extend the exception period to 12 months; we are trying to provide some flexibility, but beyond 6 months it does not seem to us that it would be a reasonable assumption that the employee continues to be free of alcohol misuse.

In the common preamble to the NPRMs, we asked whether we should require employers to give notice that a pre-employment test will be conducted. We have decided not to impose such a requirement, because it would be too time-consuming and burdensome on the hiring process, particularly in those industries where hiring occurs on the spot. The fairness issue (testing positive after a beer at lunch) is likely to diminish over time as more and more employers conduct these tests and applicants become more aware of their use.

Post-accident Testing

Post-accident alcohol testing already is required by Federal regulation in some transportation modes and is used as a valuable accident investigation and enforcement tool. States also conduct post-accident tests, depending upon the circumstances and their authority to test.

Effective post-accident testing for alcohol at remote locations can be more difficult to accomplish than drug testing, because alcohol passes from the blood and breath more quickly than most drugs. Also, delays in transporting trained personnel and testing equipment to an accident site can result in negative tests. The OA rules generally require that as soon as practicable during the 8 hours following an accident, each employer shall test each surviving covered employee for alcohol, if that employee’s performance of a safety-sensitive function either contributed to an accident or cannot be discounted as a contributing factor to the accident. The need for testing is presumed; any decision not to administer a test must be based on the employer’s determination, using the best information available at the time the determination is made, that the employee’s performance could not have contributed to the accident. The definitions of accidents or occurrences that will trigger a post-accident test vary by industry and are discussed in each OA’s final rule. They generally are the same as the triggering events for post-accident drug testing. See the OA final rules for modifications to the general approach or for disposition of comments on the events that trigger post-accident testing. For example, under the FTA rule, post-accident testing is mandatory if there is a fatality.

Any employee subject to post-accident testing shall remain readily available for such testing or may be deemed by the employer to have refused to submit to testing; such a refusal is treated as if the employee recorded a test result of 0.04 or greater. Where possible, employers should make every effort under the circumstances surrounding the accident to ensure that the employee, even one who has been permitted to leave—or has had to leave—the site, is available for a post-accident test. This, of course, does not mean that necessary medical treatment for injured people should be delayed or that an employee cannot leave the scene of an accident for the period necessary to obtain assistance in responding to the accident, materials to secure the accident site, or necessary emergency medical care.

A number of commenters believed that conducting a post-accident test within eight hours is unrealistic; they wanted a 32-hour maximum limit as required in most OA drug rules. Because alcohol is eliminated from the body much faster than drugs are, using a 32-hour limit for alcohol testing is inappropriate. We chose an eight-hour maximum time limit for post-accident alcohol tests, because if a test is not administered within eight hours following the accident, there is little likelihood of finding a meaningful alcohol concentration resulting from use preceding the accident. Some commenters, including the NTSB,
wanted the post-accident time limit shortened to two to four hours because no alcohol is likely to be detected after eight hours. Although shorter time limits may result in a more useful test result, they may not be reasonable; they ignore the likelihood that additional time may be needed for those accidents that occur in remote areas or are not discovered right away.

It is important that the employer conduct the post-accident test as soon as possible to determine whether there was any alcohol misuse. If a post-accident test is not administered within two hours following the occurrence of the accident, the employer must prepare and maintain on file a record stating why the test was not promptly administered. Some commenters wondered if the time ran from the accident or from the time the site was secured. One commenter suggested that the two hours should begin after the determination that the employee may have caused the accident. Because alcohol metabolizes so rapidly, we disagree that the two hours should run from the determination that an employee may have caused the accident or after the site has been secured; those actions could take several hours.

After eight hours has passed, the employer then shall cease attempts to administer the test and record why the employer was unable to administer a test. Some commenters grumbled about the record requirements. We believe that recording this information is necessary for program oversight and to encourage employers to make the maximum effort to conduct any necessary post-accident tests in a timely manner. The Department recognizes there may be valid reasons for not conducting the tests in these time frames, but every effort must be made to do so. We have tried to ease the reporting burden by dropping the proposed requirement that employers submit these post-accident reports to the appropriate OA. Instead, rules now require only that the employer maintain records on why a post-accident test could not be conducted and make the records available to the appropriate Department officials upon request. It is important to note that this test is not meant to be a full toxicological workup for the purpose of determining accident causation. The primary purpose of the test is to determine whether the employee(s) involved should be removed from safety-sensitive functions. Most commenters who addressed the issue of who should be required or permitted to perform the post-accident test supported OA acceptance of tests conducted by law enforcement officers, even if the testing does not comply with part 40 in every respect; a couple of commenters pointed out that, for example, the police may not have access to the employee during the critical eight hours and must be able to use the police test as a substitute, if made available. Generally, we believe that employers should conduct their own post-accident testing under these rules. However, as commenters have pointed out, the nationwide highway transportation system presents difficult post-accident testing problems. Motor vehicle operators can range far beyond the control of their employers, who may not be informed of the occurrence of an accident for an extended period. We agree that breath or blood alcohol tests conducted by on-site State and local law enforcement or public safety officials should be acceptable in lieu of post-accident testing by FHWA employers in situations where the test can be administered earlier than the employer can get to the scene or when an alcohol test cannot be conducted by the employer within eight hours. These local authorities often are first to arrive at an accident site, particularly if the accident occurs in a remote area, and sometimes are equipped to conduct tests. Such tests must meet State standards that would already make them acceptable in court. Although commenters to other OA rules expressed support of acceptance of such tests in their industries, only the FHWA rule will provide for the exception because the need is most acute for motor vehicle operations. Other OAs, e.g., FAA, have separate rules that would enable them to obtain the results of these tests, if necessary, or face fewer difficulties in finding out about or locating an accident. We recognize that we cannot always ensure cooperation in getting test reports from the police. However, where such results are made available, they would be acceptable under the FHWA program and part 40, provided that breath testing is conducted with an EBT on the CPL and by a law enforcement officer certified on that EBT, and that blood testing is conducted in compliance with State-approved procedures. Please refer to the FHWA preamble for additional discussion.

Numerous commenters believed that post-accident testing is necessary, but that it is unnecessary and impracticable without the option to use other methodologies, such as blood, saliva and urines. As stated earlier, we are considering permitting the use of post-accident blood testing and the possible use of other devices for screening tests. Until such devices are used, we cannot ensure the reliability and integrity of other devices. FHWA has its own preexisting procedures for conducting a full toxicological analysis following an accident; see the FHWA rule for its post-accident testing requirements.

Random Testing
A significant number of commenters opposed random testing, citing its costs and burdens in comparison to the perceived lack of significant problems in their industries. Several viewed training, educational efforts and employee assistance programs as better investments than random testing. Some commenters supported the need for random testing. The Act requires random alcohol testing of safety-sensitive employees in the aviation, rail, motor carrier and transit industries. It is the only type of testing not triggered by or conducted in reaction to another event; its primary objective is deterrence. Although we agree that investment in education and employee assistance efforts will deter some employees from alcohol misuse and contribute to the overall success of the alcohol misuse prevention programs, some employees will only be deterred by the existence of random testing. The additional deterrence provided by random testing is critical to ensuring public safety. Court decisions have indicated that the lack of good data indicating a specific problem in a particular industry is not a bar to our taking action to prevent or address the spread of a societal problem to that industry. Moreover, the lack of data may be due to the fact that currently there is little or no testing. Finally, and most importantly, the Act provides no discretion; we must require random testing. The rule does provide, however, that two consecutive years of very low industry positive random alcohol rates will result in a lowering of the random alcohol testing rate for that industry, thereby reducing employers’ costs.

The OA rules (except RSPA) require each employer to randomly select a number of covered employees at various times during each year for unannounced alcohol testing. The number of employees selected must be sufficient to equal an annual rate of not less than 25 percent (initially) of the total number of employees subject to alcohol testing under a particular OA’s rules. Therefore, the industry’s random alcohol rate will be adjusted based on a performance standard related to its
random alcohol violation rate. Because of safety concerns, two years of data are necessary to justify lowering the random alcohol testing rate; one year of data is sufficient to raise it. (See more specific random rate discussion below.)

The employer must select covered employees for testing through 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. One commenter believed that in-house random selection is discriminatory in practice and employers need to use the services of an outside firm. Each covered employee must have an equal chance of being tested under the random selection process used. A system using random number table or random number generator would not be discriminatory because the employer could not designate particular employees for testing. The dates for administering random tests must be spread reasonably throughout the year (the deterrent effect would disappear if employees know that the employer had completed all required random tests for the year) and should not be predictable (e.g., every Monday or the first week of each month). To achieve this, many employers may find it best to join a consortium. Because of the randomness of the testing, some employees may be tested more than once during the year, while others will not be tested at all.

In the view of some commenters, random testing would provide few safety benefits since it is limited in time to performance of safety-sensitive functions. A few commenters suggested removing those limitations and applying the requirement to all employees at any time. As stated above, we believe that the deterrence provided by random testing will increase safety. To ensure their reasonableness for Constitutional purposes (discussed earlier in this document), the rules provide that an employee can be tested for alcohol only while the employee is performing safety-sensitive functions, just before the employee is to perform safety-sensitive functions, or just after the employee has ceased performing such functions. Obviously, the best time to test is before the employee begins to perform the safety-sensitive function. Detection at that point will prevent the employee from actually performing the function while he or she had alcohol in his or her system. However, if the employee understands that a random test can be administered only before he or she begins work and there is an opportunity to drink during work, deterrence is limited. The ability to test just before, during or just after performance increases the deterrent effect and may enable detection of employees who use alcohol on the job. Although it may be easier to test at any time, if the test is not tied to safety, we do not believe there would be a sufficient basis under the Constitution to conduct the test.

One commenter wanted a better explanation of “just before” and “just after” performance of safety-sensitive functions. The purpose of the concept of “just before” and “just after” is to avoid the problem that some safety-sensitive functions cannot be interrupted for the performance of a test (e.g., piloting an aircraft). We have not defined the concept in terms of a specific time, but it is intended to be close enough to the actual performance of the safety-sensitive function, that the test results will clearly indicate that the employee would be or was at 0.04 or above (or 0.02 or greater but less than 0.04) at the time when performing those functions. To accomplish this, employers should ensure that each covered employee selected for random testing proceeds to the testing site immediately. In the event the employee is performing a safety-sensitive function when notified, the employer must ensure that the employee ceases the functions consistent with safety and proceeds to the site as soon as possible. See discussion in the specific OA preamble on what the OAs expect “immediately” to mean in the context of reporting for a random test.

Consortia/Random Testing Pools

To promote efficiency and reduce costs, particularly for smaller employers and employers subject to more than one OA rule, we generally permit the combination of geographically-proximate employees covered by different OA rules into one random testing pool. To maintain fairness and the equal chance of each type of employee for selection, certain conditions apply. For example, employees in any industry who travel most of the time could constitute one pool; others who remain in the vicinity of the testing site would be in another. However, if the testing method chosen required testing of employees immediately upon selection or whenever they arrived at the testing location after their selection (but still unannounced), there would be no need for separate pools. Any acceptable method must ensure that each employee has an equal chance of being selected for testing. Although multi-modal pools are permitted, they must meet any other specific OA requirements, such as possible differing industry random testing rates. If the employer joins a consortium, the rules permit the calculation of the annual rate (where the rates are the same) on either the total number of covered employees for each individual employer or the total number of covered employees subject to random testing by the consortium’s pool covering the employer. This means that a consortium member could have less than its required number of random tests conducted if the overall consortium rate equals the required rate. Thus, if Employer A has twenty covered employees and the consortium has 500 covered employees in the pool covering Employer A, and a 25 percent rate applies, if Employer A chooses to have the rate based on the consortium, the consortium must conduct at least 125 tests even if Employer A’s employees of Employer A are actually tested. So long as each employee has an equal chance of being tested each time the consortium conducts random tests, the requisite deterrence factor exists. Membership in a consortium should improve deterrence for small companies because their employees would continue to perceive an equal chance of being selected throughout the year.

Random Alcohol Rate Performance Standard

In the NPRMs, we requested comment on what annual rate to require for random alcohol testing within a 10 to 50 percent range. Most commenters, particularly employers, wanted a 10 percent random alcohol testing rate beginning the first year; although substantial numbers selected 25 percent or a range between 10 and 25 percent and several wanted to use 50 percent as currently required in the drug testing rules. Many commenters expressed a greater preference for having the same testing rate (and the lower the better) for both drugs and alcohol, because combining the programs would save more money than just lowering the testing rate. They argued that, with drug testing, studies have shown that lowering the testing rate did not affect deterrence. (At least one commenter argued, candidly, that since in its view random alcohol testing is worthless but the Act required it, we should set the lowest rate possible to reduce employer costs.) According to commenters, lower random alcohol testing rates are appropriate because alcohol use has declined, and many employers have strong employee assistance programs in place, which did
not exist when drug testing was phased in. Finally, most noted that it is easier to detect alcohol misuse through supervisor or co-worker observation. Specific to this rulemaking, the National Airline Commission stated that “* * * any random alcohol testing of airline employees should be at no more than a 10 percent rate.”

We note that in July 1991, the FRA initiated a comparative study of random drug testing rates and the impact on deterrence, as measured by the positive rate. The study compared 4 railroads testing at 50 percent (control group) with 4 railroads testing at 25 percent (experimental group). The positive rate for the control group when the study was initiated was 1.1 percent; for the experimental group it was 0.89 percent. In the first year (July 1991 through June 1992), the control group’s positive rate was 0.90 percent; the experimental group’s was 0.87 percent. For the period July 1992 through June 1993, these groups had positive rates of 0.80 percent and 0.54 percent, respectively.

Statistically, the differences in the positive rates between the control and experimental groups are not significant. Many would argue that the higher the random testing rate, the greater the likelihood of getting “caught” and, therefore the greater the likely deterrence. Detection is also higher at higher rates. However, if the likelihood of detection is small (e.g., because alcohol metabolizes so quickly), testing may result in little deterrence unless very high rates are used. But costs also rise as the number of tests increases. The concern is whether extra deterrence is worth the extra cost.

The Department agrees with commenters that, since alcohol symptoms are somewhat better known and easier to detect, more alcohol misusers than drug users are likely to be caught by observation, which justifies a lower random alcohol testing rate. (Of course, observation alone will not always detect employees with very low alcohol concentrations, unless they have an open bottle of liquor.) The deterrent effect of random alcohol testing may not equal that provided by random drug testing because the window for detection is limited by the rapid elimination of alcohol from the body. An individual who has alcohol in his or her system while performing safety-sensitive functions may be “negative” by the time he or she gets to the testing site and the testing is completed. In addition, there are many more programs in place to handle alcohol misuse problems than there were to handle drug use problems when we issued the drug rules. There is also no indication that alcohol is a growing problem; drug use was, and there is still much evidence that strong steps must continue to prevent drug use from increasing. Consequently, we believe that a lower initial random testing rate is appropriate for alcohol.

For the above reasons, we believe we can permit the alcohol random testing rate to drop to 10 percent if performance criteria in our rules are met, but cannot permit a comparable drop in the drug testing random rate for a similar performance. In view of the small window of opportunity for detecting alcohol misuse, we agree with commenters that the added cost could be more useful if applied to other areas of the alcohol prevention program, such as training and employee assistance. On balance, we believe that an initial 25 percent random alcohol testing rate will best achieve deterrence and detection at a reasonable cost.

Many employers commented that they wanted performance-adjusted rates, where the random testing rate would be set according to each employer’s random positive rate for the preceding year. These commenters stated that testing based on measures of results would provide an incentive for employers to try alternative deterrence methods. Labor agreed with employers on this issue. Adjusted-rate testing could be used to reward those employers who have adopted rehabilitation and treatment programs or who have low positive rates. A few preferred adjusted-rate testing by industry. Other commenters noted that providing flexibility with respect to the random testing rate would be extremely difficult to administer.

We agree that there is merit in using a random alcohol testing rate that is adjusted annually based on industry performance. To provide more incentive and flexibility, the rules allow those industries that demonstrate a very low positive alcohol random rate over two years, due to few employee alcohol misuse problems or the success of the alcohol prevention programs, to lower their random alcohol testing rate to 10 percent. Ten percent would be insufficient to protect public safety, at least as an initial testing rate. The number of tests conducted at a ten percent rate and the visibility of testing to employees, especially in medium and small companies, would be insufficient to obtain data about prevalence or deterrence of alcohol misuse. We could not reliably make decisions on data gathered with such a rate—at least not for a number of years. If those who say usage is extremely low are correct, when the data gathered at the initial 25 percent rate verifies this, the testing rate can be lowered.

The OA rules require employers to use an initial random alcohol testing rate of 25 percent. They provide that, after all employers have implemented the rules and industry-wide data for the first year is available, the OA Administrator will annually announce in the Federal Register the minimum required annual percentage rate for random alcohol testing applicable in that OA’s covered industry during the calendar year following publication of the notice. Thereafter, each OA will determine the annual random alcohol testing rate for the industry regulated by the OA rule based on the reported violation rate (number of random alcohol tests results equal to or greater than 0.04 plus refusals-to-take random alcohol tests divided by the total random alcohol tests conducted plus refusals-to-take random alcohol tests) for the industry. The random rate adjustment indicated by industry performance will occur at the beginning of the next calendar year. (Thus, during calendar year 1997, an OA will receive results from its industry for calendar years 1995 and 1996 (the first year that industry-wide data will be available), evaluate them and publish in the Federal Register a determination of the need for the industry to adjust the random rate. Any such change would take effect on January 1, 1998. Please note that, once employers of all sizes are reporting data, a decrease in the rate would require two years of qualifying data and an increase in the rate would require only one year of data.) A refusal to take a random alcohol test will count as a positive for the purpose of calculating the industry random testing rate and count toward the number of random alcohol tests required to be conducted.

Determination of the violation rate is based on data obtained from employers through the annual Management Information System (MIS) reports they must submit by the following March 15th. We envision that each OA and the OST Drug Office will review the MIS data and that the OA Administrator will issue a determination within a few months. We believe that covered entities need approximately one-half year of lead time to adjust their procedures, make changes in any contracts and take other necessary action to adjust to an increase or decrease.

To make a decision, each OA will compare the violation rate to two specific criteria: 1 percent and 0.5 percent, respectesly, to determine if the industry must change or maintain the random alcohol testing rate. If the
industry violation rate is 1 percent or greater during a given year, the random alcohol testing rate will be 50 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 1 percent but greater than 0.5 percent during a given year (for two years if testing at a higher rate), the random alcohol testing rate will be 25 percent for the calendar year following the OA Administrator's announcement that the rate must change. If the industry violation rate is less than 0.5 percent during a given year (for two years if testing at a higher rate), the random alcohol testing rate will be 10 percent for the next calendar year. For example, an industry testing at a 50 percent random rate for alcohol can drop the rate to 10 percent if its violation rate drops below 0.5 percent for two consecutive years. Because of safety concerns, two years of data are necessary to justify lowering the rate. The one year of data is sufficient to raise it. The industry testing at a higher rate can not be averaged; a violation rate of 0.07 one year and a 0.11 violation rate the next year will not allow a drop in the random alcohol testing rate.

We selected 1.0 percent and 0.5 percent as appropriate performance standards. We would prefer zero positives but recognize this may be impossible. These levels represent a balance, permitting cost savings when usage remains very low, while ensuring that if deterrence is not maintained, the rates will increase. We selected the 1 percent violation rate as the rate adjustment standard based on the experience that the military and other workplace programs have had with deterrence-based drug testing. Their results remain valid regardless of what rate is used for random testing, the testing programs will never achieve zero positives. There always is a constant group of “hard-core” individuals representing a fraction of 1 percent of the population who are detected positive over a period of time; these individuals are unaffected by deterrence-based testing because of addiction or belief in their invincibility. We also believe that a positive rate of 0.5 percent is achievable based on our limited data from the random roadside alcohol testing project, where rates below 0.5 percent were obtained, and our experience with DOT Federal employee drug testing where positive rates have decreased to 0.23 percent.

We recognize that because the reported violation rate is obtained from data whose precision is eroded by non-response bias, there is a greater risk that it diverges from the actual violation rate in the population. Each OA will be using MIS data collection and sampling methods that address these issues to the extent possible and make sense in the context of its particular industry. Where not all employers are included in the reported data, the OA will decide how many covered employers must be required to report or be sampled; this decision will be based on the number of employers (not otherwise required to report) that must be sampled to ensure that the reported data from the sampled employers reliably reflects the data that would have been received if all were required to report. However, we retain for our discretion the decision on whether the reported data reliably support the conclusion (e.g., based on audits of company records that show significant falsification of reports). If the reported data are not sufficiently reliable, the OA will not permit the random rate adjustments to occur.

We have decided to use industry violation rates (positive tests and refusals to test) as the performance benchmark rather than the employer violation rates urged by commenters. Company-by-company rates would be extremely difficult to implement and enforce, extremely difficult to apply to small companies, would require reports from all companies, could encourage cheating (especially in areas of heavy competition) and could excessively complicate the use of consortia. Although an individual company may have reduced incentive to lower its positive rate, industry organizations may pressure it to work toward a more favorable industry random alcohol testing rate. Industry-wide rates should be much easier to implement and enforce.

**Implementation Issues.** The lower random alcohol testing rates will create implementation problems, particularly for small employers and consortia (see discussion below). Small companies that do not participate in a consortium may have to test at a higher effective rate even after the industry rate has been lowered to meet other requirements. A very low number of dates on which tests are conducted will have a detrimental effect on deterrence. Therefore, to promote deterrence (and as required under the Department's drug testing rules), an employer must spread alcohol tests throughout the year. A very small company (e.g., one that has to test two covered employees) will not be permitted to only test employees once every few years. Rather, it will have to test at least once a year and establish a program that will ensure that there is no period of time during which employees know testing “is done for the year”. For example, if an employer is required to conduct only one to four tests and that number can be completed by mid-summer, the employer's program must ensure that more tests could be conducted before the end of the calendar year. For example, such an employer could conduct random testing every quarter or could randomly select the month within the next 12 months for conducting the next test(s). Depending upon the month selected, the employer may in fact test more than once in a calendar year. For example, using a revolving calendar, the first selection is May 1994 for the year January 1994 to December 1994; the next selection must be for the 12 months from May 1994 to April 1995.

Another alternative is for small employers to join a consortium so that their employees are always subject to random testing. Although we have in a number of ways eased the burden on small employers, these restrictions that may raise the effective annual random rate are necessary to achieve deterrence in random testing in the context of allowing random rate adjustments. A small employer, of course, can achieve the benefits of a lower random rate without the higher costs of meeting the deterrence requirements if it joins a consortium. If the company is in a consortium, the employee is always subject to testing because he or she is part of a much larger pool and the necessary deterrence exists.

Under the Department's current drug testing rules, employers must conduct random drug tests at a 50 percent annualized rate; that is, the number of annual random tests conducted must equal half the number of the covered employees. Each company (Federal Register, the Department is publishing a separate NPRM that seeks comment on a proposed industry performance standard to adjust the random testing rate for the current drug testing programs. The proposal is designed to lower costs and maintain an equivalent level of deterrence of illegal drug use. The NPRM proposes to allow each OA Administrator to lower the random drug testing rate to 25 percent if its industry has a positive testing rate of less than 1.0 percent for two consecutive years (while testing at 50 percent); the rate will increase back to 50 percent, if the industry random violation rate is 1 percent or higher in any year. The Department is not proposing a system to adjust the drug random rates identical to that established for alcohol random testing for the opposite of the reasons stated.
difficulties for employers interested in testing. However, the possibility of different testing rates for drug and alcohol use (e.g., sympathy for the employee simply because he or she comes in late that day. Constant lateness, for example, may result from a supervisor does not smell alcohol, he or she legitimately could decide to test an employee's time). If the employee's time is equally divided, the employer may choose the OA rule with the highest random testing rate. If an employer is required to conduct random alcohol testing under the alcohol misuse prevention rules of more than one OA per week, the employer may (1) establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at a different OA required rate; or (2) randomly select from all employees for testing at the highest rate established for the calendar year by any OA to which the employer is subject. Consortia could meet different required random testing rates by setting up separate pools.

Many commenters, particularly employers, supporting random testing claimed that it would be less burdensome if they could combine their drug and alcohol random testing programs. They noted that using the same employee selection for both alcohol testing and drug testing would allow flexibility and be more cost effective, by minimizing the impact on an employer's operations. Labor supported combination testing, where an employee would not know in advance whether he or she was being tested for alcohol, drugs, or both, as the most effective type of program. The rules do not prohibit employers from combining random drug and alcohol testing. However, the possibility of different testing rates for drug and alcohol random testing may cause difficulties for employers interested in combining their random testing programs. Differences in the testing rate for each program can be accommodated; for example, where an employer must use a 25 percent alcohol random rate and a 50 percent drug random rate, half (randomly selected) of the employees chosen for testing would be tested for both drugs and alcohol while the rest could be tested only for drugs. Other methods are possible so long as they meet the requirements of both programs. Of course, combined testing must occur around the time of performance of a safety-sensitive function to meet the requirements of the alcohol misuse prevention rules.

*Reasonable Suspicion Testing*

The vast majority of commenters supported the need for reasonable suspicion testing, although one commenter opposed it as unnecessary in view of existing company policies. We agree that this type of testing may be more valuable for alcohol than for illegal drugs. People are more familiar with the symptoms of alcohol intoxication than with those of illegal drug use. The presence of alcohol is easier to detect (at least at higher consumption amounts) from physical symptoms (e.g., odor of breath) or behavior (e.g., inability to walk a straight line) and more research has been done on how to train people to make these observations. Supervisor observation is not a complete solution, however; "practiced" drinkers often can mask symptoms (e.g., they use a breath spray or can walk a straight line) and avoid detection. Also, supervisors may have reasons to overlook employee alcohol use (e.g., sympathy for the employee, the desire to avoid confrontation, or the lack of a readily available replacement). The U.S. Army has found that supervisors have a tendency to underreport alcohol involvement in accidents (The Alcohol and Accidents Guide, February 1987).

The OA rules require employers to test covered employees for alcohol when the employer has reasonable suspicion to believe that the employee has violated the prohibitions in these rules or if the employee's behavior and appearance indicate alcohol misuse. The employer's determination that reasonable suspicion exists to require an alcohol test must be based on specific, contemporaneous, articulable observations by a trained supervisor concerning the appearance, behavior, speech, or body odors of the employee. Reasonable suspicion testing under these rules is authorized only if the required observations are made during, just preceding or just after the period of the work day that the covered employee is performing a safety-sensitive function.

Several commenters wanted supervisors to be able to use long-term performance factors, such as abuse of sick leave, in making their reasonable suspicion testing decisions. In addition, they believed that requiring the observation to occur close to or during the performance of a safety-sensitive function is too restrictive. Some commenters thought that use of long-term factors would be appropriate only in conjunction with short-term indications of alcohol misuse; others opposed any use of long-term factors. The factors set out for determining when reasonable suspicion exists in the drug and alcohol rules are short-term in the sense that they focus on what a supervisor sees at the time of performance of safety-sensitive duties. The Department believes that this restriction is appropriate because it accommodates Fourth Amendment concerns by relating the determination of the need for testing to factors indicating possible alcohol involvement that may affect the employee's present ability to safely perform required safety-related tasks. For example, even if the supervisor does not smell alcohol, he or she legitimately could decide to test an employee simply because he or she comes in late that day. Constant lateness, for example, may result from an alcohol problem, but it is not a reasonable basis for suspicion of alcohol misuse; there are too many other possible explanations. The rules do not interfere with the supervisor's own authority to take appropriate action in response to longer-term factors (e.g., a long-term decline in work performance, patterns of absenteeism, lateness, or abuse of sick leave) that may violate company policies.

A covered employee is required to undergo reasonable suspicion testing for alcohol as soon as possible, because the body rapidly eliminates alcohol. Therefore, if a reasonable suspicion test is not conducted within two hours following the determination of reasonable suspicion, the employer shall prepare and maintain on file a record stating the reasons why the test was not conducted. If the test is not conducted within eight hours after the determination of reasonable suspicion, the employer shall cease attempts to conduct the test and shall state in the record the reasons for not administering the test. These records must be submitted to the appropriate
Department officials upon request. This record requirement and the reasons we are imposing it are similar to those for post-accident testing discussed above. (Please note this is a change from the NPRMs.)

A number of commenters expressed concerns that supervisors might abuse reasonable suspicion tests to harass unpopular employees and wanted strict requirements to prevent this possibility. Many wanted us to require that two supervisors make the decision to test (as in the existing drug testing rules) to limit possible harassment and to support management’s case during future grievance and arbitration procedures. Others noted that a two-supervisor requirement would be impracticable because alcohol metabolizes so quickly and because in certain locations, many employees have only one supervisor available.

The alcohol final rules generally require a single supervisor trained in detecting the symptoms of alcohol misuse to make the required observations and determine the existence of reasonable suspicion. We agree with several commenters that alcohol testing is too time-sensitive to incorporate as a general rule the time it takes to consult a second supervisor before making the testing decision, which also is difficult or impossible in some transportation industry locations. In addition, symptoms of alcohol use are more widely-known and easier to detect than those of drug use so there is less need for corroboration. To protect against possible harassment of a specific employee, the supervisor who makes the determination that reasonable suspicion exists generally is prohibited from conducting the reasonable suspicion test on that employee. Comments were mixed on whether we should allow supervisors to base their decisions to conduct reasonable suspicion tests on third-party reports of alcohol misuse. We decided not to permit a supervisor to base such a decision on reports by a third person who has made the observations, because of that person’s possible credibility problems or lack of appropriate training.

A few commenters suggested that supervisors document within two hours and annually report their reasons for conducting a reasonable suspicion test so that the OAs can check for harassment. We believe that the possibility that a review of company records would show whether particular individuals were harassed—i.e., tested without positive result too often—should help deter harassment. A couple of commenters envisioned holding supervisors liable for damages if the results of the test did not confirm their suspicions. We believe it inappropriate to require action against a supervisor for ordering a test where the results are negative. Reasonable suspicion is not a guarantee of a positive result on an alcohol test. Other factors can result in behavior or appearance that can reasonably cause one to suspect alcohol misuse; that is why we require a test before requiring action for a rule violation. In addition, the supervisor may have been correct, but, by the time a test can be conducted, the alcohol may have passed through the employee’s system.

Behavior and Appearance

Numerous commenters wanted to eliminate the proposed prohibition on employee behavior and appearance characteristic of alcohol misuse, because it is conceptually part of the reasonable suspicion prohibition and because it is subjective. They noted that it would not be useful because managers do not always have daily contact with their employees. However, some commenters stated that they wanted the authority to remove an employee on behavior and appearance grounds when a reasonable suspicion test is not possible. We agree that simple “behavior and appearance” of alcohol misuse involves a subjective determination and should not be considered prohibited conduct that triggers the full consequences of violating these rules without confirmation of such misuse by a positive test. As a result, the final rules have been changed from the NPRMs: under the reasonable suspicion testing provisions, an employer who observes such behavior and appearance must conduct a test; however, when it is infeasible or impossible to conduct a reasonable suspicion test in a timely manner (e.g., an EBT is unavailable or broken), the employee is not permitted to perform safety-sensitive functions for eight hours (or until obtaining a result below 0.02 on a test if an EBT subsequently becomes available within the 8-hour period). The OA rules prohibit a covered employee from reporting for duty or remaining on duty requiring the performance of safety-sensitive functions while the employee is under the influence of or impaired by alcohol, as indicated by behavior, speech and performance indicators of alcohol misuse. They also prohibit an employer from allowing such an employee to perform or continue to perform safety-sensitive functions. However, since alcohol-related behavior tends to become apparent to persons without extensive training (such as that provided by police) only at alcohol concentrations well above 0.04, it is unlikely that misuse would be detected in this manner at alcohol concentrations in the 0.02–0.04 range. Thus, there are important safety reasons for requiring that an employee be removed from his or her safety-sensitive function based on behavior and/or appearance alone if no testing devices are available. Another reason that we decided not to eliminate this provision entirely as requested by many commenters is because some employers do not believe that they otherwise have the authority to remove an employee who appears to be under the influence of alcohol in the absence of a test. We do not want an employer to allow a safety-sensitive employee to remain on duty for that reason.

Some commenters, particularly in the aviation industry, wanted to retain existing prohibitions on operating “under the influence” and while “impaired”. To the extent some existing OA rules already permit removal of an employee based on suspicion alone, the employee has a right to an evidentiary hearing (e.g., as part of a certificate revocation action). The rules we have published today do not provide for a right to a hearing. For that reason, and because removal from a safety-sensitive function is the absence of a reasonable suspicion test involves a subjective determination, unverified by a test, and may provide an opportunity for the employer to harass an employee, we believe that lesser consequences should apply, i.e., removal from the safety-sensitive function until the next regularly scheduled duty period if at least 8 hours has passed. Removal for this reason does not require a SAP evaluation. Existing consequences in other OA rules that have “under the influence” or “impaired” language will continue in effect; any consequences that attach as a result of those rules could be imposed in addition to removing the employee from safety-sensitive function for eight hours. An employer’s separate existing authority to remove employees is not affected by this provision.

Return-to-Duty Testing

The commenters split over whether return-to-duty testing should be mandated by regulation or left solely to the discretion of the employer; one commenter noted that it really is another “intelligence” test. Commenters who believed that the test should be discretionary disagreed whether the decision to test should rest with the employer (in consultation with the SAP) or the SAP alone. Some commenters stated that using a 0.02 standard is too
stringent. Others liked the provision as proposed. The OA rules require each employer to ensure that a covered employee, who has violated any of these alcohol misuse rules, has been evaluated, treated (where indicated), and tested with a result indicating an alcohol concentration of less than 0.02 before returning to a safety-sensitive function. We disagree with those commenters who thought return-to-duty testing should be left solely to the discretion of the employer. We believe that compelling concerns about safety and possible recidivism justifying imposing a return-to-duty test requirement for those employees returning to safety-sensitive functions after they already have demonstrated problems with alcohol.

Similar concerns justify use of a stricter 0.02 standard for return-to-duty tests. In any event, under other provisions of the rules, employees could not perform safety-sensitive functions until they have a result lower than 0.02; since this test is specifically for return-to-duty, the application of the 0.02 standard is logical. A positive result on a return-to-duty test indicates a problem that has not been resolved; the employee cannot come back the next day to retake the test without seeing the SAP again. The decision to return the employee to safety-sensitive functions and to conduct the test ultimately belongs to the employer. The SAP's function is to advise the employer as to whether the employee has complied with any recommended program of treatment. Given the potential for poly-drug misuse, the rules permit employers to conduct return-to-duty drug tests on an employee, when the SAP has reason to suspect drug involvement and recommends such testing. Any such testing must conform to the requirements of part 40. The opposite would be true as well. Employers would have similar authority to test for alcohol where an employee tested positive for drugs and the SAP had reason to suspect alcohol misuse. (The OA drug rules have been drafted or are being changed to permit this.)

Follow-Up Testing

Commenters disagreed as to whether follow-up testing should be required or discretionary. As with return-to-duty testing, they divided over leaving the follow-up testing decision to the employer or to the SAP. Several commenters thought that a requirement for follow-up testing would be too costly and burdensome for employers and might cause them to fire the employee instead. Others thought that the concept had merit, but that the rules should require fewer tests over a shorter period of time, especially since the employee is also subject to random testing. After identification of an employee's alcohol problem, there is a strong chance of recidivism and a need to ensure continued disassociation from alcohol misuse through periodic unannounced follow-up testing. We believe that a minimum number of follow-up tests is necessary to ensure public safety in view of various disincentives for imposing them, such as cost, the customary SAP preference for informal follow-up, and FRA's experience in its drug testing program (see below). In making the decision whether to return the employee to safety-sensitive duties, we assume the employer would determine whether, in its particular circumstances, the cost of hiring and training (and testing) a new employee would exceed that of testing a returned employee to ensure continued disassociation from alcohol. We agree with commenters that it is appropriate for the SAP to determine the employee's need for an individualized rehabilitation (if any) or follow-up program beyond the minimum specified here.

The OA rules require that each covered employee, who has been identified by a SAP as needing assistance in resolving problems with alcohol misuse and who has returned to duty involving the performance of a safety-sensitive function, shall be subject to a minimum of 6 unannounced, follow-up alcohol tests administered by the employer over the following 12 months. The SAP can conduct additional testing during this period or for an additional period up to a maximum of 60 months from the date the employee returns to duty. The SAP can terminate the requirement for the follow-up testing in excess of the minimum at any time, if the SAP determines that the testing is no longer necessary. We believe that fewer follow-up alcohol tests over a shorter period would not provide sufficient deterrence of (or opportunity for detection of) alcohol misuse by an employee who has demonstrated a previous problem. The FRA's experience under its drug testing rules with required follow-up testing for employees who tested positive for prohibited drugs illustrates the need for a minimum number of required follow-up tests. In 1991, FRA conducted a compliance review on a large railroad company and found that 9 of ten employees who had tested positive and were returned to service had received no follow-up tests during the next year. One employee received one follow-up test six months after returning to work. One of the employees who had received no follow-up testing later tested positive on an FRA-required random drug test. The Department's Office of Inspector General (OIG) recently completed a review of the FRA's alcohol and drug program. The OIG reviewed follow-up testing practices on several railroads and found inconsistent procedures and a lack of follow-up tests. It report recommends prescribing procedures for follow-up tests, including a minimum number of tests and a minimum period for follow-up testing. For the above stated reasons, we believe that we must require a minimum amount of follow-up testing. The rules provide that the evaluation and treatment services may be furnished by the employer, by a SAP under contract with the employer or by a SAP not affiliated with the employer. In view of the "gatekeeper" function that the SAP has under the rules, we believe that the employer should designate the SAP. Experts note that, due to training and the profession's normal employee orientation, the SAP may be eager to place the employee back into the normal work environment, i.e., the safety-sensitive function, but reluctant to require testing by the employer. The SAP may prefer to conduct any necessary follow-up testing as part of an after-care or follow-up treatment program. While we recognize that placement of the employee back on the job as soon as possible without follow-up testing may help the employee, it could put public safety at risk. The SAP's customary professional loyalty to the employee "patient" would directly conflict with the employer's safety responsibility of the employee. In order for this program to work and to ensure public safety, the SAP must recognize his or her obligations to be cognizant of the employer's responsibilities and need for a fair evaluation of the employee.

Given the potential for poly-drug misuse, the rules permit employers to conduct follow-up drug tests on an employee during the follow-up alcohol testing period, when the SAP has reason to suspect drug involvement. Any such testing must conform to the requirements of part 40. The opposite would be true as well. Employers would have similar authority to test for alcohol where an employee tested positive for drugs and the SAP had reason to suspect alcohol misuse. (The OA drug rules have been drafted or are being changed to permit this.) The rules do not use the stricter 0.02 alcohol concentration standard imposed on return-to-duty tests for follow-up tests, even though the employee has previously demonstrated problems with
alcohol. In either case, the employee cannot perform safety-sensitive functions with an alcohol concentration of 0.02 or above. Unannounced follow-up tests of employees back on the job are similar to random tests. Because employers may find it convenient to conduct some follow-up testing at the same time as random tests, the consequences for follow-up test results must be the same as those for random tests. This will enable employers to conduct unannounced testing and combine follow-up testing with other types of testing, but avoid imposing total abstinence from alcohol on returned employees whose follow-up programs do not require it. We note that, under the Act, an aviation employee who has a second violation under the FAA alcohol misuse prevention rule will be forever barred from the employee's safety-sensitive function. Please see the preamble to the FAA rule for a more comprehensive discussion of this consequence.

Retesting of Covered Employees With an Alcohol Concentration of 0.02 or Greater, but Less Than 0.04

Some commenters disagreed that there is any need to provide for retesting. Others used this issue as an opportunity to reiterate their opposition to the lesser consequences for test results indicating alcohol concentrations between 0.02-0.039.

The rules provide that if the employer chooses to permit the employee to perform a safety-sensitive function within 8 hours following the administration of an OA-required alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04, the employer must first retest the employee. The employee can return to the safety-sensitive function if the retest results in an alcohol concentration of less than 0.02. However, the FHWA rule does not contain a retesting provision because of a statutory requirement that drivers found to have a measurable amount of alcohol in their systems must be removed for 24 hours. The FRA rule also does not contain this provision because it would conflict with its existing rules. Eliminating this option from the other OA rules would impose a hardship on some employers; the employer will make the decision whether retesting is necessary to accommodate its employment circumstances.

Handling of Test Results, Record Retention and Confidentiality

Retention of Records

We received very few comments directed to handling of alcohol recordkeeping requirements. Generally, those commenters wanted to shorten the record retention periods (the most popular option would reduce the proposed 5 years to 3 years and the proposed 2 years to 1 year). To facilitate Department oversight and effective enforcement of the alcohol testing programs and to protect employee confidentiality, we are requiring each employer to maintain records of its alcohol misuse prevention program in a secure location with controlled access. One commenter wanted to know what that really means. The employer should lock the location (room, cabinet, or, if on computer, control access by password or other protections) and allow access only to persons with a legitimate need to see the records under these rules. The OA rules require employers to retain, for a minimum of five years, records of any employee alcohol test results indicating an alcohol concentration of 0.02 or greater; documentation of refusals to take required alcohol tests; equipment calibration documentation; and documentation of employee evaluations and referrals. They require employers to retain for a minimum of two years any records related to the collection process (except equipment calibration documentation) and training. Records of negative test results must be retained for a minimum of one year.

Generally, the rules require each employer to maintain the following specific records:

1. Records related to the collection process, including: Collection logbooks, if used; documents relating to the random selection process; EBT equipment calibration documentation; and documentation of BAT training: documents generated in connection with decisions to administer reasonable suspicion and post-accident tests; and documents verifying existence of a medical explanation of an employee’s inability to provide adequate breath for testing;

2. Records related to test results, to the refusal of any covered employee to submit to a required alcohol test and to an employee dispute over the result of an alcohol test;

3. Records related to other violations of these rules;

4. Records related to evaluations and return to duty; and

5. Records related to education and training.

We have decided to retain the retention periods as proposed because, considering the serious potential consequences of alcohol misuse, we believe it is important to be able to identify repeat offenders. In addition, the FAA has a need to track the number of repeated violations under its rule for mandatory permanent disqualification of an employee under the Act.

In the common preamble to the NPRMs, we asked whether we should require documentation of reasonable suspicion determinations. Very few commenters addressed this issue; some favored the requirement because such documentation might deter harassment of employees, but others opposed it as burdensome and a violation of employee privacy. The rules do not require documentation of reasons for determinations made to conduct reasonable suspicion tests, but if employers generate them, they must maintain the records. We are not requiring that employers report the specific test results of individuals—just aggregate numbers for reasonable suspicion tests conducted and resulting positives. This requirement should not burden employers and will protect employee privacy. Employers may want to monitor their reasonable suspicion testing positive rate to determine if their supervisors need additional training.

Reporting of Results in a Management Information System

For oversight purposes, each employer generally is required to compile for the OA that regulates it, at a minimum, an annual report summarizing the results of its alcohol misuse prevention program for each calendar year. This information will allow the Department to track progress in the programs and later make changes, if justified, that could reduce costs, ease implementation and enforcement, provide better employee protection, and/or increase benefits. Some OA rules require that all employers submit the data to the OA; others require a representative sampling of employers to submit the reports or a mix of required reports from some and a sampling of others. The OAs will rely on this data for program evaluation and enforcement purposes, as well as to adjust the random testing rates for alcohol. As noted earlier, FAA, FRA, FHWA, RSPA, and USCG separately published MIS rules on December 23, 1993, that describe the particular OA requirements for reporting information on drug testing (and alcohol testing for USCG). FTA’s drug MIS requirements are in its final drug testing rule published elsewhere in today’s Federal Register.
Generally, employers subject to more than one DOT OA alcohol rule must identify each employee covered by the regulations of more than one OA and report the total number of such employees broken down by category of covered function and by the OA. Before conducting any alcohol test on an employee regulated by more than one OA, the employer must determine which OA rule requires the test and then include the test result in the appropriate OA MIS report. Pre-employment and random testing data must be reported to the OA that covers more than 50 percent of the employee’s function. Post-accident and reasonable suspicion testing results, however, must be reported to the OA that covers the function the employee was performing at the time of the accident or determination of reasonable suspicion. Finally, return-to-duty and follow-up results must be reported to the same OA that received the initial results that led to the employee’s removal from the safety-sensitive function. In response to one commenter’s concerns about confidentiality of employee results, we note that the employer must provide aggregated, not individual, information under the MIS.

Most of the comments addressed the drug MIS requirements; we received very few concerning the alcohol MIS proposal. Since the MIS requirements for drugs and alcohol are essentially similar, the Department’s responses to specific comments on the drug MIS requirements, which are addressed in the preamble to the drug MIS rules published December 23, 1993 (FTA’s MIS comments are addressed in the preamble to its final drug rule), also apply to the alcohol MIS requirements.

Commenters generally expressed concerns about ensuring unimpeded access to employee testing information kept by third-party providers, e.g., consortia. The employer is responsible for the accuracy and timeliness of each report submitted by it or a third-party service provider acting on its behalf. If necessary, the employer should ensure by contract or other means access to employee testing information held by a third-party provider.

Employers required to submit the annual reports must do so no later than March 15 of each year for the preceding calendar year on the specified form. Each report will contain a number of information items relevant to program evaluation or enforcement. Eventually, we plan to merge the alcohol and drug drug testing reporting requirements where practical to permit one annual report and to eliminate any duplicative information items. The Department is committed to developing the capability for processing electronic submission of these reports where such capability is not currently available.

Access to Facilities and Records

To preserve employee confidentiality, the rules generally prohibit employers from releasing information pertaining to an alcohol test of a covered employee or any violation of these rules, except as required by law. They provide, however, that the employee is entitled, upon written request, to obtain copies of any records concerning the employee’s use of alcohol, including alcohol test results. The rules permit the employer to disclose information arising from the results of an alcohol test administered under these rules or from the employer’s determination that the employee violated any prohibitions in these rules to the employee or in the context of a proceeding relating to: (1) An employee benefit; (2) DOT agency action against the employee (e.g., an action to revoke a certificate); or (3) an NTSB safety investigation. Employers must promptly provide any records requested by the employee, but cannot make access to an employee’s records contingent upon payment for records other than those specifically requested. The bundling of requested records with unrequested material at much higher cost has been a problem under the drug rules.

Employers also will have to release information required by law, including court orders or subpoenae. Please refer to part 40 for additional discussion.

The rules generally require an employer to permit access to all facilities involved in its alcohol testing program and make available copies of all test results and any other alcohol program records, upon request, to the Secretary of Transportation or any OA with regulatory authority over the employer or any of its covered employees. In addition, upon request by the NTSB as part of an accident investigation, employers are required to disclose information related to the employer’s administration of a post-accident alcohol test following the accident under investigation. FTA’s rule requires the employer to disclose test results to States to be consistent with obligations placed on States under FTA’s State Safety Oversight rule. See the preamble to the FTA rule for a further discussion of this. RSA’s rule requires the employer to permit access to facilities and make available test results and records to a representative of a State agency with regulatory authority over the employer.

Several commenters raised questions about the reporting of confidential information on individuals and opposed mandatory release of employee test results to subsequent employers and other parties because of unspecified liability concerns. Some commenters expressed their support for employer provision of test results in appropriate circumstances; a few others opposed allowing employers to require employees to authorize the release of previous test results as a condition of employment.

Generally, the rules require an employer to release information regarding an employee’s records as directed by the specific, written consent of the employee authorizing release to an identified person. In view of the fact that these rules permit employers to rely upon negative pre-employment alcohol tests conducted by other employers within the preceding six months, we believe that it is appropriate to require a prior employer, upon written request from the employee, to make records available to a subsequent employer. This pre-employment exception, which can significantly reduce hiring costs for some employers, might not otherwise be available to them. Since the previous employer would release the records only with the written consent of the employee for a specific limited purpose, commenters’ liability concerns appear to be unfounded. To preserve the employee’s confidentiality, the rules prohibit the identified person or recipient employer from subsequently disclosing the records, except as expressly authorized by the terms of the employee’s written request. Please refer to part 40 for additional discussion.

These rules do not prohibit employers from using their own authority to require applicants to release previous test results. We believe that employers should be able to protect themselves from alcohol misusers who move from job to job as they are detected. A prudent employer can ask an applicant to request this information from former covered employers as a condition of employment and not hire the applicant until satisfactory information has been received. If the applicant does not provide this consent, the employer simply could choose not to hire the applicant for a safety-sensitive position. Of course, an employer must conduct a pre-employment test when a previous employer does not respond (e.g., had gone out of business, could not be located, failed or refused to provide the requested information).
Consequences for Employees Engaging in Alcohol-Related Conduct

**Removal From Safety-Sensitive Function/Required Evaluation and Testing**

In general, the OA rules prohibit a covered employee who has engaged in conduct prohibited by any of the OA rules from performing safety-sensitive functions until he or she has met the conditions for returning to such work, which include a SAP evaluation, compliance with any required treatment program, and a successful return-to-duty test with a result below 0.02. The rules require employers, if they have determined that the employee has violated these rules, to ensure that the employee does not perform or continue to perform safety-sensitive functions. Some commenters expressed the opinion that employers should determine the appropriate consequences for a violation of these rules. We disagree; there may be situations where a conflict exists between protecting public safety and an employer's strong economic incentive to keep an employee who misuses alcohol on the job. We believe that we need to establish the appropriate consequences for violation of these rules to protect public safety and to ensure their uniform application to similarly-situated employees to the extent possible. The rules do not prohibit an employer with authority independent of these rules from taking any other action against an employee.

A few commenters stated that employers who remove an employee from a safety-sensitive function should not be obligated to place that employee in another position or compensate the employee. All these rules require is removal from safety-sensitive functions. We leave the specific conditions under which an employee is removed, such as whether or not the employee is paid or moved to another non-safety-sensitive position, to employer policies or collective bargaining.

A few commenters wanted the consequences to be the same for all of the OA rules. Some of the OA rules do impose different consequences; these result from differing statutory requirements and the need to place these programs within the frameworks of the OA's existing safety regulations. The Act mandates harsher treatment of certain aviation employees that violate these rules. FHWA had to fit its rule within a statutorily-required system of consequences for violations of its safety requirements. (See the FAA and FHWA rules for a specific discussion of these differences.)

**Other Alcohol-Related Conduct**

Continuing the argument over the appropriate prohibited alcohol concentration, some commenters on this section wanted to eliminate the lesser consequences for a 0.02-0.039 alcohol concentration and impose the full consequences under those rules on any test result at 0.02 or above, while others believed that no action should be taken against an employee with a result below 0.04. We disagree with commenters who want no action taken against an employee at alcohol concentrations below 0.04. Although the Department is not making alcohol concentrations below 0.04 a violation of the rules requiring removal from safety-sensitive functions until evaluation and, if necessary, treatment, we are concerned about employees whose alcohol test indicates some alcohol in their system. As noted earlier in this preamble, an alcohol concentration of 0.039 may not warrant evaluation and treatment, but it may have an adverse effect on that individual's abilities to perform safety-sensitive functions. Alternatively, the individual's blood alcohol curve may be rising, (i.e., the individual may have just consumed enough to ultimately produce an alcohol concentration of 0.04 or greater, but the alcohol is just entering the bloodstream and, at the time of testing, the alcohol concentration is below 0.04 and rising). Permitting such an employee to continue performing safety-sensitive functions, when we know there is alcohol in his or her system, would violate our (and the employer's and employee's) safety responsibility.

Therefore, in addition to the 0.04 alcohol concentration prohibition, the rules require removal of covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04 from safety-sensitive functions, until the employee is retested with a result below 0.02, or until the start of the employee's next regularly scheduled duty period, if it occurs at least eight hours following administration of the test. If the retest result is above 0.04, the employee has violated the prohibition against having an alcohol concentration greater than 0.04. The employee will then be required to meet the conditions for returning to safety-sensitive functions. The rules do not prohibit the employer with authority independent of these rules from taking any action against an employee based solely on test results showing an alcohol concentration greater than 0.02.

The OA rules and the part 40 alcohol testing procedures treat any indicated alcohol concentration reading of less than 0.02 on an evidential breath testing device (EBT) as “negative.” Given the limits of technology for measuring alcohol concentration in body fluids or breath, the rules use 0.02 as the threshold for establishing any measured alcohol concentration. Below this level, we can not be certain an individual actually has alcohol in his or her system. Readings below 0.02, therefore, have no significance for any purpose under our rules.

**Use of Back Extrapolation**

Most commenters opposed allowing the use of back extrapolation because of its difficulty and uncertainty in application and because it could infringe upon an employee's legal use of alcohol. Back extrapolation is the calculation used to determine alcohol concentrations over time based on the average rate of alcohol metabolism. It is most generally used to determine whether the alcohol concentration during the performance of the safety-sensitive functions (e.g., at the time of the accident) was actually greater than a specific concentration obtained at a later time. The OA rules require action only based on actual readings on the EBTs. They do not permit back extrapolation because, given the wide individual variations in alcohol metabolism, it creates too many uncertainties in the context of these programs. This prohibition would not prevent an OA from making use of back extrapolation in certain situations. Some existing OA rules permit the use of back extrapolation through expert scientific testimony in cases of an employee's post-accident cases conducted with appropriate due process protections. The rules that we are publishing today do not provide such protections. Those situations are different from the use of back extrapolation by employers in interpreting the results of tests conducted under part 40.

The rationale for back extrapolation is based on studies that show that the average rate of elimination of alcohol from the bloodstream is approximately 0.15 percent per hour, though this rate may well decline at low concentrations (0.02 and below). Individuals' rates of alcohol elimination are very often not “average,” however. Further, it is ordinarily not known when the individual last ingested alcohol or how much alcohol he or she consumed. All of these factors make back extrapolation subject to substantial inaccuracy. Such analysis requires a number of “assumptions.” Some of the assumptions relate to the individual subject (e.g., whether there is healthy...
liver function, whether food was ingested before consuming alcohol, or other metabolic differences), some to facts or claims that may be supplied by the individual (e.g., no on-duty consumption, no consumption during the pre-duty abstinence period), and others to data that can be supplied by the employer (e.g., when the event occurred that triggered the test, when the test occurred). It is not only desirable but necessary for such analysis to be conducted by an expert in forensic toxicology.

We have decided not to permit back extrapolation of alcohol test results under these rules, because it would base serious consequences on the variable and uncertain results of this type of analysis. However, the requirement that employers remove persons with indicated alcohol concentrations of 0.02 or greater and less than 0.04 from safety-sensitive functions for a period of not less than 8 hours or until they retest below 0.02 will achieve some of the goals of back extrapolation.

Alcohol Misuse Information, Trading, and Referral

Employer Obligation to Promulgate a Policy on Alcohol Misuse

The rules require each employer to ensure that each employee receives educational materials that explain these alcohol misuse prevention requirements and the employer’s policies and procedures with respect to meeting those requirements prior to the start of alcohol testing. Each employer is required to provide written notice to every covered employee and to representatives of employee organizations concerning the availability of this information. Under the rules, the materials must include: the identity of a contact person knowledgeable about the materials; factual information on the effects of alcohol misuse on personal life, health, and safety in the work environment; signs and symptoms of alcohol misuse (the employee’s or coworker’s), particularly at low concentrations; where help can be obtained; available intervention methods, including referral to an employee assistance program (EAP), other SAPs and/or management; categories of employees subject to testing; what period of the workday or what functions would be covered by the rules; a description of prohibited conduct and the circumstances that trigger testing; testing procedures and safeguards; an explanation of what constitutes a refusal to submit to testing and the attendant consequences; and the consequences of violating the rules (as well as lesser consequences for employees found to have an alcohol concentration of 0.02 or greater but less than 0.04).

Many commenters believed that simply providing the above information is not sufficient to ensure that employees understand the requirements of these rules and their consequences. This and other comments on this provision related to employee training are addressed below.

Self-Identification/Peer-Referral Programs

Since our primary purpose is to deter alcohol misuse and keep employees who have alcohol in their systems from performing safety-sensitive functions, employees should be able to identify themselves as unfit to work. A few commenters wanted to be able to “mark-off.” Some segments of the transportation industry already have self-identification programs that allow an employee to decline without penalty to perform or continue to perform his or her job if the employee knows that he or she is or may be impaired by alcohol.

We do not require such programs, because we believe that they are a matter more appropriate for collective bargaining and employer policy. The successful implementation of such programs depends upon joint labor-management commitment to an alcohol/drug-free work environment. However, we encourage employers to establish self-identification or peer-referral programs and encourage employees to use them.

However, such programs cannot interfere with the conduct of the alcohol tests required by these rules. Employers who have set up such programs must ensure that employees are not allowed to self-identify after they know that they have been selected for testing. This would compromise safety and frustrate the goals of these programs. The rules do not interfere with an employer’s discretion to impose its own sanctions against self-identifying employees, so long as the sanctions are not premised on our rules. Such a program could permit a covered employee to take a voluntary alcohol test to determine whether the employee would be in violation of these rules if the employee were to perform safety-sensitive functions (but not after the employee has been selected for DOT-required testing); there would be no Federal consequences or requirements pertaining to the test or its results, however, since that kind of test is not required by DOT rules.

In addition to program information, the materials also may describe any peer-identification or self-identification programs or procedures that employers offer or are associated with under which a covered employee may decline to perform or continue to perform safety-sensitive functions without penalty when he or she may be in violation of these rules, including any limits on the programs. The employer also may include informal or self-identification employer policies with respect to the use or possession of alcohol, including any consequences for an employee found to have a specified alcohol concentration, that are based on the employer’s authority independent of these rules. These additional policies must be clearly communicated and identified as based on the employer’s independent authority.

Training for Supervisors

Commenters who addressed the issue of supervisor training or education requirements proposed in the OA rules generally supported one or a mix of the following: the necessity for annual or other recurrent supervisor training; the necessity for 2 hours or more of supervisory training; the adequacy of one hour of supervisory training; or a mandatory requirement for supervisory training with the amount or length of training left unspecified. For example, those who preferred a particular amount of time for training split between a one-time training requirement and an annual or other recurring training requirement.

Those commenters who supported recurrent or annual supervisory training requirements expressed the belief that supervisory personnel need refresher or ongoing education to maintain and improve skills and knowledge necessary to making effective decisions regarding reasonable suspicion alcohol testing. These commenters cited experience with one-time training for supervisors that did not provide sufficient exposure to the problems associated with confronting and identifying problem employees. Other commenters cited anecdotal information that reasonable suspicion testing was more appropriately and frequently used when supervisory training was part of an annual or periodic training program.

The OA rules require employers to ensure that persons designated to determine whether reasonable suspicion exists to require an alcohol test receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse, particularly those associated with lower concentrations of alcohol. We believe that this amount of training time is adequate for this specific purpose and in view of the fact...
that the symptoms of alcohol misuse are commonly known and recognized. We believe that retaining the one-hour training requirement best balances the benefits of supervisor training with its high costs to employers. Additional supervisor training beyond a mandatory one-time, one-hour minimum may be desirable, but requiring it would significantly increase the costs imposed by these rules. At this time, we lack definitive information to correlate the cost of additional training with quantifiable benefits that would justify imposition of those additional costs on the transportation industries. Employers may, of course, provide additional information or annual (or other recurrent) training if they desire.

Several commenters requested that the rules combine drug and alcohol training for supervisors. These commenters argued that training would be more effective if viewed in the context of all substance abuse rather than divided into separate courses for drug and alcohol abuse. Employers are free to combine supervisor training for alcohol misuse detection with the comparable training for drug use detection currently required by the OA drug testing rules for a total of two hours to minimize costs and inconvenience. Please note that FRA will retain its existing combined three-hour requirement for alcohol and drug abuse training for supervisors.

A few commenters suggested that the requirements for supervisory training should be existent—rather than time-specific. These commenters recommended that the rules specify core or essential components of the curriculum and employers would develop the supervisory courses accordingly. This approach reflects a preference for criterion or performance standard training requirements, rather than training based on a "classroom hours" concept. We have decided not to establish mandatory performance-based training because of the difficulty of developing meaningful specific core course components that cover various different industry situations and the administrative burden of evaluating whether or not employers have met the performance standards. We would rather allow employers the flexibility of tailoring supervisor training to their particular industry and programs. We do, however, take this approach with required BAT training, because that is much more technical and specific and must be the same for part 40 testing in all transportation industries.

Employee Training

Commenters presented many of the same arguments on the issue of mandatory employee training as they did regarding supervisory training. Various commenters suggested that mandatory recurrent or periodic employee training would be advantageous and more effective as a prevention or deterrent strategy than testing. Commenters also suggested that the rules should combine alcohol awareness education with drug abuse education to address the total substance abuse problem. Some commenters opposed mandatory employee training because of cost concerns.

Most commenters on the issue of employee education criticized the lack of specific proposed requirements for mandatory employee education and training on alcohol misuse. These commenters argued that the proposals to provide employees printed literature and information were inadequate and, according to some, a waste of time and money. They expressed the belief that structured, "classroom" type training is more effective in presenting information about drug and alcohol abuse and to increase awareness and prevention of alcohol misuse. A few commenters argued that it is irresponsible and unnecessarily punitive to impose a comprehensive alcohol testing program with specific prohibitions on alcohol misuse, without requiring training for employees until they understand the prohibited conduct and the consequences of misconduct.

We believe motivating employees about safety in the workplace and good health is important in making an alcohol misuse prevention program work. Because the primary objective of any effective alcohol misuse program is deterrence rather than detection, it is especially important that, before any testing is begun, employers make their employees fully aware of the dangers of alcohol misuse in their jobs, advise them where help can be obtained if they have a problem with alcohol use, and alert them to the potential consequences for people who violate these rules. These rules require that employers give covered employees alcohol misuse information, but do not require classroom training for nonsupervisory employees. Although such training may be desirable, industry-wide mandatory employee classroom training would be prohibitively expensive. In the highway area alone, a one-time, one-hour training requirement for approximately 6.3 million employees, with a large amount of turnover, at an average hourly wage of $14.50 plus travel time, cost of materials, etc., would cost in excess of $900 million. At this time, we lack definitive information to correlate the cost of training with quantifiable benefits that would justify imposition of these costs. Because of the large number of employees covered by these rules, the widely varying relationships between employer and employees, and the difficulty in ensuring the effectiveness of such wide-spread training, we believe it appropriate to allow employers the discretion to determine the best means of educating their employees beyond the minimum requirement to distribute informational materials.

Some researchers claim that education is more effective in preventing alcohol misuse than sanctions or enforcement initiatives. For example, a Boston University researcher concluded that social pressure and publicity "may be as important as government regulations in reducing impaired driving and fatal crashes," (quoted in "USA Today," Wednesday, August 3, 1988.) In the area of impaired driving deterrence, NHTSA believes that the most effective programs are those that combine education and enforcement. Information and education programs, in the absence of enforcement activities or sanctions, have never been shown to have an impact on reducing alcohol-related fatal crashes.

Conversely, scores of studies have found that programs involving enhanced enforcement, roadside sobriety checkpoints, and the use of sanctions such as license suspensions frequently have resulted in significant reductions of alcohol-related fatalities. Although there is disagreement on the effectiveness of education alone, it appears that using education as an adjunct to other deterrent measures, such as those in these rules, will make both more effective. We recognize that it may be difficult to get the attention and support of workers by handing them literature or displaying various materials on a bulletin board. In conjunction with the implementation of the rules, the Department also plans to distribute educational materials and conduct seminars designed to help employers increase employee awareness of the risks of alcohol misuse by those who perform safety-sensitive functions. The Department took similar action in the drug area.

Referral, Evaluation, and Treatment

Numerous commenters expressed concern that the NPRMs did not go far enough in ensuring that employees would get access to needed assistance and treatment. They felt that even
though the proposed rules require “evaluation and assessment” by a SAP, they do not protect employees who violate the alcohol misuse provisions from termination, and, therefore, the access to treatment via the SAP evaluation is a sham, a paperwork exercise in conduct prohibited mandatory employer-provided or paid rehabilitation, citing our proposals as a cynical violation of the Congressional mandate to provide an opportunity for rehabilitation. Some commenters, particularly labor and union groups, expressed the view that the rules should specifically guarantee that employees who violate the regulations are evaluated by a SAP and provided access to treatment, regardless of personnel actions taken by the employer. Many commenters, however, opposed mandatory employer-provided or paid rehabilitation.

The Act requires that an opportunity for treatment be made available to covered employees. To implement this mandate, these rules require an employer to advise a covered employee, who engages in conduct prohibited under these rules, of the available resources for evaluation and treatment of alcohol problems, including the names, addresses, and telephone numbers of SAPs and counseling and treatment programs. They also provide for SAP evaluation to identify employees with alcohol misuse problems. The employer has no similar obligation to applicants who refuse to submit to or have a positive result on a pre-employment test; this obligation runs only to current employees. The rules do not require employers to provide or pay for rehabilitation or to hold a job open for an employee with or without salary; the costs of such requirements could be prohibitive and could jeopardize the success of this program. In the drug testing rules, the Department decided that it was inappropriate to establish a Federal role in mandating that employers provide for rehabilitation and that it should be left for management/employee negotiation. The same logic applies here and the Department has decided not to require employer-provided rehabilitation in these rules. We believe that the rules’ provisions concerning evaluation adequately address the Act’s requirements.

Many commenters noted that EAPs have proven successful in offering employees with alcohol problems an avenue to non-punitive resolution of their problems and in offering employers the ability to return employees to the workforce who might otherwise have been fired. Aviation employers pointed to the FAA-supported Human Intervention and Motivational Study (HIMS) as a particularly effective program, with its combination of alcohol awareness training for supervisors and peers, rehabilitation, return to duty/medical certification process, and Intensive follow-up monitoring of recovery. Overall, the success rate for alcoholic pilots identified through the HIMS or related programs has been about ninety percent. Some transportation employers have established similar programs for all of their employees. A number of these commenters also expressed their concerns that resources currently dedicated to EAPs would have to be shifted to support the new alcohol testing requirements, resulting in the reduction or elimination of existing EAP services.

We recognize that these programs will be costly and that, in specific circumstances, employers may decide that they have to divert funds from an EAP to conduct the required alcohol testing and prevention programs. The primary safety objective of these rules is to prevent, through deterrence and detection, alcohol misusers from performing safety-sensitive functions. The necessary resources must be provided to accomplish this objective. We hope that employers do not have to divert resources from EAPs to achieve this. We recognize the value of rehabilitation and encourage those employers who can afford to provide it to do so through established health insurance programs, since it helps their employees, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs. Please note that repeated provision of access to rehabilitation services after “positive” testing, followed by repeated reinstatement and repeated violations, may raise public safety and liability concerns for employers. It also could dilute the deterrent value of testing programs and encourage further misuse of alcohol.

Commenters also addressed the issue of the role of the SAP in return-to-duty determinations. Many of these commenters felt that the NPRMs were not clear in delineating and by whom the decision of an employee’s return to safety-sensitive functions would be made. Some of these commenters believe that the SAP should play a crucial role in advising or recommending return-to-duty actions to employers.

The rules provide that the evaluation may be provided by a SAP employed by the employer, by a SAP under contract with the employer, or by a SAP not affiliated with the employer. A SAP will evaluate each covered employee who violates these rules to determine whether the employee needs assistance resolving problems associated with alcohol misuse and refer the employee for any necessary treatment. Before returning to duty, an employee identified as needing assistance must (1) be evaluated again by a SAP to determine whether the employee has successfully complied with the treatment program prescribed following the initial evaluation, (2) undergo an alcohol test with a result of less than 0.02 alcohol concentration, and (3) be subject to a minimum of six (6) unannounced, follow-up alcohol tests over the following twelve (12) months. Compliance with the prescribed treatment and passing the return-to-duty alcohol test do not guarantee a right of reemployment or return to safety-sensitive duties; they are preconditions the employee must meet in order to perform safety-sensitive functions. The decision on whether to return the employee to his or her job we leave to the employer. The choice of SAP and assignment of costs should be made in accordance with employer/employee agreements and/or employer policies.

In the common preamble to the NPRMs, we proposed categories of persons eligible to be SAPs and asked if other categories should be included. Numerous commenters complained that the proposed definition was too restrictive. The National Association of Alcoholism and Drug Abuse Counselors (NAADAC) organized a widespread effort for its membership to send comments supporting the position that certified addiction counselors were the most qualified professional or occupational group to serve as SAPs. These comments tended to emphasize NAADAC standards and certification requirements, especially in counseling, treatment and rehabilitation of alcoholics and addicts. Many commenters certified by other State or local boards also presented arguments for their inclusion in the definition of a SAP. A few commenters suggested that physicians, social workers, and psychologists do not generally have training or skills specific to alcohol and drug abuse diagnosis or treatment. The final rules, as proposed, to include a licensed physician (with a Medical Doctor or Doctor of Osteopathy degree) 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. In response to comments, we also have included in the definition alcohol and drug abuse counselors certified by the NAADAC Certification Commission, a national organization that imposes qualification standards for treatment of alcohol-related disorders. The commenters provided information showing that the training and experience necessary to meet NAADAC standards are sufficient for participating as a SAP in our alcohol misuse prevention programs. We rejected commenters’ suggestions that the definition include State-certified counselors, because the qualification standards vary dramatically by State; in some States, certified counselors do not have the experience or training we deem necessary to implement the objectives of our rules. State-certified addiction counselors, of course, take the NAADAC competency examination and become a certified alcoholism and drug abuse counselor. The rules require that all persons in the categories listed in the definition must have knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders to qualify.

A few commenters expressed concern about the relationship of the SAP to the treatment or rehabilitation staff or facility. These commenters specifically addressed potential conflicts of interest, a “referral-to-self” practice, and the objectivity of return-to-duty evaluations. Many of these commenters believed that the rules should establish specific parameters that outline the SAP’s duty or obligation to the employer as well as protections for employees against unscrupulous or unethical SAPs who would use the evaluation and assessment process to foster their own practice or treatment facilities.

Professional organizations, such as the Employee Assistance Professionals Association, prohibit their members from making referrals for treatment to their own practice or to agencies from which they receive financial remuneration. We want to avoid conflict-of-interest problems that could arise where the SAP is involved in both the evaluation and treatment phases of employee assistance, which could lead to recommendations for inadequate or inappropriate treatment for the employee and/or the imposition of unnecessary costs on both employers and employees. For example, a SAP might recommend a one-time misuser for a 30-day treatment program in which the SAP has a financial interest or send an alcoholic through the SAP’s own outpatient treatment program. Therefore, the rules generally require the employer to ensure that a SAP who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the SAP’s private practice or to a person or organization from which the SAP receives remuneration or in which the SAP has a financial interest. However, this requirement could impose hardship and the unnecessary costs of requiring two different sources of assessment and treatment on employers in remote areas or in situations where employee assistance (including assessment and treatment) is provided by contract or through a health insurance program. Therefore, the rules prohibit a SAP from referring an employee for assistance provided through (1) a public agency; (2) the employer; (3) a person under contract to provide treatment for alcohol problems on behalf of the employer; (4) the sole source of therapeutically appropriate treatment under the employee’s health insurance program; or (5) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

Some commenters wanted a medical review officer (MRO) to review and interpret alcohol test results. Since the determination made in alcohol tests required by these rules is whether there is a prohibited concentration of alcohol in an individual’s system, regardless of the source, there is no need to require an MRO to interpret positive test results, as required by the DOT drug testing rules. There is no “alternative medical explanation” for the prohibited alcohol concentration, so there is no role for an MRO. The mental health and/or medical professionals to whom the employee is referred can evaluate the employee’s problems, if any, associated with the alcohol misuse. A SAP will then determine whether the employee has complied with any recommended treatment program. In some OSHA rules, where the employee operates under a certificate or license, a physician must certify, in conjunction with a medical examination, whether the employee can return to work.

Other Issues

Flexible Approaches

As in the drug testing rules, we want to provide program flexibility to allow employers to carry out their programs in a more efficient, cost-effective manner and to ease the compliance burden on small businesses. Testing, for example, can be conducted by the employer, an outside contractor or program administrator, a consortium, a union, or any other entity. The use of consortia has worked well in the drug testing area: in fact, it is the predominant method of compliance in some industries, particularly among smaller employers. We have delayed implementation of the alcohol rules for smaller employers by an additional year to enable them to join established consortia or to begin employer testing programs, rather than have to establish their own programs.

The OA rules have specific provisions to make it easier for smaller employers; FRA is retaining its existing exemption from its drug and alcohol rules for railroads with 15 or fewer employees that do not engage in joint operations. These entities are not considered sufficiently safety-sensitive to be subject to testing, since they tend to operate on private track at slow speeds.) FRA, which requires covered employers to submit plans for their alcohol misuse programs, imposes significantly reduced plan requirements on smaller employers.

Employers may find it more cost-effective and convenient to conduct alcohol testing, particularly random testing, at the same time they conduct drug testing. Because we require alcohol testing at or near the time of performance, however, all random and reasonable suspicion drug testing also would have to occur at such times. In addition, the testing would have to take account differences in the alcohol and drug random testing rates for the employer’s industry. For random testing, employers can reasonably choose the employee’s number and then test the employee for both drugs and alcohol the next time he or she performs safety-sensitive functions. As described earlier, we are allowing performance-based random alcohol testing rate adjustments and initiating additional rulemaking to provide for greater flexibility in testing methods.

Motor Carrier Safety Assistance Program (MCSAP Option)

In the OA NPRMs, we sought public comment on whether the post-accident and random (or other) roadside testing could be conducted by state and local law enforcement officials under the FHWA Motor Carrier Safety Assistance Program (MCSAP), which is a Federal/State cost-reimbursement and matching grant-in-aid program to increase commercial motor vehicle safety, or a similar program. The FHWA NPRM specifically proposed this option. Under the MCSAP, participating States would have to submit a random (or other) alcohol testing plan as part of their
mandate on State, local and tribal governments, unless the mandate is required by statute, direct costs are funded by the Federal Government, or the executive department justifies the need for the mandate to the Office of Management and Budget (OMB) after appropriate consultation with the affected governments. The costs of State-operated random alcohol testing would exceed the total annual MCSAP funding allocation of $85 million. With current limited budgetary resources, it is unlikely that the MCSAP program or any other Federal program will obtain additional appropriations to fund State testing. Legislation would be needed to collect user fees and use those fees to cover any additional, necessary MCSAP funding. Moreover, the MCSAP option could never completely replace employer-based programs; it could cover only three of the types of testing (random, reasonable suspicion and post-accident) and only on certain roads. Furthermore, in some States, the MCSAP program is directed through agencies other than the police, who would be the likely candidates to do the testing. Before it could be implemented, this option would require numerous changes to existing State statutes or constitutions to permit State and local officials to test without probable cause.

**Multi-Agency Coverage**

Multi-Agency Coverage In some transportation industries, a significant percentage of employees are subject to the testing rules of more than one DOT OA; some are subject to the testing rules of more than one Federal agency (e.g., employee drivers covered by the Department of Energy (DOE) may also be covered by FHWA). This is one reason we have tried to make the DOT OA rules as uniform as possible (and why we have also consulted closely with other Federal agencies). Where it does not compromise the effectiveness of the testing program or other requirements, one DOT OA will defer to another or recognize the validity of the other's requirements. For example, FHWA defers to FTA for CDL holders employed by FTA grantees, and FTA defers to FHA for grantees that are part of the general railroad system of transportation. There are different situations in which multi-agency coverage can occur:

(1) An employee may perform different modal functions for the same employer. For example, an employee may act as both a pipeline worker or driver for purposes of random testing based on which function he or she performs the majority of the time. The employee would be subject to reasonable suspicion and post-accident testing under RSPA or FHWA rules while performing either pipeline or driving functions.

(2) An employee may have two employers. For example, an employee may fly for one employer and drive for another. That employee will be subject to two OA random testing requirements and will generally be in two different pools. As discussed above, however, the employee can be covered by one random testing pool, e.g., one run by a consortium; in both situations, the employee will be subject to random testing in either job at the appropriate industry rate.

The rules require that employees cease safety-sensitive functions in every mode of transportation, once determined to be in violation of any one of the OA rules. We note that the Act clearly prohibits the performance of safety-sensitive functions in the aviation, rail, motor carrier, or transit industries by an employee who has used alcohol in violation of any law or any Federal regulation.

We also have continued to consult with other Federal agencies that are considering developing similar programs during this rulemaking proceeding in an attempt to make Federal government rules as consistent as possible.

**International Issues**

The Act mandates that the requirements for pre-employment, reasonable suspicion, random and post-accident tests for alcohol (and drugs) be applied to foreign operators in the aviation, rail, motor carrier, or transit industries to the extent those requirements are consistent with our international obligations. We must also "take into consideration any applicable laws and regulations of foreign countries." Because of the many questions raised about the implementation of this statutory mandate, we issued advance notices of proposed rulemaking on these issues. Published elsewhere in today's Federal Register are FHWA, and PAA NPRMs that propose to cover foreign operators in the U.S., but would defer implementation until January 1, 1996. During this period, we will be working through international organizations or bilateral agreements to achieve programs comparable to DOT's for alcohol and drugs; if we are unsuccessful at making progress, the
rules will go into effect. Because in their very limited foreign operations in the U.S., foreign railroad employers already are complying with FRA's existing alcohol and drug testing requirements, the FRA has published a notice withdrawing its advance notice of proposed rulemaking elsewhere in today's Federal Register.

Regulatory Analyses and Notices

General

Each of the OA preambles separately addresses a number of administrative matters concerning compliance with administrative requirements in statutes, executive orders and Departmental policies and procedures. Readers should refer to the individual OA rules for statements specific to each rule. This common preamble and all the associated rulemakings published in today's Federal Register have been classified as significant under Executive Order 12866 and the Department's regulatory policies and procedures and have been reviewed by the Office of Management and Budget.

Paperwork Reduction Act

The proposed information collection requirements contained in the notices of proposed rulemaking were reviewed by the Office of Management and Budget (OMB) under section 3501 et. seq. of the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.). Revisions of the information collection requirements contained in the final rules have been submitted to OMB for final approval. A Federal Register notice will be published when that approval has been obtained.

Appendix A to Common Preamble—Bibliography


Issued on January 25, 1994, in Washington, DC.

Federico Peña, Secretary of Transportation.

David R. Hinson, Administrator, Federal Aviation Administration.

Rodney E. Slater, Administrator, Federal Highway Administration.

Jolese M. Malitoris, Administrator, Federal Railroad Administration.

Gordon J. Linton, Administrator, Federal Transit Administration.

Ana Sol Gutiérrez, Acting Administrator, Research and Special Programs Administration. [FR Doc. 94–2027 Filed 2–3–94; 1:00 pm]"
Part III

Department of Transportation

Office of the Secretary
National Highway Traffic Safety Administration

49 CFR Part 40
Procedures for Transportation Workplace Drug and Alcohol Testing Programs and Proposed Model Specifications for Screening Devices To Measure Alcohol in Bodily Fluids; Final Rule, Proposed Rule, Notice
DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 40 [Docket 48513]
RIN 2105-AB95

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.
ACTION: Final rule.

SUMMARY: Under the Omnibus Transportation Employee Testing Act of 1991, the Department of Transportation is required to implement alcohol testing programs in various transportation industries. The rule establishes uniform testing procedures that would be used by all Department of Transportation operating administrations conducting alcohol testing programs under the Act or conducting alcohol testing programs modeled on those required by the Act. This rule also implements changes required by the statute in the Department's drug testing procedures.

DATES: Effective Dates: This rule is effective March 17, 1994, except § 40.25(0)(10)(i)(B), which is effective August 15, 1994. Compliance Date: Compliance with § 40.25(0)(10)(i)(B) is authorized beginning March 17, 1994.

FOR FURTHER INFORMATION CONTACT: Donna Smith, Acting Director, Department of Transportation Office of Drug Enforcement and Program Compliance, 400 7th Street, SW., Washington DC, 20590, room 9404, 202—366—9306; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., room 10424, 202—366—3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., room 10424, 202—366—3784.

SUPPLEMENTARY INFORMATION:

Background

The Omnibus Transportation Employee Testing Act of 1991, enacted October 28, 1991, directed significant changes in the Department of Transportation's substance abuse-related programs for most transportation industries that the Department regulates. These changes are discussed in detail in the Common Preamble published in today's Federal Register. With respect to drug testing procedures, the Act added a requirement for using the “split sample” approach to testing, which Congress believed would provide an additional safeguard for employees. The Act also imposes a variety of requirements for alcohol testing procedures, which this regulation also implements. The Coast Guard is not amending its existing alcohol testing regulations (33 CFR part 95 and 46 CFR part 4), and will continue to use separate procedures for that testing.

The Department's drug testing procedures, 49 CFR part 40, have governed drug testing under all six operating administration drug testing rules since 1988. Likewise, this rule governs alcohol testing procedures for the five modes affected (the Coast Guard is not covered by the alcohol testing procedures of this part). Under the rule, the existing drug testing procedures become a separate subpart of the regulation, and we are adding new subpart containing the alcohol testing procedures.

Having all the Department's uniform drug and alcohol testing procedures in a single regulation will simplify compliance for covered parties and avoid confusion by permitting all parties to look to one source for information on these issues. This should be particularly helpful to those employers who have employees covered by more than one DOT operating administration. However, employers regulated solely by the Coast Guard should continue to refer to 33 CFR part 95 and 46 CFR part 4 for alcohol testing requirements and procedures.

The Department published the Notice of Proposed Rulemaking (NPRM) for this rule on December 15, 1992, at the same time as the operating administrations (OAs) published their proposed alcohol and, in some cases, drug testing rules. We received over 250 comments to the part 40 docket. In addition, the OAs' dockets received some comments on the testing procedure issues raised by the part 40 NPRM. The Department considered all these comments.

Comments and Responses

Split Sample Procedures for Drug Testing

This discussion concerns how we will carry out a statutory requirement to use the “split sample” method for collecting and analyzing urine samples for purposes of the Department's drug testing program. The Act requires split samples to be used for testing under the Federal Highway Administration (FHWA), Federal Aviation Administration (FAA), Federal Transit Administration (FTA), and Federal Railroad Administration (FRA) rules.

Mandatory Use of Split Sample Method

The NPRM proposed to implement the statutory requirement for split samples in drug testing by making mandatory the optional split sample procedure in the existing part 40. The procedure would remain optional under the Research and Special Programs Administration (RSPA) and Coast Guard drug testing rules, which are not affected by the Act. Several commenters wanted the split sample procedure to remain optional in all modes. Because the statute requires the use of split samples in the four OAs mentioned above, the Department cannot adopt this comment. In order to give employers time to prepare to use the split sample collection method, the rule does not require affected employers to begin using this method until 6 months from the date of this rule's publication.

Employers, who under the existing rule have the option of using this approach, may begin using the split sample method at any time.

Sample Volume

The NPRM proposed that the total amount of urine collected be 45 ml (30 ml for the primary specimen and 15 ml for the split specimen). The existing rule calls for a 60 ml collection; the Department believed that this was a greater quantity than is needed. Eighteen comments supported the NPRM proposal; two commenters opposed the proposal, one of whom supported collecting 60 ml each for the primary and split specimens. Based on information about laboratory testing needs gained over the course of four years of implementing a drug testing program, the Department is persuaded that 45 ml (30 ml for the primary specimen and 15 ml for the split specimen) is sufficient. This reduction from the current 60 ml minimum should also reduce "shy bladder" situations in which a test is canceled for lack of sufficient specimen volume.

Time Period for Requesting Test of Split Specimen

Another subject of interest to commenters was the time frame in which employees could request a test of a split specimen. The NPRM proposed a 72-hour period, following the employee's being informed of a verified positive test, during which he or she could request a test of the split specimen. Twenty commenters favored this approach, saying that this period was sufficient to allow an employee to make a choice about whether to request the test of the split specimen. Some of these commenters also asserted that allowing the much longer times permitted under some OA regulations (e.g., 60 days) could lead to tests of deteriorated samples and unreasonably postpone employer disciplinary actions. Seven commenters suggested a longer...
A specimen is necessary. If the employee does not believe that testing the split specimen is required or that the MRO should have informed the individual that the test was accurate, but contends that the MRO should have provided a test of the split specimen "if the individual requests the independent test within 3 days of being advised of the results of the confirmation test." To comply with the statute, the Department is not required to provide a time period longer than 72 hours.

Moreover, the Department has not seen a persuasive rationale for permitting a longer time period. Nothing prevents an employee who is told of a verified positive test from deciding in a very short time to seek a test of the split specimen. For example, some employees testing positive admit that they used drugs. Such employees may well not believe that testing the split specimen is necessary. If the employee concedes that the test was accurate, but contends that the MRO should have provided a test of the split specimen if he or she has a confirmed positive test, the MRO must also tell the employee that he or she will have 72 hours following notice of a verified positive test in which to request a test of the split specimen. This notification is required in all cases of confirmed positive laboratory results, except in those situations in which an employee has effectively waived the opportunity to talk to the MRO. The 72-hour period does not start until the time when the employee is notified, whether by the MRO or the employer, that the test result is a verified positive.

The employee is not required to wait until after a verified positive test in order to request an analysis of the split specimen. An employee could, if he or she chose, ask the MRO at the time of the notification of a confirmed positive test to initiate the test of the split specimen. The MRO would satisfy this request. The verification process would continue, and the MRO would notify the employer of the verified result in the usual way. The verification and notification processes would not be on hold pending the result of the analysis of the split specimen. Such a delay in removing from performance of a safety-sensitive function an individual with a verified positive test could not be justified on safety grounds. Once a test is verified as positive, the employee must be removed from safety-sensitive functions, and the employee may not again perform safety-sensitive duties until he or she has met the conditions of the applicable operating administration rule for return to duty, pending the result of the test of the split specimen.

In any situation in which the MRO does not personally notify the employee of a verified positive test, we advise the MRO, upon receipt of a request from an employee to test the split specimen, to contact the employer or other party for verification of the time the employee was notified of the verified positive test. This should help to avoid potential questions about when the employee has made a timely request.

In addition, to ensure that employees are not unfairly deprived of the opportunity to request a test of the split specimen, the Department is adding a provision to allow an employee who fails to request this test within 72 hours to present information to the MRO that the failure to make a timely request was caused by circumstances beyond the employee’s control. This provision is similar to one in the existing rule concerning an employee’s opportunity to convince the MRO that there was a good reason for the employee’s failure to contact the MRO for verification purposes (see § 40.33(c)(5)). If the employee persuades the MRO, the MRO would initiate a test of split specimen, even though the employee’s request had been made after the 72-hour period ended.

Number of Collection Containers

With respect to the collection itself, the NPRM proposed that the employee provide the specimen into a collection container, which would, in most cases, be subdivided and poured into two separate specimen bottles. One commenter favored the proposed approach; six others said that a two-containter, rather than three-container approach, made more sense. That is, in all situations—not just unusual situations, as the NPRM proposed—the employee should urinate into a specimen bottle, which would become one specimen. The collection site or person would then pour an amount of the urine from that bottle into a second bottle, which would become the other specimen. Commenters said this approach would save time and money.

The Department believes that these comments have merit, and the final rule permits either approach. The employer could use a collection container with the specimen subdivided and poured into two specimen bottles. Alternatively, the employer could use a specimen bottle capable of holding at least 60 ml, into which the employee would urinate. The specimen would then be subdivided, with 30 ml being poured into a second specimen bottle, which becomes the primary specimen.
for testing purposes. The original specimen bottle, into which the employee had urinated, would become the split specimen.

This latter point may seem counter-intuitive, but there is a reason for it. We want to make sure that there is a 30 ml primary specimen. Pouring 30 ml of the void into the second specimen bottle ensures that this will be the case. If the instructions were to pour 15 ml of the void into the second bottle, to be used for the split specimen, the primary specimen might wind up with less than 30 ml of urine if the collection site person overpoured. Laboratories have informed the Department that they intend to provide only 60 ml bottles to collection sites, because of the economies of mass producing a single size container and to avoid confusion by collection site personnel. For this reason, the final rule’s procedure should not result in extra costs.

Storage of Split Specimens

Three commenters recommended that employers be authorized to store split specimens at the collection site rather than send them to the laboratory, in order to reduce shipping costs. The Department is not adopting this suggestion. Generally, laboratories have better, more secure storage facilities than many collection sites. The chances of loss, deterioration, tampering, etc. of a specimen are likely to increase in non-laboratory locations. A uniform procedure for storage and re-shipment of split specimens is likely to reduce opportunities for error in the testing process. The rule also addresses the issue of how long the split specimen should remain in storage. As noted above, the employee must notify the MRO within 72 hours of being informed of a verified positive test to trigger a requirement for a test of the split specimen. Consequently, it is not necessary for the laboratory to retain the split specimen for a prolonged period. In the Department’s view, it is sufficient to require the split specimen to be stored 60 days from the date it arrives at the laboratory, if a request for testing it has not been received. (The primary specimen would remain in storage for one year, as under the existing rule.)

Choice of Alcohol Testing Methods and Devices

NPRM Proposal

The NPRM for alcohol testing procedures proposed that both the initial and confirmation tests would be done on an evidential breath testing device (EBT). An EBT is a breath testing device that is on the National Highway Traffic Safety Administration’s (NHTSA) Conforming Products List (CPL), a list of breath testing devices that NHTSA has approved for use by law enforcement agencies in drunk driving cases. In addition, the EBTs would have to print out results and assign a sequential number to tests, to ensure that test results were preserved in a way that minimized the chances for human error (e.g., the disregarding of an initial positive test by an employer who did not want to lose an employee’s services).

The NPRM also proposed training requirements for breath alcohol technicians (BATs), who would administer the tests, and maintenance and calibration requirements for EBTs. In requiring EBTs for all testing, DOT proposed that other testing methods—blood, saliva, urine, non-evidential breath, performance testing—could not be used for either screening or confirmation tests. In summary, the Department made this proposal because EBTs are a well-established, reliable, and accurate testing method; EBTs are minimally intrusive; EBTs can provide an on-the-spot result that allows employers to take action that prevents potential safety risks; and EBTs can produce a printed record of the test result that will prevent disputes about the accuracy and integrity of the testing process.

Comments

Overview

This proposal generated more comments than any other feature of the NPRM. Approximately 190 of the comments to part 40 addressed some aspect of testing methodology. These comments came from a variety of sources, including employers in all the industries covered by the proposed regulations, unions, laboratories, manufacturers of testing equipment and products, and consortia and third-party testing service providers. The most consistent theme among comments on this subject was a desire for greater flexibility in the choice of testing methodology than the NPRM proposed.

Support for NPRM Proposal

Twenty-six comments, representing employers in several industries, unions, third-party testing services, manufacturers of testing equipment, state police agencies, and the National Transportation Safety Board, supported the NPRM proposal. They cited as reasons for their support the non-invasiveness of breath testing, the long acceptance by courts and employees, its provision of a quantitative readout, simplicity compared to blood or urine testing, and the relatively low operating costs involved. Some of these commenters qualified their support of the NPRM proposal by saying that breath testing, while a good method, should be one of an array of options available to employers, or required only for certain types of testing (e.g., pre-employment and random) where the employer has control over the time and place of testing.

Concerns About Difficulty in Implementing NPRM Proposal

Some commenters feared that there would be insufficient numbers of EBTs, BATs, and testing sites available to implement the proposal. There would be a rapid expansion of the need for EBTs (one commenter estimated a 3000-4000 percent increase in the market) that manufacturers may be unable to fulfill, as well as a rapid training need for thousands of BATs that would take substantial time to meet. Seventeen commenters (including a number of third-party service providers and employers) said that the cost of obtaining EBTs and training BATs, the unfamiliarity of many third-party testing sites with breath testing, and liability concerns would deter many potential third-party service providers from...
participating. This would particularly be a problem in small towns and rural areas, where the low volume of testing would make the needed investment too costly.

Concern About Confrontations

Twenty-eight commentators (principally third-party service providers and employers) expressed concern about the possibility of confrontations between BATs and employees. These confrontations would occur, commenters said, because the BAT—not an employer representative with supervisory authority over the employee—would be the messenger of bad news about a test result. Several commenters cited the image of a 90-pound female BAT having to deal with an angry (and perhaps intoxicated) 300-pound truck driver who had just been told he had failed an alcohol test.

Other Comments About NPRM Proposal

Commenters expressed other concerns about the EBT—EBT approach. Some found the process too time-consuming. Others pointed out that the collection site is commonly recognized as the weak point of the drug testing process, and that conducting the alcohol testing process there increased the chance of error. Other commenters said that there were too many opportunities for human and mechanical error in the breath testing process, which, together with what they regarded as the unreliability of EBTs at low alcohol concentrations, created numerous opportunities for litigation. Some commenters also said that, if all screening and confirmation testing were done on EBTs, the two tests should be run on different machines.

Legal Issues

Several commenters raised legal challenges to the proposal. Nine commenters (primarily manufacturers of competing devices and unions) said that the statute requires split samples (i.e., the subdivision and retention of a portion of a sample for an additional test at a laboratory as a safeguard for the accuracy of the process) in all cases. Generally, EBTs do not retain breath samples. Therefore, these comments said, methods that permitted split samples (e.g., blood, urine, saliva) must be used. Thirty-one comments said that the statute contemplated the use of different methods for the screening and confirmation test, respectively. Eleven comments said that, since the results of EBT tests would be used to refer persons for rehabilitation or treatment, they would be considered medical devices subject to Department of Health and Human Services (DHHS) regulation.

Since DHHS had not approved EBTs as medical devices, their use could be blocked.

Desire for More Flexibility

Seventy-five commenters (representing a wide variety of equipment manufacturers, employers, and third-party service providers) favored allowing employers to choose the best testing method for them. In addition to the virtue of flexibility, this approach would permit each employer to choose the most cost-effective method of compliance in its own circumstances.

Most of these commenters appeared to favor testing methods that would use two different testing methods (e.g., non-evidential breath or saliva screening test, blood test for confirmation). Ten commenters disagreed on this point, saying that non-evidentiary screening tests should never be permitted. Their primary concern was about the accuracy of these testing methods. Several commenters who favored using non-evidentiary screening tests conceded that it would probably be necessary to suspend an employee's performance of safety sensitive functions pending a confirmation test of a positive non-evidentiary screening test. Most commenters who addressed confirmation procedures in a two-method system said that confirmation tests (if whatever body fluid) should be done on GC (gas chromatography, the same highly accurate method used for confirmation tests under the drug testing program).

Specific Comments on Other Testing Methods

Non-Evidential Breath Testing Devices

(e.g., tubes filled with materials that turn a certain color when alcohol-laden breath is blown into them or small, hand-held electronic devices that register the presence or absence of alcohol concentration in breath)

Twenty-nine commenters, including a variety of employers and manufacturers of the devices, supported using non-evidentiary breath testing devices. Most commenters cited cost (estimated at between $90—550 for various models of non-evidentiary breath testing machines, and about $2—4 each for disposable devices) and convenience as reasons. A few opponents of non-evidentiary breath testing devices said their accuracy was questionable, both with respect to false positives and false negatives.

Saliva Testing

(i.e., a device which registers a particular alcohol concentration when a swab with saliva from the employee's mouth is inserted into it)

Forty-five commenters favored the use of saliva testing. These commenters included a variety of employers, third-party service providers, equipment manufacturers, and others. Commenters claimed several advantages for use of screening saliva tests: modest cost (estimated at between $5—20 per test); simplicity of use, little need for training; existing "approvals" from NHTSA and Food and Drug Administration (FDA) for some devices (though in contexts other than a workplace testing program); non-invasive nature of the devices; sufficient accuracy for screening tests. Two commenters also said that, while it was most typical to use blood testing for confirmation after a saliva screen, saliva specimens could also be used for confirmation, as laboratories could run a gas chromatography analysis on saliva.

A few commenters expressed concerns about saliva testing devices. A union provided data that it said showed that saliva devices had a mixed record for accuracy. Other commenters said saliva remained an unproven method, that saliva devices were not ethanol-specific, and that saliva alcohol and blood alcohol results may differ.

Proponents of saliva testing devices conceded that chain of custody forms would be needed and that there was no method of automatically generating permanent records of test results that positively identified a particular employee with a particular result. They said that keeping paper records was adequate for this purpose, however.

Blood Testing

Forty-eight commenters (again representing a variety of employers, plus third-party providers, laboratories and others) favored allowing the use of blood testing as a confirmation test method. The advantages cited for this method included well-established scientific and legal acceptance for accuracy, the availability almost anywhere of technicians trained in drawing blood, and utility for post-accident testing on employees who are unconscious. Some of these commenters said that, while blood testing is admittedly more invasive than other methods, employees accept it because of its reputation for accuracy. Also, they said, the low expected positive rates on screening tests will mean that few blood confirmation tests would have to be performed. Commenters estimated costs to be in the $20—60 range per test.

Seven commenters opposed the use of blood testing, primarily on the ground that it is too invasive. In addition, a few commenters said that DHHS or DOT
would have to develop laboratory certification standards for blood testing. Some commenters said that employees might have to be required to “stand down” during the interval between the blood collection and the return of the test result from the laboratory.

Urine Testing

Eight commenters favored allowing the use of urine testing, including some employers who now use this approach to their satisfaction and laboratories that do urine testing. One advantage cited for this approach is that alcohol could simply be added to the list of substances for which urine samples taken for drug testing are tested, at a low incremental cost. Commenters said that DOT or DHHS should develop laboratory certification procedures and cutoff levels. Some commenters also noted that detailed collection procedures would have to be developed, since urine testing for alcohol is more complicated than urine testing for drugs (e.g., two voids, twenty minutes apart, are recommended to measure alcohol concentration in urine).

Performance Testing

Five commenters, most of whom were manufacturers of the devices, supported the use of performance tests for the screening or screening test. (A performance test does not measure alcohol concentration; it measures deviations from a personal norm of reaction time, motor coordination, etc.) One commenter opposed performance testing devices as inappropriate for this program.

Responses to Comments on Testing Methods

Legal Issues

The Act provides, with respect to confirmation testing, that all tests shall be confirmed by a scientifically recognized method of testing capable of providing quantitative data regarding alcohol.

Some commenters asserted that this provision requires that a different testing method be used for the screen and confirmation tests, respectively. The statute says no such thing, stating only that the confirmation test must use a “scientifically recognized” method that can provide “quantitative data” regarding alcohol. As long as the method of confirmation meets these criteria, the statutory requirement is satisfied. Breath testing is scientifically and legally recognized as a method for accurately testing alcohol concentration, and devices meeting the Department’s requirements provide quantitative data.

(Blood testing, of course, also meets the statutory criteria.)

The ability of a method of confirmation testing to pass these statutory tests is not dependent on the choice of a method of screening testing. Testing of breath for confirmation, as provided in this rule, is equally valid under the statute whether evidentiary breath testing, non-evidentiary breath testing, or saliva is used for the screening test. Testing of blood for confirmation is equally valid under the statute whether blood, breath, saliva or urine is used for the screening test. All that matters is that the confirmation testing method meet the statutory criteria in its own right.

With respect to split samples, the Act requires the Department’s regulations to provide that each specimen sample be subdivided and that a portion thereof be retained in a secure manner to prevent the possibility of tampering, so that in the event the individual’s confirmation testing results are positive the individual has an opportunity to have the retained portion assayed by a confirmation test done independently at a second certified laboratory if the individual requests the independent test within 3 days after being advised of the result of the confirmation test.

Some commenters asserted that this language should be read to require that split samples be used in all alcohol testing, with the implication that a method that did not permit the use of split samples could not be used. Since most EBTs—including those proposed by the Department in the NPRM—do not retain a sample that could theoretically be subdivided and preserved for testing of a split specimen, some of these commenters asserted not only that breath or other liquid-based testing methods were required, but that breath testing was prohibited.

This interpretation is flatly contrary to the statute, which specifically contemplates the use of breath testing (see, e.g., sec. 3(a) of the Act, adding section 614(d)(6) to the Federal Aviation Act). Breath testing is a well-recognized form of alcohol testing, and there is no evidence that Congress had any intention of prohibiting its use, either indirectly by requiring split samples or otherwise. The legislative history makes clear that the Senate sponsors of the legislation intended that breath testing be used and that split samples were not mandated for breath testing. In the floor debate, during a colloquy between Senators Danforth and Hollings, Senator Hollings stated:

[(t)here are also requirements for split samples, primarily included in the legislation to allow urine samples to be retested. DOT would have the authority to determine that blood samples should be similarly handled. This specific requirement is not relevant in the case of breath testing for alcohol, but DOT is directed by the legislation to provide necessary safeguards in this area to ensure the validity of test results.]

137 Cong. Rec S 14764, 14770.

There is also internal evidence in the wording of the statutory provision that supports the reasonable interpretation that the split sample requirement is intended to apply to liquid body fluids like urine and blood, but not to breath. The statute uses the word “samples” in ways that refer primarily to samples of liquid body fluids. For example, section 614(d)(1) of the amended Federal Aviation Act refers to the need for “privacy in the collection of specimen samples.” Privacy is very important with respect to collection of urine samples for drug testing. Because elimination functions are not involved, privacy is not as important in breath collections. In paragraph (d)(6) of the same section, the statute refers to detecting and quantifying “alcohol in breath and body fluid samples, including urine and blood.” In this language, the phrase “including urine and blood” is best understood as modifying “body fluid samples,” as opposed to “breath.” Given the way that the term “sample” is used in these portions of the statute, the use in paragraph (d)(5) of “sample” should also be read to refer to liquid body fluid samples (i.e., urine and blood). When this paragraph speaks of the “specimen sample be [ing] subdivided,” then, it is imposing a split sample requirement on blood and urine, not on breath.

Some commenters argued that the language mentioned above from paragraph (d)(6), requiring the Department to “ensure appropriate safeguards for testing to detect and quantify alcohol in breath and body fluid samples, including urine and blood,” creates a right for employees to have a screening test confirmed by blood testing. This language, on its face, does not create such a requirement, since it does not specify any particular sort of test for either screening or confirmation purposes. There is ambiguous legislative history on the point, with the Senate report on the Act saying both that “an employee testing positive for alcohol using a specimen other than blood shall be entitled, at that employee’s [sic] option, to a blood test” and that “the Committee has not specified the type of test to be used in either the screening or confirmation test.” Given that the statute does not explicitly require blood
testing for confirmation, and that the portion of the statute that mandates confirmation testing requires only a "scientifically recognized" confirmation test that can produce "quantitative data" (criteria that breath testing clearly meets), the Department does not believe it would be reasonable to view this ambiguous legislative history as a mandate for the availability of blood confirmation testing in all cases.

The Department does not believe that regulations of the Food and Drug Administration (FDA) would interfere with the implementation of breath testing under this rule. FDA does regulate the safety, labeling, etc. of medical devices. It is our understanding that FDA may be considering initiatives to regulate EBTs used as medical devices and methods, at both the federal and state levels. FDA does not, however, regulate or certify the precision or accuracy of EBTs that are currently used for law enforcement purposes or that would be used under the DOT alcohol testing program. (These would not be viewed as medical devices used in medical settings.) We believe that current FDA rules are, and future FDA rules would be, consistent with NHTSA certification of EBTs.

**Flexibility and Cost**

Many commenters made flexibility in testing methods a high priority. The Department agrees that flexibility is desirable. However, the Department also believes that any testing system should meet a series of criteria, each of which is necessary to execute the statute faithfully and to ensure that the safety and accuracy goals of the program are met. The Department cannot emphasize too strongly the importance of ensuring accuracy and reliability of testing devices and methods, at both the screening and confirmation test stages. This is needed, among other reasons, to protect employees from even temporarily being identified as misusers of alcohol. In the context of drug testing litigation, the courts, in upholding the Department’s program, relied to a substantial extent on the reliability and accuracy safeguards in that program.

Within these constraints, our objective is to provide maximum flexibility and minimum cost. The Department’s criteria for carrying out its objectives in this area are the following:

- As required by the statute, the method used for confirmation should be scientifically recognized and able to produce a quantitative result. The method should meet NHTSA Conforming Products List (CPL) standards at 0.02 and higher alcohol concentrations.
- The confirmation method should be alcohol-specific (i.e., does not produce a reading for acetone).
- The confirmation method should generally provide documentation of quality control/calibration and be admissible as forensic evidence in administrative proceedings.
- The testing method used for confirmation should provide a result at the time and place of the test, so that an employee whose continued performance of a safety sensitive function may present a safety risk can be removed from performing that function.
- The testing method used for the screening test should minimize the occurrence of false positives and false negatives and should meet stringent standards for precision and accuracy (e.g., +/- .005 at 0.02 alcohol concentration).
- The testing method used for confirmation tests should provide a record of the test number and test result, in order to avoid uncertainty about whether this employee took this test with this result. The testing methods used for screening tests should provide either this kind of record or be used in conjunction with procedures that provide a record of the test result linked to the individual tested through some form of permanent documentation. The purpose of this criterion is to prevent collusion and cheating.
- The testing methods used for screening and confirmation tests should, as a policy matter, be as non-invasive as possible.

At the present time, only evidential breath testing methods meet all these criteria for screening and confirmation tests. Applying these criteria strictly would result in a final rule that, like the NPRM, permitted only evidential breath testing for both tests. This approach was favored by the NHTSA, as a result of comments received from DOT-mandated alcohol testing. This approach required the Department to achieve a reasonable balance between the legal and policy goals on which the criteria are based and commenters’ desire for greater flexibility, by modifying the approach proposed in the NPRM. First, the final rule will permit EBTs that are on the NHTSA CPL, but that do not meet the additional requirements for confirmation EBTs (e.g., "breath tubes") may not be used at this time.

Second, in an NPRM published in today’s Federal Register, the Department will propose to permit blood testing to be used in limited circumstances. In the case of a reasonable suspicion test or a post-accident test, where an EBT meeting the requirements of part 40 is not readily available, the employer could use blood testing for the confirmation test. Blood alcohol testing would also be available as an option in "shy lung" situations. This NPRM also proposes blood testing procedures to be used in these circumstances. The rationale for allowing this limited use of blood testing is discussed in the preamble to the NPRM.

Third, the Department is also publishing in today’s Federal Register a notice proposing to adopt criteria and procedures that would permit additional alcohol screening devices to be used for screening tests in the program. This proposal would be intended to result in the adoption of model specifications for a conforming products list for alcohol screening devices. Under this proposal, manufacturers of devices could submit their products to DOT for evaluation and, if their devices met the model specifications, the Department would authorize their use as screening devices in DOT-mandated alcohol testing. This approach will permit greater flexibility in the use of screening devices that are not now appropriate for use, including those supported by their manufacturers and others in comments to the part 40 docket, if they are able to meet DOT model specifications.

With respect to costs, commenters had three basic concerns. First, commenters believed that EBTs meeting all the NPRM’s requirements would be too expensive. Some commenters believed that adding features such as a sequential numbering and printout capability would add considerably to the cost of the devices. The Department’s information, included in our regulatory evaluations, and based on data obtained from manufacturers, suggests that the list price per unit of an EBT meeting all the NPRM criteria for use in confirmation tests is about $2000. (There are some indications that prices may be lower for purchases in quantity.) There are other EBTs on the CPL available under the final rule to be used for screening tests, that list for about...
$1000, again with the possibility of lower prices for purchases in quantity. Because the Department is proposing to permit blood testing in post-accident and reasonable suspicion situations where a breath testing unit is not readily available, the numbers of EBTs that any employer would have to obtain may be reduced significantly from earlier estimates, lowering many commenters' estimated capital costs of the program. This is because employers would not have to provide an EBT at all its work sites against the contingency of a reasonable suspicion or post-accident test happening there, as a number of employers' estimates assumed. Commenters identified having to pre-position EBTs at all work sites, even the small and remote ones, as a major cost of compliance with the NPRM (even though the NPRM would not have imposed this requirement). In addition, making blood testing available means that the time workers would be held out of service pending a test would be reduced significantly, resulting in further savings. We refer commenters to today's NPRM on blood alcohol testing for further information.

Second, commenters expressed concern about the costs of training personnel and maintaining and calibrating the instruments. While training can be expensive, we believe that these costs are difficult to avoid if the accuracy and integrity of the testing program are to be protected. As other devices are approved under the Department's forthcoming procedures, employers will have the opportunity to determine if use of other methods will reduce their overall costs.

Third, some commenters (especially from the railroad industry) who already use EBTs expressed concern about the costs of the additional features that the NPRM would have required (e.g., sequential numbering capacity, print-out capability). The final rule responds to these concerns by allowing EBTs without these features to be used for screening purposes. A railroad could use its existing EBTs (assuming they are on the NHTSA CPL) for screening tests, while obtaining only as many of the machines with the additional features as it needed for confirmation testing. This would reduce the additional costs that these employers would have to incur.

When the Department issues a broad mandate for employee testing, the overall effect is likely to be the creation of additional opportunities for professionals, manufacturers, and other businesses to serve the markets created by the DOT requirements. These opportunities can fairly be expected to lead to an influx of participants into the market. There is ample evidence that this has been the case in the Department's drug testing program, and it is reasonable to expect that similar economic opportunities will draw businesses and professionals into the alcohol testing market. The Department believes that this factor is likely to outweigh, by a substantial margin, any deterrent effects on participation in the program related to equipment or training costs, the newness of the procedures, liability, or the willingness of businesses and professionals to participate.

Comments that potential participants would be deterred for these reasons were, for the most part, speculative. Given the market's response to the drug testing rules since 1988, it is fairer to assume that the market's response to the even larger-scale alcohol testing program will not be timid. With respect to the issue of sufficient EBTs being available, the Department has contacted EBT manufacturers, and we do not anticipate any serious shortage of devices as the program begins operation. If, at any time, the Department learns that there are inadequate supplies, the Department could postpone or otherwise modify its rules.

While the image of a large, angry, intoxicated employee confronting a 90-pound female BAT over a positive result is a graphic one, the speculation and spotty anecdotal evidence provided by commenters to back up their concern on this matter is not sufficient to cause the Department to retreat from its position that immediate results are needed. This concern goes to any testing method that provides an immediate result, not just to breath testing. It might appear even more strongly in a situation in which an individual is told, as the result of a non-evidential screen, that he is to "stand down" and not work for three days while a laboratory test result is obtained.

The point of getting an immediate result is safety: if an employee, of whatever size, has a higher alcohol concentration than the Department's rules permit, the individual should not be performing a safety-sensitive function. In the interest of safety, we need to stop the individual's performance of that function now, not two or three days later when a laboratory test result becomes available. We also want to prevent the unnecessary cost of holding an employee out of service for two or three days pending laboratory results following a non-evidential screen. BATs are not given the responsibility of taking a driver's keys away. The DOT alcohol testing form includes a statement, to be signed by the employee, that persons who test positive should not drive or perform other safety-sensitive functions. Employers have a responsibility, as part of their alcohol education for employees, to emphasize that employees must cease performing safety-sensitive functions if they test positive.

The Department does not believe that it is necessary to use two separate EBTs in order to have a valid, defensible result. EBTs on the NHTSA CPL are designed for accuracy, and the internal and external calibration checks built into the Department's procedures are sufficient insurance against error. (Where employers choose to use an EBT without the additional features for screening tests, of course, the employer will necessarily use a different machine for the confirmation test.) The Department is satisfied that EBTs meeting its requirements are sufficiently accurate and reliable, at the alcohol concentrations that will be tested for, and that excessive invalidations of tests or successful lawsuits or grievances will not occur. Similarly, the likelihood of extensive errors by testing personnel should be diminished by the BAT training requirements.

Manufacturers of alternative testing devices, and some other commenters as well, advocated various other methods of testing, particularly for screening tests. As noted above, the Department intends to take action that could result in decisions to authorize use of other screening devices and to authorize the use of breath testing in some circumstances. The Department has decided not to permit the use of these alternative methods until they can meet the criteria we believe are necessary for accurate testing meeting the requirements of the statute. The following paragraphs summarize the Department's reasons for not permitting the use, at this time, of other testing methods:

**Blood Testing**

- This is the most invasive form of testing.
- Employees may fear needles or fear infection from improper medical procedures.
- Additional collection procedures, chain of custody procedures, and equipment requirements would be needed, making regulatory requirements more complex.
- Laboratory certification standards and testing protocols would need to be established. As noted in the accompanying NPRM, this poses potentially significant problems even in the limited context in which the Department is proposing to permit the use of blood testing.
- Results would not be available for at least 24 hours, and could take 3–4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was
affected by alcohol, which would reduce the safety benefits of the program.

**Urinary Testing**
- Present laboratory certification standards and testing protocols do not cover urine testing for alcohol. There would have to be additional laboratory certification procedures and testing protocols developed for urine testing.
- Urine testing for alcohol (as distinct from drugs) requires a complex collection process, involving two separate voids with an interval between them. Addition of a preservative to prevent the creation of alcohol by microbial fermentation is also needed. We would need to add new collection procedures to accommodate these requirements, as well as new training requirements for collection site personnel. These additional procedures would make the collection process more complex and multiply the chances for errors.
- Urine testing is regarded as the least accurate method currently available for determining the amount of alcohol in the body.
- A blood to urine ratio has not been definitively established, making it difficult to equate a urine test result for alcohol to a particular blood or breath alcohol level.
- There are greater costs of employee “down time,” for transporting the employee to a collection site for testing and for the longer collection procedure.
- Testing of urine specimens would have to be done in a laboratory. Results would not be available for at least 24 hours, and could take 3-4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program.

**Saliva Testing**
- Especially at low alcohol levels, saliva devices are likely to have a higher rate of false positives and negatives than EBTDs on the CPL.
- Some saliva devices do not provide quantitative results.
- Because saliva screening testing devices are disposable, and do not generate a record of the test, ascertaining whether a particular employee took a particular test and had a particular result, or that the test took place at all, could be difficult. (The use of a log book, which helps to address this concern where EBTDs without sequential numbering or printout capabilities are used, would be difficult in the case of disposable devices. The log book would accompany the EBT wherever it went, which would not be possible with disposable devices.)
- If laboratory confirmation methods (e.g., blood) are used in combination with saliva screening, confirmation results would not be available for at least 24 hours, and could take 3-4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program.

**Non-evidential Breath Testing**
- Non-evidential breath devices (i.e., disposable devices and others not on the CPL) have a higher rate of false positives and negatives than evidential EBTDs.
- Non-evidential breath screening testing devices do not generate a record of the test, so that ascertaining whether a particular employee took a particular test and had a particular result, or that the test took place at all, could be difficult. (The use of a log book, which helps to address this concern where EBTDs without sequential numbering or printout capabilities are used, would be difficult in the case of disposable devices. The log book would accompany the EBT wherever it went, which could not be possible with disposable devices.)
- If laboratory confirmation methods (e.g., blood) are used in combination with non-evidential breath screens, confirmation results would not be available for at least 24 hours, and could take 3-4 days to arrive. Confirmed results would, therefore, not be available at the time the employee was affected by alcohol, which would reduce the safety benefits of the program.
- Non-evidential EBTDs on the market appear to vary greatly in type of technology used, quality, and accuracy. Until NHTSA criteria are established for these devices, it is premature to permit their use in the DOT program.
- The Department would have to establish additional procedures, training requirements, quality control requirements, etc. for non-evidential breath testing, adding further complexity to the program.

**Performance Testing**
- The statute requires testing for alcohol concentration, not diminished performance. A test for performance appears not to meet this statutory requirement.
- Performance tests are very unspecific, which could result in positives caused by a wide variety of things other than alcohol use (e.g., illnes, prescription or over-the-counter medication, fatigue, emotional distress). This would lead to many unnecessary confirmation tests and could result in employees being taken off the job while awaiting confirmation test results, adding extra costs for employers and employees.
- The accuracy of performance testing devices is unproven.
- Many performance testing devices do not generate a record of the test. Ascertaining whether a particular employee took a particular test and had a particular result, or that the test took place at all, could be difficult.

Most performance testing devices require the establishment of individual baseline data for each employee, which can be a time-consuming and costly procedure.
- In many systems, performance assessment must be decided by critical job skills, measures of which have not been established for many occupations.
- Performance testing devices or systems on the market appear to vary greatly in quality and accuracy. Until NHTSA criteria are established for these devices, it is premature to permit their use in the DOT program.
- The Department would have to establish additional procedures, training requirements, quality control requirements, etc. for performance testing, adding further complexity to the program.

This discussion is in the context of an extensive, multi-modal testing program, including pre-employment and random testing as well as reasonable suspicion and post-accident testing. Greater protections are needed in such a program, particularly in the absence of procedural protections present in some testing programs that may use non-evidential testing in some circumstances. For example, the Coast Guard post-accident alcohol testing program can involve administrative proceedings in which the employee has the opportunity to challenge test results before a license is revoked or an investigatory inquiry at which further evidence could be introduced.

**Breath Alcohol Technicians**

The NPRM proposed that breath alcohol technicians (BATs) be trained to proficiency in using EBTDs in DOT alcohol testing procedures, using a NHTSA- or state-approved course. The competence of the BAT would have to be documented. Additional (i.e., refresher) training would be required, as needed, to maintain proficiency. An employee’s supervisor could not act as the BAT for that employee unless allowed by a DOT rule and no other qualified BAT were available.

Commenters spoke to several provisions of this section. Six commenters favored, and 15 opposed, requiring BATs to be tested to ensure that they are alcohol free (an issue about which the Department had asked a question in the NPRM preamble). A number of the opponents said that this issue should be decided by the BATs’ employers. The Department is not adopting this idea, which we believe to be unnecessary to the program.

Forty-nine comments addressed the training and qualification of BATs. All these commenters favored training,
testing, or at remote sites, supervisors may be the most readily available, or perhaps the only available, trained BATs. Eleven other commenters disagreed, most saying that an employee’s supervisor should never be the employee’s BAT. These commenters appeared concerned about the appearance or reality of a conflict of interest between the supervisor’s managerial role and his objectivity as a BAT. The Department believes that, when possible, someone other than an employer’s supervisor must act as a BAT for the employee’s test. However, a supervisory BAT is better than no BAT at all. To enable a test to go forward when no other BAT is available in a timely manner, the Department will permit a BAT-trained supervisor to conduct the test. However, if a DOT operating administration regulation prohibits the use of a supervisor in this role (e.g., in reasonable suspicion testing), the supervisor may not act as the BAT even in this circumstance.

**EBT Technology**

The NPRM required EBTs used for screening and confirmation testing to be on the NHTSA CPL, have the capacity to print out triplicate (or three consecutive identical) results, assign a sequential number to each test, distinguish alcohol from acetone at the 0.02 alcohol concentration level, and have the capability for performing both air blanks and external calibration checks. Commenters addressed a number of points concerning EBT technology.

Some commenters pointed to what they viewed as shortcomings of the CPL itself, particularly that it did not require EBTs to be accurate at the 0.02 level. This was true of the CPL at the time the NPRMs were issued, however, NHTSA has since modified the model specifications for the CPL to require accuracy and precision at the 0.02 level. Other commenters said that since inclusion on the CPL is based on testing of a prototype, rather than testing of each device, the CPL was an inadequate assurance of accuracy. The final rule does not rely on the CPL alone to ensure accuracy, however. The rule requires there to be a quality assurance plan (QAP) for the instrument as well as air blanks and external calibration checks.

As noted above, a number of commenters criticized the requirement for printing results and sequential numbering capability, saying that these features were unnecessarily costly. Any device on the CPL should be able to be used, one of these commenters said. The final rule responds to these comments by allowing any device on the CPL to be used for screening tests, with the additional features required only on those machines used for confirmation testing. This should reduce the number of the more expensive models employers will have to obtain.

Some commenters expressed concern about radio frequency interference (RFI) affecting the results of some types of EBTs. The concern is that, in airports and other locations where communications or other electronic equipment is operating, alcohol concentration readings could be distorted. DOT asked manufacturers about this issue, who said that most models of EBTs are shielded to avoid this problem. NHTSA tested three models of EBTs at Washington National Airport and detected no RFI effects on their readings. In addition, NHTSA plans, as part of its process for reviewing quality assurance plans (see discussion below), to have manufacturers establish operational guidelines to avoid RFI problems.

Commenters also expressed concern that some EBTs might not be able to distinguish acetone from some alcohols. Commenters also questioned the suitability of the CPL for instruments measuring alcohol concentrations at the 0.02/0.04 levels, since the CPL, at the time of the NPRM, did not address testing at these levels. As noted above, NHTSA has revised the model specifications on which CPL listing of devices is based. The revised specifications address both issues, and EBTs on the CPL will distinguish acetone from alcohol and be accurate at the 0.02/0.04 levels.

A few comments raised other technical issues about the design of EBTs. One issue was the effect of altitude on external calibration standards. Altitude affects gas aerosol standards; NHTSA will address this problem by requiring gas aerosol standards on its CPL for calibration devices to be criterion-referenced for various altitudes.

Another concern was based on the belief that EBTs that display results to only two, rather than three, decimal places would round up. That is, commenters were concerned that someone whose actual alcohol concentration was .036 would be reported as a 0.04, subjecting the individual to heavier sanctions. EBTs on the CPL provide three-digit displays, so this problem does not arise for these devices.

Finally, some commenters expressed concern that defining alcohol concentration in terms of grams of
alcohol per 210 liters of breath was not as accurate as desirable (or as accurate as a blood alcohol reading), because this ratio could vary among individuals. The Department's information is that any variation is very minor and unlikely to affect the results of a breath test or its consequences under these rules. In addition, EBTs are typically calibrated to account for any variation by slightly underestimating alcohol concentration.

**Quality Assurance Plans**

The NPRM proposed that EBT manufacturers would develop a quality assurance plan (QAP) for each EBT model. The plan would cover such matters as external calibration methods, tolerances and intervals and inspection and maintenance requirements. The manufacturer would have to obtain NHTSA approval of the QAP, and employers would have to comply with it. This compliance includes making external calibration checks as called for in the QAP and taking EBTs out of service if they "flunk" an external calibration check. In addition, the employer would have to ensure that inspection, calibration and maintenance of EBTs is done by the manufacturer, a representative certified by the manufacturer, or an appropriate state agency.

On the basic concept of the QAP, five commenters supported the NPRM's approach, while another eight said that NHTSA, rather than the manufacturer, should establish the standards. Some of the latter commenters appeared concerned that manufacturers may have incentives to establish requirements for their devices that were not optimal. The Department believes that NHTSA approval of the QAPs should be sufficient to ensure that the manufacturer's standards are adequate and that the manufacturers are better positioned than we are to establish model-specific requirements for individual EBTs. For this reason, we are retaining the proposed approach. QAPs would be required for all EBTs on the NHTSA CPL that would be used in DOT-required alcohol testing, whether or not a particular EBT met the additional requirements of this part for use in confirmation testing.

Commenters suggested a wide variety of requirements concerning how frequently an external calibration test must be performed. Some of the ideas included performing such checks before and/or after every test, after every positive test, before, during and after the testing shift, every day, after every five tests, every thirty days, or before disciplinary action is taken on the basis of a positive test. All these comments respond to a basic point: if an EBT "flunks" an external calibration check, positive tests conducted on that device since the last previous successful external calibration check must be regarded as invalid. This fact provides a strong incentive to employers and BATs to conduct these checks frequently enough to avoid retroactive invalidations of positive tests. In conjunction with the manufacturer's instructions on the QAP, this incentive should be sufficient to induce employers acting in good faith and testers to conduct these checks at appropriate intervals. A generally applicable regulatory requirement for external checks of calibration at a stated interval, on the other hand, would provide less flexibility and might not fit a variety of situations well.

A few commenters suggested specific types of calibration, or for the obtaining such solutions from certified laboratories. Others suggested that the Department establish particular standards for external calibration devices, or allow use of only those external calibration devices that are on the NHTSA CPL. Others suggested particular tolerance standards (e.g., +/- 0.06). The Department does agree that the employers should use external calibration devices that are on the NHTSA CPL, and this requirement has been incorporated into the final rule. The Department does not certify laboratories for production of external calibration solutions, so we could not reasonably require employers to obtain solutions from certified laboratories. For the type of solution that work best with a particular manufacturer, we refer to the manufacturer's knowledge of the behavior of its product, makes the most sense.

On the subject of maintenance, most commenters supported the NPRM's proposal for maintenance by manufacturers, or their representatives, and careful documentation of this activity. These provisions have been retained.

**Testing Location**

The NPRM called for a testing site that afforded visual and aural privacy to the employee, though in unusual circumstances a test could be conducted elsewhere. The site would have to be secured. A mobile facility (e.g., a van) that met the requirements could be used. At the site, the BAT was to supervise only one employee's use of an EBT at a time, and the BAT could not leave the site when testing was in progress. The Department, with some modifications, is adopting this provision in the final rule. In our view, privacy in the context of breath alcohol testing is primarily for the purpose limiting other persons' access to information about the employee's test result. In contrast to urine drug testing, where private elimination functions are involved, privacy need not be as strict for breath alcohol testing. We have also eliminated references to the site being "secured," as such, because this term could lead to confusion. Our concern is that unauthorized persons not be in a position to see or overhear test results. We are not requiring that testing take place behind locked doors, in a totally enclosed space, or in a dedicated facility that is not used for other purposes.

There were few comments on this provision. Two commenters noted that privacy could be hard to achieve at a remote site. The Department made allowance for this problem, however, by saying that a testing location did not have to provide full privacy in unusual circumstances such as a post-accident or reasonable suspicion test in a remote location. Other comments included a concern that privacy be protected adequately, that too much privacy could sharpen the concern about confrontations between BATs and employees, and that privacy requirements should not exclude a witness (e.g., a union representative) from the testing site. The provision establishes a general performance standard for privacy of the physical site: It does not address the issue of whether a witness may be present (that is a matter for labor-management negotiation). It does not require a site that is so isolated that a BAT could not find assistance if needed. One commenter asked for a DOT-operated national inspection program for test sites, analogous to the DHHS laboratory certification program. The Department believes that such a system would not be practicable, given the very high number of testing sites likely to be involved with the program.

**Testing Form and Log Book**

The NPRM proposed to require the use of a standard form for DOT-mandated testing, which employers could not modify. It would be a triplicate form, with copies for the BAT, employer, and employee. The colors of each copy of the form are intended to be consistent with the colors of the Department's drug testing form. The Department has decided to adopt this provision with minor modifications.

Seven commenters supported the NPRM provision as drafted. Thirteen commenters favored having space on
the form for recording a repeat of a test, in order to reduce paperwork. The Department believes that adding space for this purpose would result in a longer, more complicated form. Moreover, it is likely to be only in a minority of cases that a test will have to be repeated, meaning that the extra complexity of the form would not serve a useful purpose in most cases. For this reason, the Department is not adopting this comment.

Two commenters suggested that a combined drug/alcohol form be developed. The Department responds that, because of the differences between drug and alcohol testing, it would be difficult to develop a combined form that would not be too cumbersome and would work in both situations.

Two commenters asked that employers be able to modify the form. The Department's experience with the drug testing program, where some modification of the form has been permitted, is that the resulting variety of forms leads to confusion, errors, and difficulty in completing the form by collection site personnel. The Department believes that an unvarying, standard form will minimize these problems. Employers would have to use the form exactly as presented in Appendix A to this regulation (though a form directly generated by an EBT could be smaller and would not need a space to affix a separate printed result.) One commenter suggested that DOT provide the forms to employers free of charge. The Department does not believe that this is an appropriate use of Federal funds.

Two commenters asked that the form specify that the test is being conducted under the authority of DOT regulations. The Department's experience under the drug testing program is that, for lack of such a statement, some employees have been confused about whether a particular test was being conducted under DOT authority or simply under the employer's policy. The form being published with this rule includes such a statement. The result of including such a statement is that employers are not permitted to use the "DOT form" for a test not conducted under DOT authority.

Two commenters questioned the option to have the EBT or printer print results directly on the form, preferring to use a separate form. The regulation's requirements for EBTs used in confirmation testing provides this option, which is appropriate to provide flexibility. An employer who is uncomfortable with one approach can use the other.

This section of the rule includes a new provision requiring the use of a log book with EBTs, used for screening tests, that do not have the sequential numbering and printing capabilities required for devices used for confirmation tests. This section spells out the requirement for the log book and what it must contain; the rationale for the log book requirement is discussed below.

Preparation for Testing

The NPRM proposed that the BAT and the employee provide identification to one another and that the BAT explain the testing procedure to the employee. A commenter suggested that written information be provided to the employee, so that the briefing could be more detailed and the BAT had less verbal work to perform. The employer may provide the information in this fashion, though the regulation will not require it. Other comments were few and supportive. The NPRM provisions have been retained. Some provisions of this NPRM section, concerning filling out forms and refused or incomplete tests, have been moved to the next section.

Initial Breath Test Procedures

The NPRM proposed to require an air blank before and after the screening test, which the machine had to pass in order to stay in service. The NPRM also included proposed requirements concerning completing the test paperwork.

Fifteen commenters addressed the issue of air blanks. Seven commenters agreed with the NPRM that air blanks should be required before and after each screening test. Two said that air blanks are not technically relevant with some types of EBTs. Six commenters said that an air blank should not be required after a test when the result was less than 0.02, as this was a waste of time. Some of these commenters favored pre-test air blanks, however. One commenter supported only pre-test air blanks.

The Department has decided that it will not require air blanks either before or after a screening test. First, most screening test results will be below 0.02, making post-test air blanks of limited value in those cases. Second, pre-test air blanks, at the screening stage, are not crucial in preventing "false positives" for employees, since no action against an employee may be taken without a confirmation test. Third, the Department will require air blanks before confirmation tests, which will build this protection into the testing process where it matters most. Fourth, the Department is permitting all EBTs on the NHTSA CPL to be used in screening tests, and some of these instruments would not provide any durable record of an air blank, even if they were able to perform air blanks. Finally, the absence of a requirement for air blanks on the more frequent screening tests will result in some cumulative savings of BAT and employee time and wear on the machines.

The NPRM called for a 15-20 minute waiting period before the confirmation test; no such waiting period was proposed for before the screening test. Seven commenters favored a waiting period before the screening test, eight opposed it, and two favored employer discretion. Because the confirmation testing procedures do provide for a waiting period, and since action against an employee can be taken only on the basis of a confirmation test, we believe that requiring an additional waiting period before the screening test would be superfluous.

The NPRM provision addressed situations in which the printed and displayed results did not match, proposing that such tests would be invalid. The final rule modifies this provision, since it is irrelevant concerning instruments that do not print out a result. The NPRM provision remains in effect for EBTs that do print out.

The additional flexibility the Department has provided in screening testing procedures, by permitting the use of EBTs that do not have sequential numbering and result printing capabilities, makes it more difficult to determine that a test of a particular employee, with a particular result, has taken place, raising the possibility of cheating by employers. To mitigate this potential problem, the final rule will require a log book to be kept with each EBT used for screening that does not have the sequential numbering and printout capabilities. (This requirement does not apply to EBTs meeting the requirements for devices used for confirmation testing.) The BAT will fill out a log book entry for each test in addition to completing the alcohol testing form. The log book entries are intended to serve as a cross-check on the performance and result of a test.

There were several comments both to this section and the next section concerning whether the cutoff level for a test to which consequences for the employee would attach should be 0.02, 0.04, or, as the NPRM proposed, a bifurcated 0.02/0.04 standard, with different consequences at each level. The rule takes the latter approach, for reasons discussed in the common preamble to the OA rules.
The employee is told to sign the form after the test has been taken. If the employee does not do so, it is not regarded as a refusal to take the test. Obviously, it would be silly to regard as a refusal to take the test a refusal to sign the form after the test had already been successfully conducted. In this situation, the BAT is required to note the failure to sign in the remarks section of the form.

**Confirmation Breath Test Procedures**

The NPRM instructed the BAT to tell the employee to avoid eating, drinking, etc. during a 15-20 minute interval between the screening and confirmation test, though the test would continue even if the employee did not follow the directions. The BAT would also give the employee a notice not to drive or perform other safety-sensitive functions if the employee's alcohol concentration were 0.04 or greater. After performing the same steps as with the screening test, the BAT would note the alcohol concentration reading and transmit the results to the employer in a confidential manner. The lower of the two readings—screening and confirmation—would control the result.

There were 29 comments concerning the waiting period before the confirmation test, fifteen of which supported the 15-minute minimum time proposed in the NPRM. Four comments wanted a shorter interval (e.g., two or five minutes) and four supported a longer interval (e.g., 20 or 30 minutes). Two comments opposed any requirement concerning an interval. Six comments either wanted no maximum waiting time or preferred to rely on the employer's or EBT manufacturer's discretion.

The waiting period is important. It is intended to give the employee the opportunity to ensure that any residual mouth alcohol does not influence the result of the confirmation test. According to the Department's information, fifteen minutes is the minimum period after which one can be confident that any residual mouth alcohol has disappeared. A shorter interval is not feasible for this reason. At the same time, waiting a long period between tests can be costly in terms of lost employee time and could influence the outcome of the confirmation test. In order to guard against lengthy delays in the performance of confirmation tests, which can allow alcohol concentration levels to fall, the final rule retains the 20-minute maximum. It should be pointed out that failing to observe the minimum 15-minute period is a "fatal flaw" (see §40.79(a)), automatically invalidating a test. This is because the Department believes it is important to prevent artificially high readings due to mouth alcohol residue. However, taking longer than 20 minutes between tests is not a "fatal flaw." The Department is aware that circumstances may sometimes result in stretching the time between tests for a few additional minutes.

Another issue addressed by commenters in a variety of ways was that of whether the screening or confirmation test result prevails when one is higher than the other. Eighteen commenters believed that the confirmation test should prevail in all cases. Two commenters supported using the higher of the two results, while three supported using the lower of the two results. The Department believes that it is more understandable, and less potentially confusing, for the confirmation test result to determine the outcome of the test. The confirmation test will always have to be performed using the most reliable methods. Also, alcohol concentration can still be rising at the time of the screening test. Although it is also possible for alcohol concentration to have dropped since the screening test, the Department's requirement for the confirmation test to be conducted a short time after the screening test should minimize any problem. Finally, this approach is consistent with that the Department takes in drug testing. Consequently, in situations in which a confirmation test is needed, the final rule will attach consequences only to the confirmation test result.

Nine commenters asked that the final rule, unlike the NPRM, provide for medical review officer (MRO) review of the confirmation test result, as the Department requires in drug testing. Among their reasons were that there could be valid medical or food-related reasons for alcohol concentrations, that there could be inadvertent alcohol consumption, that someone should review results for procedural errors, that an MRO should play the role assigned to the substance abuse professional (SAP) by the proposed rules, or that the alcohol rules should mirror the drug rules as much as possible.

In the drug testing context, an MRO determines whether there is a legitimate medical explanation for an individual having in his or her system a substance which is otherwise illegal. The alcohol rules are different in this respect. They prohibit safety sensitive employees from having alcohol concentrations above certain levels, regardless of the source of the alcohol. An alcohol concentration of 0.04 resulting from drinking beverage alcohol has the same consequences under the rules as an alcohol concentration of 0.04 resulting from ingesting medication. Both uses of alcohol are legal (as long as they do not violate OA rules concerning on-duty use, pre-duty abstinence, etc.), the resulting alcohol concentration is prohibited by DOT regulations equally in both cases. In this context, there is nothing for an MRO to decide. Inserting an MRO into the process without this key function would add to the complexity and cost of the system without providing any benefits. For these reasons, the Department will not require MRO review of alcohol testing results.

The NPRM proposed that employers could use the same EBT for both the screening and confirmation tests. Fifteen commenters objected to this proposal. Some said that an entirely different methodology should be used for the two tests. The legal issue section of the preamble discusses this point. Others said that a different EBT should be used for each test, some making the argument that using the same machine for both tests constituted "repetition," but not "confirmation." This semantic argument is not persuasive. The statute does not require different machines to be used, as long as the machine used for the second test meets statutory requirements. Of course, where an employer chooses to use a preliminary EBT for the screening device, it will necessarily use two different machines.) Because of the reliability of EBT's meeting the requirements of this rule, we believe it would be unnecessarily expensive to require a second device to be used, which could have the effect of roughly doubling the capital equipment costs of the program.

Twelve of thirteen commenters opposed requiring a second confirmation test after the first confirmation test had been positive, a matter about which the NPRM preamble asked a question. The Department does not see a basis for requiring a second confirmation test, and we are not adding this requirement to the final rule.

A few commenters suggested getting rid of the requirement for the BAT to notify someone testing positive that he or she should not drive. The Department has decided to include a notice to this effect on the alcohol testing form, making direct participation by the BAT unnecessary.

Two commenters suggested that the rule be clarified to indicate that an employer could have more than one representative to whom results are transmitted. The Department has done so.
Two comments supported, and two opposed, the practice of back extrapolation to obtain a result. The Department's NPRMs proposed that the consequences of test results attach only to employees whose EBT readings were in fact at the stated levels. The Department did not propose to attach these consequences to inferences from EBT readings about what an employee's alcohol concentration might have been at an earlier point. For example, if an employee's EBT test result were .03, the requirement that the individual not again perform safety-sensitive functions until he or she was evaluated by a substance abuse professional (SAP) and had passed a return-to-duty test, and the requirement that the individual be subject to follow-up testing, would not apply because the employer, SAP, or another party believed that the individual's alcohol concentration had been .04 or greater prior to the test.

Given the wide individual variations in alcohol metabolism among individuals, such inferences involve considerable uncertainty. The Department is retaining the NPRM provision on this point. This would not prevent an OA from making use of back extrapolation in certain situations (e.g., FRA makes some use of back extrapolation in its existing toxicocological testing program, in a context involving the use of samples of two different body fluids; inquiries into accident causation or proceedings to revoke DOT-issued certificates or licenses held by employees, where expert testimony can be produced with the protection of the due process procedures of a hearing). These situations are different from the use of back extrapolation by employers in interpreting the results of tests conducted under part 40, however.

There will be some cases in which the BAT who conducts the screening test and the BAT who conducts the confirmation test are different people. For example, BAT #1 conducts a screening test, using an EBT not having sequential numbering or printout capabilities, in location A. The confirmation test, using a device that has these features, happens subsequently in location B, and is conducted by BAT #2. In such a case, to minimize the possibility of lost forms or other errors, the final rule provides that BAT #1 would complete the form for the screening test and give the employee his or her copy of the form. BAT #2 would then start a new form. The sections of the rule concerning screening and confirmation testing procedures have been modified to this effect.

Refused and Incomplete Tests

The final rule, in § 40.67, picks up paragraphs from the NPRM that do not fit conveniently in other sections. The first provides that if an employee refuses to take certain actions (e.g., complete and sign Step 2 of the form, provide breath) constitute a refusal to be tested. Such refusals, under the operating administration rules, have the same consequences as a test result of .04 or greater. The NPRM provision on which this paragraph is based was not the subject of comment. The second paragraph provides that if a test cannot be completed, or an event occurs that would invalidate the test, the BAT would, if practicable, run a retest. All seventeen comments on the subject favored this approach, and the Department is including it in the final rule.

Inability to Provide Sufficient Breath

The NPRM proposed that if an employee were unable to provide enough breath for an adequate sample, the BAT would ask the employee to try again. If the same result occurred, then the employee would be referred to a doctor for a medical evaluation. If the doctor determined that the inability to provide breath was due, or probably due, to a medical condition, the failure to provide the sample would be excused. If not, it would be treated as a refusal. Four comments supported the NPRM provision. Three others thought that this situation was unlikely to arise, since only an employee who was seriously disabled, unconscious, or dead would be unable to provide the modest quantity of breath required to complete a test. We agree that this situation should not occur frequently, but we believe it is sensible to have a procedure in place to handle the occasional occurrence.

Nine commenters suggested that, if the employee cannot provide sufficient breath, the employee should be required to provide a sample of a body fluid (e.g., blood, urine). Two comments urged employer discretion in these cases. Ten commenters said that there should be a medical evaluation in all cases where an employee cannot produce sufficient breath, though these commenters disagreed with each other about whether the employee should be held out of safety-sensitive functions pending the result of the evaluation.

Under the final rule, the employer is required to direct the employee to be medically evaluated in "shy lung" cases. The final rule directs the employer to ensure that this evaluation occurs as soon as possible. Employers, under their own authority, could choose to "stand down" an employee pending the result of a medical evaluation, but the rule does not require this step.

In addition, the accompanying NPRM proposes that blood testing may be used in post-accident and reasonable suspicion testing when an EBT is not readily available. Since blood testing, and procedures for it, may become part of the rule for these purposes, the Department is responding to these comments by proposing blood testing as an option (regardless of the type of testing involved) when an employee cannot provide a sufficient breath sample. If the NPRM's proposal is made part of a final rule, the employer would have discretion concerning which alternative (blood alcohol testing or a medical evaluation) to select. Persons interested in this issue are asked to comment to the NPRM docket.

Invalid Tests

The original NPRM listed nine "fatal flaws" that would invalidate breath tests. An invalid test is neither positive nor negative, and it has no consequences for an employee. The NPRM being published today proposes a similar list of fatal flaws for blood tests.

The NPRM proposed that failure to observe the 15-minute minimum waiting period before the confirmation test would be a fatal flaw; going over the 20-minute maximum would not. Comments generally agreed with this approach, noting that if exceeding a maximum waiting time were to be a fatal flaw, the outer limit should be 30 or 60 minutes rather than 20. One commenter opposed making observance of the minimum a fatal flaw. The Department is retaining the NPRM provision on this point.

The Department is changing the provision concerning air blanks to reflect the final rule's requirement of an air blank before only the confirmation test. Likewise, the NPRM provision making the device's failure to print out a result a fatal flaw has been changed to apply only to confirmation tests. The provision on disagreement between the printout and the machine display concerning sequential test numbers or alcohol concentration has been modified for the same reason. If the employee fails to sign Step 4 of the form, that is not a fatal flaw; the BAT's failure to note the employee's failure to sign that portion of the form would be a fatal flaw, however.

The NPRM proposed that if an EBT fails an external calibration check, every test performed on the device since the
Transportation Safety Board (NTSB). Employers must also make information about an employee's test available to that employee.

Seven commenters, most of whom were from the motor carrier industry, asked that employers be authorized or required to make testing information available to third parties without the employee's consent. In this industry, the commenters said, there was a high turnover rate. Employees move rapidly from employer to employer. In the absence of authorization or requirement for a former employer to provide testing information to a potential new employer, either the hiring process would be slowed or important information about positive tests in the employee's past would be unavailable to the new employer.

In response, the Department points out that an employer may, without authorization from DOT, require an applicant, as a condition of employment, to give written consent to the disclosure of this information by a former employer. The Department is adding a sentence to this provision of the rule telling employers that they must provide the information when the employee consents to its transmission to a third party. However, in order to maintain the confidentiality of sensitive information, in which employees have a significant privacy interest, the Department will not authorize the transmission of this information among employers or potential employers without written employee consent.

The Department emphasizes that the consent involved must be a specific written consent for information to be sent from one named party to another named party. Blanket consents (i.e., a consent for testing information to be sent from one named employer or members of a consortium) are not permitted. Each consent must pertain to one specific employer providing the information about a particular employee to another specific employer.

Two commenters suggested that an employee should not have to pay for obtaining information in his or her own file concerning alcohol tests. The Department believes that this is a matter better left to employer-employee agreements. As the Department interprets this provision, employers may impose reasonable charges to cover the cost of retrieval, copying, and transmission of the records requested. The employer is also expected only to provide copies within its possession or control (including documents that may be maintained by a consortium or third-party provider that conducted testing for the employer).

Records Concerning BATs and EBTs

The NPRM proposed that the employer maintain various records concerning EBTs and BATs for five years. One commenter suggested that consortia and third-party providers be authorized to keep the records instead of the employer. The Department agrees that this is reasonable, and the final rule requires the employer or its agent to maintain the records. The employer retains ultimate responsibility for producing the records, however. Two commenters suggested we reduce the record retention period to two years, while one commenter said that the recordkeeping requirements in the NPRM were not burdensome. Consistent with the OA rules, the final part 40 rule establishes a 5-year retention period for calibration records and a two-year retention period for other records.

Other Issues

A number of commenters asked that we modify the definition of alcohol to include alcohols other than ethanol (e.g., methanol, isopropanol), in order to avoid loopholes in the program that would allow an employee to claim that his or her alcohol concentration reading was the result of ingesting a non-ethanol substance. The NPRM preamble asked for suggestions on how to deal with this. The final regulation includes a modified definition of alcohol use, which emphasizes that any consumption of a preparation including alcohol (e.g., beverages, medicines) counts as alcohol use.

A few commenters asked that, for convenience, we centralize all the definitions in part 40 in one section. We have done so, and all the definitions are now in § 40.3.

The NPRM preamble asked for suggestions on how to deal with situations in which an arbitrator took an employer's personal action based on an alcohol test result. Employers had expressed concern about perceived conflicts between the arbitrator's decisions and DOT regulations, and several commenters echoed these concerns. The Department is not convinced, however, that this problem is either frequent enough or serious enough to warrant a mandate in the regulatory text. Such a mandate, because it could not anticipate all the nuances of the factual situations involved, might interfere with...
reasonable resolutions of particular disputes. However, it is clear that employers are obligated to comply with DOT safety regulations, which have the force and effect of law. As a matter of law, no decision by an employer, employee organization, or individual or group appointed by those or other parties, can have the effect of excusing noncompliance by an employer with a provision of a DOT safety regulation. If a violation of DOT rules has occurred, then the consequences prescribed by DOT rules must follow (e.g., the employee must be removed from performing a safety-sensitive function).

In the NPRM preamble, the Department included a discussion of handling of perceived conflicts between part 40 and operating administration regulations, exemptions, and the obligations of consortia and third-party providers (57 FR 59410; December 15, 1992). This discussion applies to the implementation of the final part 40 as well. The relevant language is reprinted below:

Although implementation of part 40 generally would be done through an operating administration, part 40 is an Office of the Secretary of Transportation (OST) regulation. As such, requests for exemption would be processed under 49 CFR part 5, an existing regulation covering requests for exemption from or amendment to all OST rules, rather than through separate operating administration exemption procedures. This would add an additional element of consistency. This approach is consistent with the existing part 40 drug testing procedures, from which exemptions would also be granted under part 40. (See 54 FR 49863; December 1, 1989).

The grant of an exemption under part 40 must be based on special or exceptional circumstances. It is not appropriate to carve out a generally applicable exception to a rule. Also, an exemption must be based on circumstances not contemplated as part of the rulemaking. The exemption process is not designed to revisit issues settled in the rulemaking process.

Section 40.1 would also emphasize that other parties involved in the testing process—such as consortia, contractors, and agents—"stand in the shoes" of the employer. They are, therefore, subject to the same obligations and requirements as the employer. If an employer is required to do something, so is the consortium that is conducting testing for the employer. If the consortium fails to do something correctly, the employer is in noncompliance.

Since, as noted above, part 40 is a regulation of the Office of the Secretary of Transportation, the source of definitive interpretations of the rule is the Office of the Secretary. Interpretations have been and will continue to be made in close coordination among the OAs, the Office of Drug Enforcement and Program Compliance (DEPC), and the Office of General Counsel.

Regulatory Analyses and Notices

Because of substantial public interest and substantial impacts on a wide range of private and public sector organizations, the Department has determined that this rule—in conjunction with the operating administration alcohol and drug testing rules—is significant under Executive Order 12866. The rule has been reviewed under this Order. It is also significant under the Department’s regulatory policies and procedures. The Department has prepared a regulatory evaluation for part 40, which we have included in the docket. The costs of the application of part 40 procedures to the programs of the various OAs are estimated in each of the OAs’ regulatory evaluations for their drug and alcohol rules being published today.

This rule, in conjunction with the operating administration drug and alcohol testing rules, is likely to have a significant economic impact on a substantial number of small entities. These impacts are assessed in the OAs' regulatory evaluations. The Federalism impacts of this rule are either minimal or required by statute; for these reasons, we have not prepared a Federalism assessment.

This rule also contains collection of information requirements. The Department has submitted these requirements to the Office of Management and Budget for review and approval under the Paperwork Reduction Act (44 U.S.C. 350, et. seq.). Please see the Common Preamble on the status of Paperwork Reduction Act approvals.

List of Subjects in 49 CFR Part 40

Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.
EBTs using gas chromatography technology, a reading of the device’s internal standard.

Alcohol. The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

**Alcohol concentration.** The alcohol in a volume of breath expressed in terms of grams of alcohol per 210 liters of breath as indicated by a breath test including methyl or isopropyl alcohol.

**Aliquot.** A portion of a specimen used for testing.

**Blind sample or blind performance test specimen.** A urine specimen submitted to a laboratory for quality control testing purposes, with a fictitious identifier, so that the laboratory cannot distinguish it from employee specimens, and which is spiked with known quantities of specific drugs or which is blank, containing no drugs.

**Breath Alcohol Technician (BAT).** An individual who instructs and assists individuals in the alcohol testing process and operates an EBT.

**Canceled or invalid test.** In drug testing, a drug test that has been declared invalid by a Medical Review Officer. A canceled test is neither a positive nor a negative test. For purposes of this part, a sample that has been rejected for testing by a laboratory is treated the same as a canceled test. In alcohol testing, a test that is deemed to be invalid under § 40.79. It is neither a positive nor a negative test.

**Chain of custody.** A record of procedures to account for the integrity of each urine or blood specimen by tracking its handling and storage from point of specimen collection to final disposition of the specimen. With respect to drug testing, these procedures shall require that an appropriate drug testing custody form (see § 40.23(a)) be used from time of collection to receipt by the laboratory and that upon receipt by the laboratory an appropriate laboratory chain of custody form(s) account(s) for the sample or urine aliquots within the laboratory.

**Collection container.** A container into which the employee urinates to provide the urine sample used for a drug test.

**Collection site.** A place designated by an employer where individuals present themselves for the purpose of providing a specimen of their urine to be analyzed for the presence of drugs.

**Collection site person.** A person who instructs and assists individuals at a collection site and who receives and makes a screening examination of the urine specimen provided by those individuals.

**Confirmation (or confirmatory) test.** In drug testing, a second analytical procedure to identify the presence of a specific drug or metabolite that is independent of the screening test and that uses a different technique and chemical principle from that of the screening test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.) In alcohol testing, a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

**DHHS.** The Department of Health and Human Services or any designee of the Secretary, Department of Health and Human Services.

**DOT agency.** An agency of the United States Department of Transportation administering regulations related to drug or alcohol testing, including the United States Coast Guard (for drug testing purposes only), the Federal Aviation Administration, the Federal Railroad Administration, the Federal Highway Administration, the Federal Transit Administration, the Research and Special Programs Administration, and the Office of the Secretary.

**Employee.** An individual designated in a DOT agency regulation as subject to drug testing and/or alcohol testing. As used in this part “employee” includes an applicant for employment.

**Employee and individual** or “individual to be tested” have the same meaning for purposes of this part.

**Employer.** An entity employing one or more employees that is subject to DOT agency regulations requiring compliance with this part. As used in this part, “employer” includes an industry consortium or joint enterprise comprised of two or more employing entities.

**EBT (or evidential breath testing device).** An EBT approved by the National Highway Traffic Safety Administration (NHTSA) for the evidential testing of breath and placed on NHTSA’s “Conforming Products List of Evidential Breath Measurement Devices” (CPL).

**Medical Review Officer (MRO).** A licensed physician (medical doctor or doctor of osteopathy) responsible for receiving laboratory results generated by an employer’s drug testing program who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual’s confirmed positive test result together with his or her medical history and any other relevant biomedical information.

**Screening test (or initial test).** In drug testing, an immunoassay screen to eliminate “negative” urine specimens from further analysis. In alcohol testing, an analytic procedure to determine whether an employee may have a prohibited concentration of alcohol in a breath specimen.

**Secretary.** The Secretary of Transportation or the Secretary’s designee.

**Shipping container.** A container capable of being secured with a tamper-evident seal that is used for transfer of one or more urine specimen bottle(s) and associated documentation from the collection site to the laboratory.

**Specimen bottle.** The bottle that, after being labeled and sealed according to the procedures in this part, is used to transmit a urine sample to the laboratory.

§§ 40.5—40.19 [Reserved]

2. §§ 40.21 through 40.30 are designated subpart B.

Subpart B—Drug Testing

40.21 The drugs.

40.23 Preparation for testing.

40.25 Specimen collection procedures.

40.27 Laboratory personnel.

40.29 Laboratory analysis procedures.

40.31 Quality assurance and quality control.

40.33 Reporting and review of results.

40.35 Protection of employee records.

40.37 Individual access to test and laboratory certification results.

40.38 Use of DHHS-certified laboratories.


3. In § 40.25, paragraph (f)(10) is revised to read as follows:

§ 40.25 Specimen collection procedures. 

(f) * * * * *

(10) The collection site person shall instruct the employee to provide at least 45 ml of urine under the split sample method of collection or 30 ml of urine under the single sample method of collection.

(A) Employers with employees subject to drug testing only under the drug testing rules of the Research and Special Programs Administration and/or Coast Guard may use the “split sample” method of collection or may collect a single sample for those employees.

(B) Employers with employees subject to drug testing under the drug testing rules of the Federal Highway Administration, Federal Railroad...
the cancellation and the reasons for it to MRO shall cancel the test, and report specimen fails to reconfirm the presence regulations as the result of a positive specimen. a safety-sensitive function) is not stayed ding test (e.g., removal from performing laboratory to the MRO. specimen is transmitted by the second request, and the split specimen copy of with seal intact, a copy of the MRO has requested a test of the split specimen, the laboratory may discard the split specimen. (3) When directed in writing by the MRO to forward the split specimen to another DHHS-certified laboratory for analysis, the second laboratory shall analyze the split specimen by GC/MS to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen. Such GC/MS confirmation shall be conducted without regard to the cutoff levels of §40.29(f). The split specimen shall be retained in long-term storage for one year by the laboratory conducting the analysis of the split specimen (or longer if litigation concerning the test is pending).

6. In §40.33 paragraphs (e), (f) and (g) are revised; paragraph (h) is redesignated as paragraphs (I), and a new paragraph (h) is added, as follows:

§40.33 Reporting and review of results.

(e) In a situation in which the employer has used the single sample method of collection, the MRO shall notify each employee who has a confirmed positive test that the employee has 72 hours in which to request a reanalysis of the original specimen, if the test is verified positive. If requested to do so by the employee within 72 hours of the employee’s having been informed of a verified positive test, the Medical Review Officer shall direct, in writing, such a reanalysis if the MRO questions the accuracy or validity of any test result. Only the MRO may authorize such a reanalysis, and such a reanalysis may take place only at laboratories certified by DHHS. If the reanalysis fails to reconfirm the presence of the drug or drug metabolite, the MRO shall cancel the test and report the cancellation and the reasons for it to the DOT, the employer, and the employee.

§40.29 Laboratory analysis procedures.

(b) * * * * * * * *(2) In situations where the employer uses the split sample collection method, the laboratory shall log in the split specimen, with the split specimen bottle seal remaining intact. The laboratory shall store this sample securely (see paragraph (c) of this section). If the result of the test of the primary specimen is negative, the laboratory may discard the split specimen. If the result of the test of the primary specimen is positive, the laboratory shall retain the split specimen in frozen storage for 60 days from the date on which the laboratory acquires it (see paragraph (h) of this section). Following the end of the 60-day period, if not informed by the MRO that the employee has requested a test of the split specimen, the laboratory may discard the split specimen.
§ 40.51 The breath alcohol technician.
(a) The breath alcohol technician (BAT) shall be trained to proficiency in the operation of the EBT he or she is using and in the alcohol testing procedures of this part.
(1) Proficiency shall be demonstrated by successful completion of a course of instruction which, at a minimum, provides training in the principles of EBT methodology, operation, and calibration checks; the fundamentals of breath analysis for alcohol content; and the procedures required in this part for obtaining a breath sample, and interpreting and recording EBT results.
(2) Only courses of instruction for operation of EBTs that are equivalent to the Department of Transportation model course, as determined by the National Highway Traffic Safety Administration (NHTSA), may be used to train BATs to proficiency. On request, NHTSA will review a BAT instruction course for equivalency.
(3) The course of instruction shall provide documentation that the BAT has demonstrated competence in the operation of the specific EBT(s) he/she will use.
(4) Any BAT who will perform an external calibration check of an EBT shall be trained to proficiency in conducting the check on the particular model of EBT, to include practical experience and demonstrated competence in preparing the breath alcohol simulator or alcohol standard, and in maintenance and calibration of the EBT.
(5) The BAT shall receive additional training, as needed, to ensure proficiency, concerning new or additional devices or changes in technology that he or she will use.
(b) EBTs shall be capable of assigning a unique and sequential number to each test and, in each instance, the number shall be a permanent part of the EBT.
§ 40.53 Devices to be used for breath alcohol tests.
(a) For screening tests, employers shall use only EBTs. When the employer uses for a screening test an EBT that does not meet the requirements of paragraphs (b) (1) through (3) of this section, the employer shall use a log book in conjunction with the EBT (see § 40.59(c)).
(b) For confirmation tests, employers shall use EBTs that meet the following requirements:
(1) EBTs shall have the capability of providing, independently or by direct link to a separate printer, a printed result in triplicate (or three consecutive identical copies) of each breath test and of the operations specified in paragraphs (b) (2) and (3) of this section.
(2) EBTs shall be capable of assigning a unique and sequential number to each completed test, with the number capable of being read by the BAT and the employee before each test and being printed out on each copy of the result.
(3) EBTs shall be capable of printing out, on each copy of the result, the manufacturer’s name for the device, the device’s serial number, and the time of the test.
(4) EBTs shall be able to distinguish alcohol from acetone at the 0.02 alcohol concentration level.
(5) EBTs shall be capable of the following operations:
(i) Testing an air blank prior to each collection of breath; and
(ii) Performing an external calibration check.
§ 40.55 Quality assurance plans for EBTs.
(a) In order to be used in either screening or confirmation alcohol testing subject to this part, an EBT shall have a quality assurance plan (QAP) developed by the manufacturer.
(1) The plan shall designate the method or methods to be used to perform external calibration checks of the device, using only calibration devices on the NHTSA “Conforming Products List of Calibrating Units for Breath Alcohol Tests.”
(2) The plan shall specify the minimum intervals for performing external calibration checks of the device. Intervals shall be specified for different frequencies of use, environmental conditions (e.g., temperature, altitude, humidity), and contexts of operation (e.g., stationary or mobile use).
(3) The plan shall specify the tolerances on an external calibration check within which the EBT is regarded to be in proper calibration.
(4) The plan shall specify inspection, maintenance, and calibration
requirements and intervals for the device.

(5) For a plan to be regarded as valid, the manufacturer shall have submitted the plan to NHTSA for review and have received NHTSA approval of the plan.

(b) The employer shall comply with the NHTSA-approved quality assurance plan for each EBT it uses for alcohol screening or confirmation testing subject to this part.

(1) The employer shall ensure that external calibration checks of each EBT are performed as provided in the QAP.

(2) The employer shall take an EBT out of service if any external calibration check results in a reading outside the tolerances for the EBT set forth in the QAP. The EBT shall not again be used for alcohol testing under this part until it has been serviced and has had an external calibration check resulting in a reading within the tolerances for the EBT.

(3) The employer shall ensure that inspection, maintenance, and calibration of each EBT are performed by the manufacturer or a maintenance representative certified by the device’s manufacturer or a state health agency or other appropriate state agency. The employer shall also ensure that each EBT or other individual who performs an external calibration check of an EBT used for alcohol testing subject to this part has demonstrated proficiency in conducting such a check of the model of EBT in question.

(4) The employer shall maintain records of the external calibration checks of EBTs as provided in §40.83.

(c) When the employer is not using the EBT at an alcohol testing site, the employer shall store the EBT in a secure space.

§40.57 Locations for breath alcohol testing.

(a) Each employer shall conduct alcohol testing in a location that affords visual and aural privacy to the individual being tested, sufficient to prevent unauthorized persons from seeing or hearing test results. All necessary equipment, personnel, and materials for breath testing shall be provided at the location where testing is conducted.

(b) An employer may use a mobile collection facility (e.g., a van equipped for alcohol testing) that meets the requirements of paragraph (a) of this section.

(c) No unauthorized persons shall be permitted access to the testing location when the EBT remains unsecured or, in order to prevent such persons from seeing or hearing a testing result, at any time when testing is being conducted.

(d) In unusual circumstances (e.g., when it is essential to conduct a test outdoors at the scene of an accident), a test may be conducted at a location that does not fully meet the requirements of paragraph (a) of this section. In such a case, the employer or BAT shall provide visual and aural privacy to the employee to the greatest extent practicable.

(e) The BAT shall supervise only one employee’s use of the EBT at a time. The BAT shall not leave the alcohol testing location while the testing procedure for a given employee (see §§40.61 through 40.65) is in progress.

§40.59 The breath alcohol testing form and log book.

(a) Each employer shall use the breath alcohol testing form prescribed under this part. The form is found in appendix A to this subpart. Employers may not modify or revise this form, except that a test result printed by the EBT may omit the space for affixing a separate printed result to the form.

(b) The form shall provide triplicate (or three consecutive identical) copies. Copy 1 (white) shall be retained by the BAT. Copy 2 (green) shall be provided to the employee. Copy 3 (blue) shall be transmitted to the employer. Except for a form generated by an EBT, the form shall be 8½ by 11 inches in size.

(c) A log book shall be used in conjunction with any EBT used for screening tests that does not meet the requirements of §40.53(b)(1) through (3). There shall be a log book for each such device, that is not used in conjunction with any other device and that is used to record every test conducted on the device. The log book shall include columns for the test number, date of the test, name of the BAT, location of the test, quantified test result, and initials of the employee taking each test.

§40.61 Preparation for breath alcohol testing.

(a) When the employee enters the alcohol testing location, the BAT will require him or her to provide positive identification (e.g., through use of a photo ID, card or identification by an employer representative). On request by the employee, the BAT shall provide positive identification to the employee.

(b) The BAT shall explain the testing procedure to the employee.

§40.63 Procedures for screening tests.

(a) The BAT shall complete Step 1 on the Breath Alcohol Testing Form. The employee shall then complete Step 2 on the form, signing the certification in Step 3 of the form. The BAT shall transmit the result of less than 0.02 to the employer in a certification shall be regarded as a refusal to take the test. A refusal by the employee to blow forcefully into the mouthpiece for at least 6 seconds or until the EBT indicates that an adequate amount of breath has been obtained. (d)(1) If the EBT does not meet the requirements of §40.53(b)(1) through (3), the BAT and the employee shall take the following steps:

(i) Show the employee the result displayed on the EBT. The BAT shall record the displayed result, test number, testing device, serial number of the testing device, time and quantified result in Step 3 of the form.

(ii) Record the test number, date of the test, name of the BAT, location, and quantified test result in the log book. The employee shall initial the log book entry.

(2) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(3) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(d) In any case in which the result of the screening test is a breath alcohol concentration of less than 0.02, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee’s failure to sign or initial in the “Remarks” section of the form.

(3) If a test result printed by the EBT (see paragraph (d)(2) or (d)(3) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with §40.79, the test is invalid and the employer and employee shall be so advised.

(4) No further testing is authorized. The BAT shall transmit the result of less than 0.02 to the employer in a case.
confidential manner, and the employer shall receive and store the information so as to ensure that confidentiality is maintained as required by §40.81. 

(f) If the result of the screening test is an alcohol concentration of 0.02 or greater, a confirmation test shall be performed as provided in § 40.65. 

(g) If the confirmation test will be conducted by a different BAT, the BAT who conducts the screening test shall complete and sign the form and log book entry. The BAT will provide the employee with Copy 2 of the form.

§ 40.65 Procedures for confirmation tests. 

(a) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall follow the procedures of § 40.61. 

(b) The BAT shall instruct the employee not to eat, drink, put any object or substance in his or her mouth, and, to the extent possible, not belch during a waiting period before the confirmation test. This time period begins with the completion of the screening test, and shall not be less than 15 minutes. The confirmation test shall be conducted within 20 minutes of the completion of the screening test. The BAT shall explain to the employee the reason for this requirement (i.e., to prevent any accumulation of mouth alcohol leading to an artificially high reading) and the fact that it is for the employee’s benefit. The BAT shall also explain that the test will be conducted at the end of the waiting period, even if the employee has disregarded the instruction. If the BAT becomes aware that the employee has not complied with this instruction, the BAT shall so note in the “Remarks” section of the form.

(c) (1) If a BAT other than the one who conducted the screening test is conducting the confirmation test, the new BAT shall initiate a new Breath Alcohol Testing form. The BAT shall complete Step 1 on the form. The employee shall then complete Step 2 on the form, signing the certification. Refusal by the employee to sign this certification shall be regarded as a refusal to take the test. The BAT shall note in the “Remarks” section of the form that a different BAT conducted the screening test.

(2) In all cases, the procedures of § 40.63 (a), (b), and (c) shall be followed. A new mouthpiece shall be used for the confirmation test.

(d) Before the confirmation test is administered for each employee, the BAT shall ensure that the EBT registers 0.00 on an air blank. If the reading is greater than 0.00, the BAT shall conduct one more air blank. If the reading is greater than 0.00, testing shall not proceed using that instrument. However, testing may proceed on another instrument.

(e) Any EBT taken out of service because of failure to perform an air blank accurately shall not be used for testing until a check of external calibration is conducted and the EBT is found to be within tolerance limits.

(f) In the event that the screening and confirmation test results are not identical, the confirmation test result is deemed to be the final result upon which any action under operating administration rules shall be based.

(g) (1) If the EBT provides a printed result, but does not print the results directly onto the form, the BAT shall show the employee the result displayed on the EBT. The BAT shall then affix the test result printout to the breath alcohol test form in the designated space, using a method that will provide clear evidence of removal (e.g., tamper-evident tape).

(2) If the EBT prints the test results directly onto the form, the BAT shall show the employee the result displayed on the EBT.

(h) (1) Following the completion of the test, the BAT shall date the form and sign the certification in Step 3 of the form. The employee shall sign the certification and fill in the date in Step 4 of the form.

(2) If the employee does not sign the certification in Step 4 of the form or does not initial the log book entry for a test, it shall not be considered a refusal to be tested. In this event, the BAT shall note the employee’s failure to sign or initial in the “Remarks” section of the form.

(3) If a test result printed by the EBT (see paragraph (g)(1) or (g)(2) of this section) does not match the displayed result, the BAT shall note the disparity in the remarks section. Both the employee and the BAT shall initial or sign the notation. In accordance with § 40.79, the test is invalid and the employer and employee shall be so advised.

(4) The BAT shall conduct an air blank. If the reading is greater than 0.00, the test is invalid.

(i) The BAT shall transmit all results to the employer in a confidential manner.

(1) Each employer shall designate one or more employer representatives for the purpose of receiving and handling alcohol testing results in a confidential manner. All communications by BAT’s to the employer concerning the alcohol testing results of employees shall be to a designated employer representative.

(2) Such transmission may be in writing, in person or by telephone or electronic means, but the BAT shall ensure immediate transmission to the employer of results that require the employer to prevent the employee from performing a safety-sensitive function.

(3) If the initial transmission is not in writing (e.g., by telephone), the employer shall establish a mechanism to verify the identity of the BAT providing the information.

(4) If the initial transmission is not in writing, the BAT shall follow the initial transmission by providing to the employer the employer’s copy of the breath alcohol testing form. The employer shall store the information so as to ensure that confidentiality is maintained as required by § 40.81.

§ 40.67 Refusals to test and uncompelled tests.

(a) Refusal by an employee to complete and sign the breath alcohol testing form (Step 2), to provide breath, to provide an adequate amount of breath, or otherwise to cooperate with the testing process in a way that prevents the completion of the test, shall be noted by the BAT in the remarks section of the form. The testing process shall be terminated and the BAT shall immediately notify the employer.

(b) If a screening or confirmation test cannot be completed, or if an event occurs that would invalidate the test, the BAT shall, if practicable, begin a new screening or confirmation test, as applicable, using a new breath alcohol testing form with a new sequential test number (in the case of a screening test conducted on an EBT that meets the requirements of § 40.53(b) or in the case of a confirmation test).

§ 40.69 Inability to provide an adequate amount of breath.

(a) This section sets forth procedures to be followed in any case in which an employee is unable, or alleges that he or she is unable, to provide an amount of breath sufficient to permit a valid breath test because of a medical condition.

(b) The BAT shall again instruct the employee to attempt to provide an adequate amount of breath. If the employee refuses to make the attempt, the BAT shall immediately inform the employer.

(c) If the employee attempts and fails to provide an adequate amount of breath, the BAT shall so note in the “Remarks” section of the breath alcohol testing form and immediately inform the employer.

(d) If the employee attempts and fails to provide an adequate amount of breath, the employer shall proceed as follows:
(1) The employer shall direct the employee to obtain, as soon as practical after the attempted provision of breath, an evaluation from a licensed physician who is acceptable to the employer concerning the employee’s medical ability to provide an adequate amount of breath.

(i) If the physician determines, in his or her reasonable medical judgment, that a medical condition has, or with a high degree of probability, could have, precluded the employee from providing an adequate amount of breath, the employee’s failure to provide an adequate amount of breath shall not be deemed a refusal to take a test. The physician shall provide to the employer a written statement of the basis for his or her conclusion.

(ii) If the licensed physician, in his or her reasonable medical judgment, is unable to make the determination set forth in paragraph (d)(2)(i) of this section the employee’s failure to provide an adequate amount of breath shall be regarded as a refusal to take a test. The licensed physician shall provide a written statement of the basis for his or her conclusion to the employer.

§40.71-40.77 [Reserved]

§40.79 Invalid tests.

(a) A breath alcohol test shall be invalid under the following circumstances:

(1) The next external calibration check of an EBT produces a result that differs by more than the tolerance stated in the QAP from the known value of the test standard. In this event, every test result of 0.02 or above obtained on the device since the last valid external calibration check shall be invalid;

(2) The BAT does not observe the minimum 15-minute waiting period prior to the confirmation test, as provided in §40.65(b);

(3) The BAT does not perform an air blank of the EBT before a confirmation test, or an air blank does not result in a reading of 0.00 prior to or after the administration of the test, as provided in §40.65;

(4) The BAT does not sign the form as required by §§40.63 and 40.65;

(5) The BAT has failed to note on the remarks section of the form that the employee has failed or refused to sign the form following the recording or printing on or attachment to the form of the test result;

(6) An EBT fails to print a confirmation test result; or

(7) On a confirmation test and, where applicable, on a screening test, the sequential test number or alcohol concentration displayed on the EBT is not the same as the sequential test number or alcohol concentration on the printed result.

(b) [Reserved]

§40.81 Availability and disclosure of alcohol testing information about individual employees.

(a) Employers shall maintain records in a secure manner, so that disclosure of information to unauthorized persons does not occur.

(b) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in the records required to be maintained by this part or by DOT agency alcohol misuse rules.

(c) Information about an employee subject to testing 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.

(d) Each employer shall permit access to all facilities utilized in complying with the requirements of this part and DOT agency alcohol misuse rules to the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations).

(e) When requested by the Secretary of Transportation, any DOT agency with regulatory authority over the employer, or a state agency with regulatory authority over the employer (as authorized by DOT agency regulations), each employer shall make available copies of all results for employer alcohol testing conducted under the requirements of this part and any other information pertaining to the employer’s alcohol misuse prevention program. The information shall include name-specific alcohol test results, records and reports.

(f) When requested by the National Transportation Safety Board as part of an accident investigation, an employer shall disclose information related to the employer’s administration of any post-accident alcohol tests administered following the accident under investigation.

(g) An employer shall make records available to a subsequent employer upon receipt of a written request from a covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee’s written request.

(b) An employer may disclose information required to be maintained under this part pertaining to a covered employee to that 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 the requirements of this part, or from the employer’s determination that the employee engaged in conduct prohibited by a DOT agency alcohol misuse regulation (including, but not limited to, a worker’s compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) 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 is permitted only in accordance with the terms of the employee’s consent.

§40.83 Maintenance and disclosure of records concerning EBTs and BATs.

(a) Each employer or its agent shall maintain the following records for two years:

(1) Records of the inspection and maintenance of each EBT used in employee testing;

(2) Documentation of the employer’s compliance with the QAP for each EBT it uses for alcohol testing under this part;

(3) Records of the training and proficiency testing of each BAT used in employee testing;

(4) The log books required by §40.59(c);

(b) Each employer or its agent shall maintain for five years records pertaining to the calibration of each EBT used in alcohol testing under this part, including records of the results of external calibration checks.

(c) Records required to be maintained by this section shall be disclosed on the same basis as provided in §40.81.

Appendix A to Subpart C of Part 40—The Breath Alcohol Testing Form
U.S. Department of Transportation (DOT)  
Breath Alcohol Testing Form

[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]

STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name ________________________________________________________________
   (PRINT) (First, M.I., Last)

B. SSN or Employee ID No. _______________________________________________________

C. Employer Name, Address, & Telephone No. _______________________________________

D. Reason for Test: □ Pre-employment □ Random □ Reasonable Suspicion/Cause □ Post-accident □ Return to Duty □ Follow-up

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee ___________________________ Date ___ / ___ / ___

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

<table>
<thead>
<tr>
<th>Test No.</th>
<th>Testing Device Name</th>
<th>Testing Device Serial Number</th>
<th>Time</th>
<th>Result</th>
</tr>
</thead>
</table>

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks:

(PART) Breath Alcohol Technician's Name (First, M.I., Last) ___________________________ Signature of Breath Alcohol Technician ___________________________ Date ___ / ___ / ___

STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee ___________________________ Date ___ / ___ / ___

COPY 1 - ORIGINAL - BREATH ALCOHOL TECHNICIAN RETAINS

OMB No. 2105-0529
AFFIX SCREENING TEST RESULTS HERE (IF APPLICABLE)

USE TAMPER-EVIDENT TAPE

AFFIX CONFIRMATION TEST RESULTS HERE

USE TAMPER-EVIDENT TAPE

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average: 3 minutes/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3001, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 1 - ORIGINAL - BREATH ALCOHOL TECHNICIAN RETAINS
U.S. Department of Transportation (DOT)
Breath Alcohol Testing Form

(The instructions for completing this form are on the back of Copy 3)

STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

A. Employee Name ______________________
   (PRINT) (First, M.I., Last)

B. SSN or Employee ID No.

C. Employer Name, Address, & Telephone No.

D. Reason for Test: □ Pre-employment □ Random □ Reasonable Suspicion/Cause □ Post-accident □ Return to Duty □ Follow-up

STEP 2: TO BE COMPLETED BY EMPLOYEE

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

Signature of Employee

STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

Screening test: Complete only if the testing device is not designed to print the following.

<table>
<thead>
<tr>
<th>Test No.</th>
<th>Testing Device Name</th>
<th>Testing Device Serial Number</th>
<th>Time</th>
<th>Result</th>
</tr>
</thead>
</table>

Confirmation test: Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks:

Signature of Breath Alcohol Technician

STEP 4: TO BE COMPLETED BY EMPLOYEE

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

Signature of Employee

COPY 2 - EMPLOYEE RETAINS

OMB No. 2105-0529
Privacy Act Statement
(applicable in those cases where completed Breath Alcohol Testing Forms are retained in a Federal Privacy Act system of records)
Except for your Social Security Number (SSN), submission of the information on the front side of this form is mandatory. Incomplete submission of the information, failure to provide an adequate breath specimen for testing without a valid medical explanation, engaging in conduct that clearly obstructs the testing process, or failure to sign the certification statements on the front side of this form may result in delay or denial of your application for employment/appointment, your inability to resume performing safety-sensitive duties, removal from a safety-sensitive position, or other disciplinary action.

The authority for obtaining the breath specimen required by the U.S. Department of Transportation is the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102-143, Title V. The principal purpose for which the information sought is to be used is to ensure that you have submitted to breath alcohol testing and to ensure that you are promptly notified in the event of non-compliance with the U.S. Department of Transportation breath alcohol testing requirements.

Submission of your SSN is not required by law and is voluntary. If you object to the use of your SSN in this form, you will not be denied any right, benefit, or privilege provided by law; a substitute number or other identifier will be assigned.

The information provided in this form may be disclosed, as a routine use, to a Federal, State, or local agency for authorized investigative or enforcement purposes or to a court or an administrative tribunal when the Government or one of its agencies is a party to a judicial proceeding before the court or involved in administrative proceedings before the tribunal.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)
Public reporting burden for this collection of information is estimated for each respondent to average 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S. Department of Transportation, Drug Enforcement and Program Compliance, Room 9404, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3603, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 2 - EMPLOYEE RETAINS
**U.S. Department of Transportation (DOT)**

**Breath Alcohol Testing Form**

*[THE INSTRUCTIONS FOR COMPLETING THIS FORM ARE ON THE BACK OF COPY 3]*

**STEP 1: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN**

A. Employee Name ______________ (PRINT) (First, M.I., Last)

B. SSN or Employee ID No.

C. Employer Name, Address, 
Telephone No. ________________

D. Reason for Test: [ ] Pre-employment [ ] Random [ ] Reasonable Suspicion/Cause [ ] Post-accident [ ] Return to Duty [ ] Follow-up

**STEP 2: TO BE COMPLETED BY EMPLOYEE**

I certify that I am about to submit to breath alcohol testing required by U.S. Department of Transportation regulations and that the identifying information provided on this form is true and correct.

**STEP 3: TO BE COMPLETED BY BREATH ALCOHOL TECHNICIAN**

I certify that I have conducted breath alcohol testing on the above named individual in accordance with the procedures established in the U.S. Department of Transportation regulation, 49 CFR Part 40, that I am qualified to operate the testing devices identified, and that the results are as recorded.

**Screening test:** Complete only if the testing device is not designed to print the following.

- Test No.
- Testing Device Name
- Testing Device Serial Number
- Time
- Result

**Confirmation test:** Confirmation test results MUST be affixed to the back of each copy of this form.

Remarks:

__________________________

(PRTINT) Breath Alcohol Technician's Name (First, M.I., Last) ________________

Signature of Breath Alcohol Technician ________________ Date ____________

**STEP 4: TO BE COMPLETED BY EMPLOYEE**

I certify that I have submitted to breath alcohol testing and the results are as recorded on this form. I understand that I must not drive, perform safety-sensitive duties, or operate heavy equipment if the results are 0.02 or greater.

__________________________

Signature of Employee ________________ Date ____________

COPY 3 - FORWARD TO THE EMPLOYER

OMB No. 2105-0529
INSTRUCTIONS FOR COMPLETING THE U.S. DEPARTMENT OF TRANSPORTATION BREATH ALCOHOL TESTING FORM

NOTE: Use a ballpoint pen, press hard, and check all copies for legibility.

STEP 1 The Breath Alcohol Technician (BAT) completes the information required in this step. Be sure to print the employee's name and check the box identifying the reason for the test.

NOTE: If the employee refuses to provide SSN or ID number, be sure to indicate this in the remarks section in STEP 3. Proceed with STEP 2.

STEP 2 Instruct the employee to read, sign, and date the employee certification statement in STEP 2.

NOTE: If the employee refuses to sign the certification statement, do not proceed with the alcohol test. Contact the designated employer representative.

STEP 3 The Breath Alcohol Technician (BAT) completes the information required in this step. After conducting the alcohol screening test, do the following (as appropriate):

If the breath testing device used in conducting the screening test is not capable of printing the screening test information located on the front of this form (test number, testing device name, testing device serial number, time of test and results), complete this information in the space provided on the front of this form.

NOTE: Be sure to enter the result of the test exactly as it is indicated on the breath testing device, i.e., 0.00, 0.02, 0.04, etc.

OR, If the breath testing device used in conducting the screening test is capable of printing the screening test information located on the front of this form, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

If the results of the screening test are less than 0.02, print, sign your name, and enter today's date in the space provided. Go to STEP 4.

If the results of the screening test are 0.02 or greater, a confirmation test must be administered in accordance with DOT regulations. An EVIDENTIAL BREATH TESTING device that is capable of printing confirmation test information must be used in conducting this test.

After conducting the alcohol confirmation test, affix the printed information in the space provided above. Be sure to use tamper-evident tape.

Print, sign your name, and enter the date in the space provided. Go to STEP 4.

STEP 4 Instruct the employee to read, sign, and date the employee certification statement in STEP 4.

NOTE: If the employee refuses to sign the certification statement in STEP 4, be sure to indicate this in the remarks section in STEP 3.

Retain Copy 1 (white page) for BAT records.
Give Copy 2 (green page) to the employee.
Forward Copy 3 (blue page) to the employer.

PAPERWORK REDUCTION ACT NOTICE (as required by 5 CFR 1320.21)

Public reporting burden for this collection of information is estimated for each respondent to average 1 minute/employee, 4 minutes/Breath Alcohol Technician. Individuals may send comments regarding these burden estimates, or any other aspect of this collection of information, including suggestions for reducing the burden, to U.S.: Department of Transportation, Drug Enforcement and Program Compliance, Room 5401, 400 Seventh St., SW, Washington, D.C. 20590 or Office of Management and Budget, Paperwork Reduction Project, Room 3513, 725 Seventeenth St., NW, Washington, D.C. 20503.

COPY 3 - FORWARD TO THE EMPLOYER
Office of the Secretary

49 CFR Part 40

[Notice 49384, Notice 94–3]

RIN 2105-AB95

Procedures for Transportation Workplace Drug and Alcohol Testing Programs

AGENCY: Office of the Secretary, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Transportation (DOT) is required to implement alcohol testing programs in various transportation industries. This proposed rule would establish circumstances in which blood alcohol testing could be used in these programs and procedures that would be used for blood alcohol testing.

DATES: Comments on this notice of proposed rulemaking should be received by May 16, 1994. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Comments should be sent to the Docket Clerk, Att: Docket No. 49384, Department of Transportation, 400 7th Street, SW., room 4107, Washington DC, 20590. For the convenience of persons wishing to review the docket, it is requested that comments be sent in duplicate. Persons wishing their comments to be acknowledged should enclose a stamped, self-addressed postcard with their comment. The docket clerk will date stamp the postcard and return it to the sender. Comments may be reviewed at the above address from 9 a.m. through 5:30 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Donna Smith, Acting Director, Department of Transportation Office of Drug Enforcement and Program Compliance, 400 7th Street, SW., Washington DC, 20590, room 9404, 202-366-3784; or Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, 400 7th Street, SW., room 10424, 202-366-9306.

SUPPLEMENTARY INFORMATION: Department published in today’s Federal Register a final rule (49 CFR part 40) establishing testing procedures for the Department’s new alcohol testing rules. The Department’s December 1992 NPRM for these procedures did not propose to permit blood alcohol testing. Therefore, it did not include any proposed blood alcohol testing procedures. Today’s NPRM proposes limited circumstances in which blood alcohol testing would be permitted for the covered operating administrations and procedures that would be used for this purpose. We seek comments on these proposed procedures and on any additions, deletions or modifications we should make to them. In addition, we seek comment on the broader question of whether the Department should adopt blood alcohol testing at all.

Section-by-Section Analysis

Section 40.71 Authorized Uses for Blood Alcohol Testing

We propose to allow blood alcohol testing only in a limited set of circumstances. Blood alcohol testing could be used in reasonable suspicion and post-accident testing, where an evidential breath testing device (EBT) is not readily available, and in place of a medical evaluation in “shy lung” situations. If breath testing were not readily available for a reasonable suspicion or post-accident test, employers would have to use blood alcohol testing to meet their regulatory obligations.

We are aware of certain advantages to blood alcohol testing. It is accurate, does not require expenditures for expensive new equipment, and can be conducted by qualified personnel who are generally readily available even in remote locations. At the same time, blood alcohol testing has a number of disadvantages, all of which are exacerbated with extensive use. It is the most intrusive form of testing, it does not provide an immediate confirmed result, and it necessitates additional procedural complexities such as collection, laboratory, and chain of custody requirements. There could be additional costs and litigation. Nevertheless, because we are aware that, in some circumstances the unavailability of EBT’s meeting part 40 requirements may make breath testing impracticable, we believe that it may be useful to allow some flexibility. We think it better, in these circumstances, to allow testing using a method with some disadvantages than to be unable to complete a test at all.

Reasonable suspicion and post-accident tests are more likely than other kinds of test to happen at unpredictable times and in remote locations. The time and, to some extent, place of random and pre-employment testing are more likely to be under the employer’s control.) Consequently, as commenters suggested, unless an employer incurs the expense of having EBT’s in all of its locations, or has an extensive rapid-deployment capability, it may be substantially easier and less costly to arrange for a blood alcohol test in these circumstances. In some cases, it may be impossible to get an EBT to a remote location in time to conduct a meaningful test.

Particularly in remote locations, there could be situations in which the only person trained to conduct alcohol tests is the supervisor of an employee subject to a post-accident or reasonable suspicion test. Our current rules permit a supervisor to conduct breath alcohol tests, if the supervisor is a trained BAT and another BAT is not available, as long as operating administration rules do not prohibit this action by the supervisor. In the case of reasonable suspicion tests, the operating administration rules prohibit the supervisor who has made the reasonable suspicion determination from conducting either the screening or confirmation test. The purpose of this NPRM is to increase flexibility in post-accident and reasonable suspicion testing in circumstances in which testing would otherwise be difficult to accomplish. With that purpose in mind, would it make sense to permit supervisors to conduct screening tests in these situations? Should blood testing be treated any differently from breath testing for these purposes?

Moreover, the number of post-accident and reasonable suspicion tests is likely to be substantially lower than the numbers of pre-employment and random tests. This means that the disadvantages of blood alcohol testing noted above will occur in a limited number of cases. (The Department estimates that there will be around 2500 blood alcohol tests per year under this proposal and seeks comment on whether this estimate is reasonable.) If employers “stand down” employees on the basis of the event leading to the test, the safety impact of the lack of an immediate result may be further reduced.

One of the key conditions for allowing the use of blood alcohol testing is that EBT’s not be “readily available.” Because of its greater invasiveness and because it does not produce an immediate result, the use of blood alcohol testing is intended to be used only in those reasonable suspicion and post-accident testing circumstances where it is not practicable to use breath testing. Blood alcohol testing is not intended, under the proposal, to be an equal alternative method that an employer can choose as a matter of preference.

We seek comment on when the final rule should regard an EBT as being “readily available.” For example, if a
breath test can be arranged within a given time (e.g., two hours) of the event requiring that test, should breath testing be regarded as readily available? What should the time frame be? What if the cost of obtaining an EBT and bringing it to the site for testing is a certain multiple of the cost of conducting blood alcohol testing in that case? What if it were simply more convenient or less expensive to use a blood alcohol test rather than breath testing in a particular case? Are there other criteria that could be used to determine when breath testing was readily available? Should this be left to the judgment of the employer? If so, how would the Department judge when this discretion had been exercised properly? Should the Department require the employer to document the facts that led to a decision to use blood alcohol testing?

In context of this discussion of “readily available,” we would point out that the EBT involved need not be one that the employer owns. It could also be a device that is owned by another employer or a third-party provider. We do not think that it should be necessary for an employer to pre-position an EBT (or enter into a contract) at every possible testing location. However, we do believe it is fair to expect employers to make arrangements for the use of EBTs either through purchase, lease or contract, assuming normal deployment to do routine random and pre-employment testing. The Department seeks comment on whether, and how, these expectations should be made part of the text of the final rule.

The NPRM proposes that, if no EBT were readily available for even the screening procedure, an EBT sample would be collected and sent to the laboratory, where two tests would be conducted on the primary specimen. Alternatively, if an EBT were available for the screening test, but an EBT meeting part 40 requirements for use in a confirmation test were not available, a blood confirmation test could be performed. Some questions arise about the former situation. Would this provision discourage employers from obtaining the less expensive alcohol screening devices permitted by part 40? Would employers be deterred from using blood as a collection method by fear of confrontations with or litigation by employees who resented the intrusiveness of blood alcohol testing all the more for the absence of a breath screening test? Would additional supervisor training be needed? On the other hand, would the availability of EBTs in situations in which blood could be used under this proposal likely be situations in which no EBTs at all were available, so that using blood for both screening and confirmation testing would be necessary in order to make the proposal meaningful?

The NPRM also proposes that employers could use blood alcohol testing for an employee covered under the “shy lung” provision of the Department’s new alcohol testing procedures. If an employee was unable to provide sufficient breath for a breath test, the employer could choose either to refer the employee for a medical evaluation or to draw a blood sample as provided in this NPRM.

Whether for liability reasons or on the basis of the events leading to a post-accident or reasonable suspicion test, many employers might prefer to “stand down” the employee pending the receipt of the laboratory result of the blood alcohol test. Is it necessary for the Department’s regulations to address this subject? If so, what should the rules provide?

Section 40.73 Collection Procedures for Blood Alcohol Tests

We think it will not be necessary to establish extensive new procedures for collecting blood samples, given the limited circumstances in which use of this method would be authorized. (The situation would probably be different if blood testing were being proposed for pre-employment and random testing as well.) Collection of blood specimens for forensic purposes such as law enforcement is considered standard procedure at many medical facilities. For these reasons, we believe that we should depend, to the extent possible, on existing resources and programs. We propose that anyone who is licensed, certified, or otherwise authorized under state law to draw blood could do so in the State for purposes of the DOT program. In most states, physicians, nurses, phlebotomists, and sometimes other medical personnel, have this authority.

It is our understanding that states, for law enforcement and other forensic purposes, have approved procedures for collecting blood specimens for the purpose of alcohol testing. Except to the extent that DOT rules specify certain requirements, the NPRM would allow a blood specimen to be collected for purposes of the DOT program in accordance with these existing state procedures. As with personnel qualifications and specimen collection procedures, chain of custody requirements would follow state requirements for law enforcement and other forensic blood collections. The Department seeks comment on whether reliance on state requirements would produce too much confusion or inconsistency, such that nationwide, uniform DOT procedures would be preferable. On the other hand, would such uniform DOT procedures make it too difficult to operate a blood testing program for a relatively small number of samples, reducing flexibility that this proposal is designed to permit?

The NPRM would require 20 ml of blood to be drawn for the test. As explained in the preamble to the final rule for part 40 published today, there is a statutory requirement for collecting split samples of body fluids in FAA, FTA, FRA, and FHWA programs. In this situation, the sample would be subdivided into two 10 ml tubes. Collections under the RSPA rule, where split samples are not required, would require only 10 ml of blood, placed in one tube. The NPRM would require certain standard testing materials to be used, which would be provided by testing laboratories in a sealed kit. The kit would include the blood tubes, labels, chain of custody form, blood extraction device, etc. We seek comment on whether it is advisable to require the inclusion of blood extraction devices. That is, is including these materials needed, in light of the resources available at testing sites? Would including them give rise to concerns about theft? We also seek comment on whether the kit should also include standardized collection instructions. The employer would be responsible for ensuring the kit was available at the testing location.

Section 40.75 Laboratories for Blood Alcohol Testing

The regulatory text of this proposed section is a place-holder. One of the most difficult questions facing the Department is how to ensure that appropriately well-qualified laboratories test blood specimens for alcohol. Absent a satisfactory answer to this question, the viability of this proposed rule is in question.

One approach the Department could take, which is consistent with the approach of using existing resources to the extent practicable, is to rely on those laboratories—whether state-operated or private—that conduct forensic blood alcohol tests for law enforcement and other purposes in each state. The final rule would assume, in effect, that a laboratory whose findings were deemed sufficient under state law to act as the basis for criminal or civil penalties against persons in DUI or similar cases was adequate for DOT workplace testing program purposes. In order for this approach to work, there would have to be state or state-approved laboratories in...
sufficient number of states that had
the willingness and capacity to accept
and process "DOT" blood specimens. We
see no reason why laboratories in
every state would necessarily have to
participate. Since we expect few blood
alcohol tests, large numbers of
laboratories would not be necessary.

A second approach would be to
construct a system based on the
laboratories certified by the Department
of Health and Human Services (DHHS)
for urine drug testing. DHHS has
carefully reviewed the overall
proficiency and forensic capability of
these laboratories, and they are available
to users throughout the country. Many
DHHS-certified laboratories currently
perform blood alcohol testing, but there
is no blood alcohol testing proficiency
requirement involved with DHHS
certification. Under this approach, the
Department, in cooperation with DHHS,
could develop a proficiency
requirement for blood alcohol testing.

Such a requirement could be
implemented through a DOT-DHHS
agreement calling for DHHS certification
and inspection for blood alcohol testing
purposes.

This approach would require DOT
and DHHS to work out an agreement.
The cost of the certification program—
both to the Department and to
laboratories—is not yet known, though
the Department is working with DHHS
to develop this information. The cost to
the Federal government of this
certification program would have to be
recovered from the laboratories via user
fees. Given the small number of tests, it
is questionable whether laboratories
would find it cost-effective to become
certified for blood alcohol testing,
though there could be some pressure
from customers to process blood as well
as urine samples. The Department seeks
comments on the advantages and
disadvantages of this approach.

There are other possibilities. For
example, the Department could use
laboratories certified by private
certifying bodies, though the
Department has expressly declined to
do so in its drug testing program. DOT
and DHHS both believe that the DHHS
approval process for laboratories
provides a more thorough and intense
review of laboratory quality than
existing private certification programs.
The Department could also contract
with one or more laboratories to
conduct the needed tests. It is likely that
user fees would be needed to fund such
an approach. The Department seeks
comment on any additional approaches
that commenters believe have merit.

This discussion of the need for
laboratory certification is in the context
of a testing program that does not
provide for evidentiary proceedings in
which an individual could challenge
test results. Existing Coast Guard
alcohol testing regulations provide for
post-accident blood testing in some
situations. The validity of these
proceedings is subject to evidentiary
hearings, has long been recognized in
administrative and court decisions, and
is not brought into question by the
Department's proposals concerning
laboratory certification.

Section 40.27 Testing of Blood
Specimens
The basic scheme of this provision is
similar to that which a laboratory uses
for drug testing. An aliquot of the
primary specimen is tested by gas
chromatography (GC) or enzyme assay.

(Because testing for alcohol is simpler
chemically than testing for drug
metabolites, mass spectrometry is not
needed.) If the alcohol concentration is
less than 0.04, the laboratory reports a
equivalent to those provided for
breath alcohol testing and urine drug
testing.

We seek comment on whether it
should be a fatal flaw if an unauthorized
person has succeeded in drawing a
blood sample from an employee. Once
the sample has been drawn, does the
lack of authorization of the individual
drawing the sample affect its accuracy?
Should this be a fatal flaw simply as a
means of ensuring that appropriately
qualified people draw blood, regardless
of the effects on sample accuracy?

In some circumstances, it may be
unclear to the personnel involved what
state a test occurs in (e.g., a post-
accident test on a bridge between two
states). The procedures of the two states
may differ. Should the rule be modified
to avoid the invalidation of a test just
because the procedures used turned out
to pertain to the wrong state?

Regulatory Analyses and Notices
Because of substantial public interest
and substantial impacts on a wide range
of private and public sector
organizations, the Department has
determined that this proposed rule—in
conjunction with the operating
administrations' alcohol and drug
testing rules and the remainder of the
alcohol testing portion of part 40—is
significant under Executive Order
12866. OMB has reviewed this NPRM
under that Order. The NPRM is also
significant under the Department's
regulatory policies and procedures.
The Department has prepared a regulatory evaluation for the alcohol portion of part 40, which we have included in the docket. The costs of the application of part 40 procedures to the programs of the various operating administrations are estimated in each of the operating administrations' regulatory evaluations for their final alcohol rules being published today. At the time of a final rule based on this NPRM, the covered operating administrations will supplement their part 40 alcohol testing rule regulatory evaluations as needed with respect to blood alcohol testing.

The Department expects that this proposal, if implemented, will lower costs to employers by providing more flexibility and decreasing the number of EBTs needed. As noted above, the Department estimates that there would be about 2500 blood alcohol tests annually, under all five affected operating administration rules. The Department expects that the amount of employee time involved in drawing blood would be about the same time involved in breath testing. We seek comment on these matters.

This NPRM, in conjunction with the operating administration drug and alcohol testing rules, is likely to have a significant economic impact on a substantial number of small entities. These impacts are assessed in the operating administrations' supplements to their alcohol testing rule regulatory evaluations. The Federalism impacts of this rule are either minimal or required by statute; for these reasons, we have not prepared a Federalism assessment.

List of Subjects in 49 CFR Part 40

Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.
§ 40.75 Laboratories for blood alcohol testing.

Blood alcohol testing under this part shall be conducted only in laboratories where such testing is authorized by Department of Transportation regulations.

§ 40.77 Testing of blood specimens.

(a) When the split sample method has been used, the laboratory shall retain the tube designated as the split specimen in secure refrigerated storage, with the seal intact. If the seal on the tube designated as the primary specimen has been broken, or the primary specimen is otherwise unavailable for testing, the laboratory shall use the tube designated as the split specimen in its place.

(b) The laboratory shall analyze an aliquot of the primary (or sole) specimen for its alcohol concentration, using gas chromatography or an enzyme assay, at a cutoff level of 0.04. If the result of the analysis is an alcohol concentration of less than 0.04, the laboratory shall report the result of the test to the employer as negative. In this case, the laboratory may discard the split specimen. If the alcohol concentration is 0.04 or greater, the laboratory shall analyze a second aliquot of the primary specimen, using gas chromatography.

(c) If the result of the analysis of the second aliquot is an alcohol concentration of less than 0.04, the laboratory shall report the result of the test to the employer as negative. In this case, the laboratory may discard the split specimen. If the alcohol concentration is 0.04 or greater, the laboratory shall analyze a second aliquot of the split specimen for its alcohol concentration, using gas chromatography, at a cutoff level of 0.04.

(d) If the result of the analysis of the split specimen is an alcohol concentration of 0.04 or above, the laboratory shall report to the employer that the result of the test of the primary specimen has been reconfirmed.

(e) If the result of this test is an alcohol concentration of less than 0.04, or if any of the circumstances set forth in § 40.79(b)(6) occur, the laboratory shall report to the employee that the result of the test of the primary specimen has not been reconfirmed, and therefore, the test is invalid.

6. A new paragraph (b) is proposed to be added to § 40.79, to read as follows:

§ 40.79 Invalid tests.

(b) A blood alcohol test shall be invalid under the following circumstances:

(1) The person who draws the blood sample from the employee is not authorized to do so under the law of the State in which the sample is drawn;

(2) The test was not conducted in accordance with forensic blood alcohol collection procedures approved in the State in which the test takes place;

(3) The chain of custody does not meet forensic standards acceptable under the law of the State in which the blood is drawn or there is a break in the chain of custody;

(4) The volume of the specimen used for the primary blood alcohol test (i.e., as distinct from the split specimen) is less than 10 ml; except that if, upon arrival at the laboratory, the specimen volume is not less than 8 ml, the laboratory may accept the specimen if the laboratory can ensure that sufficient volume will be available for testing and any necessary reanalyses for quality control;

(5) The seal on both specimens (or the only specimen) is broken or shows evidence of tampering;

(6) The test did not take place in a laboratory meeting the requirements of § 40.75;

(7) The testing methods prescribed in § 40.77(b) are not used;

(8) If, after an employee makes a timely request for a test of the split specimen under § 40.77(e)—

(i) The split specimen is unavailable for testing;

(ii) There is insufficient blood to permit a valid reconfirmation test to be conducted;

(iii) The seal on the tube containing the split specimen has been broken prior to testing at the second laboratory, or otherwise shows evidence of tampering;

(iv) The split specimen has not been retained in secure and refrigerated storage prior to being transmitted to the second laboratory;

(v) The inter-laboratory chain of custody is incomplete; or

(vi) The test of the split specimen fails to reconfirm the presence of alcohol at a level of at least 0.04.
DEPARTMENT OF TRANSPORTATION
National Highway Traffic Safety Administration

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice; Request for comments.

SUMMARY: This notice proposes Model Specifications for the performance and testing of alcohol screening devices. These devices test for the presence of alcohol, and may use breath or other bodily fluids, such as saliva, to do so. NHTSA is proposing these specifications to support State laws that target youthful offenders (i.e., "zero tolerance" laws) and the Department of Transportation’s regulations on Alcohol Misuse Prevention, and in recognition of industry efforts to develop new technologies (i.e., non-breath devices) that measure alcohol content from bodily fluids.

A Conforming Products List (CPL) will be published identifying the devices that meet NHTSA’s Model Specifications. The CPL can serve as a guide for those interested in purchasing devices that screen for the presence of alcohol.

DATES: Comments must be received no later than April 18, 1994.

ADDRESSES: Comments should refer to the docket number and the number of this notice and be submitted (preferably in (en copies) to the Docket Section, room 5109, 400 Seventh Street, SW., Washington, DC 20590 (Docket hours are from 9:30 a.m. to 4 p.m.).

FOR FURTHER INFORMATION CONTACT: Ms. Lori A. Miller, Office of Alcohol and State Programs, NTS—21, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590. Telephone (202) 366-9835.

SUPPLEMENTARY INFORMATION: On December 14, 1984 (49 FR 48854), the National Highway Traffic Safety Administration (NHTSA) issued a notice converting the mandatory standards for breath alcohol testing devices (38 FR 30459) to Model Specifications. The notice indicated that the agency would continue to test evidential breath testing devices (EBTs) and would release its findings by publishing a Conforming Products List (CPL) to provide States that choose not to conduct their own testing with adequate information upon which to base their purchasing decisions. These Model Specifications provided for EBTs to be tested at alcohol concentration levels of 0.000, 0.050, 0.101 and 0.151. Since 1984, a number of States have amended their laws by lowering the alcohol level at which drivers are deemed to be impaired or enacted new laws targeting youthful offenders, including “zero tolerance” laws, which provide that it is an offense for a person under the age of 21 to drive with any alcohol concentration level above 0.00 (or in some cases above 0.01 or 0.02).

On December 15, 1992 (57 FR 59382), the U.S. Department of Transportation (DOT) published a Notice of Proposed Rulemaking (NPRM) proposing rules to implement the "Omnibus Transportation Employee Testing Act of 1991," which requires alcohol testing programs in the aviation, motor carrier, rail, and mass transit industries, in the interest of public safety. The Research and Special Programs Administration (RSPA) proposed similar regulations for the pipeline industry. In general, the NPRM proposed to prohibit covered employees from performing safety-sensitive functions when test results indicate alcohol concentration levels of 0.04 or greater. The NPRM proposed to apply slightly different consequences to employees having alcohol concentration levels of 0.02 or greater but less than 0.04.

To determine alcohol concentration, the NPRM proposed to use breath as measured by only those EBTs listed on NHTSA’s CPL which are capable of providing a printed result, sequentially numbering the tests conducted, and distinguishing alcohol from acetone at the 0.02 BAC level. In addition, the final rule indicates that NHTSA is publishing a separate notice in today’s Federal Register proposing to adopt Model Specifications and a CPL that would permit additional alcohol testing devices to be used for screening purposes.

This Federal Register notice is the one to which the final rule refers. It proposes to establish Model Specifications for alcohol screening devices, which differ from the Model Specifications for Evidential Breath Testing devices in a number of important respects. These proposed Model Specifications are designed to test whether devices are suitable for screening, not evidential, purposes. In addition, they are designed to test the performance of devices that may use bodily fluids other than breath (such as saliva) to determine the presence of alcohol.

Under these proposed Model Specifications, an alcohol screening device is defined as a device that is used to detect the presence of 0.020 or more BAC. The Model Specifications propose that the test result may be indicated by numerical read-out or by other means, such as by the use of lights or color changes.

The Model Specifications propose that the device may measure any bodily fluid, but the output must be in blood...
alcohol concentration (BAC) units. Further, the relationship between the bodily fluid being measured and BAC must be properly established so that means for evaluating the device can be devised. The relationship between breath alcohol concentration (BrAC) and blood alcohol concentration (BAC) is well established, and several studies have been published establishing a relationship between BAC and saliva alcohol concentration. Accordingly, the proposed Model Specifications specifically provide that blood, breath or saliva may be used. In addition, these Model Specifications identify the proposed conversion factors for devices that use these bodily fluids. The conversion factors between blood and breath are commonly accepted. Based on the available literature, NHTSA believes it is appropriate to use a one-to-one conversion factor between blood and saliva, and has included this factor in these proposed Model Specifications. We request comments on the proposed use of this conversion factor.

NHTSA proposes that if a manufacturer intends to use any bodily fluid other than blood, breath, or saliva to determine the presence of alcohol, the relationship between that fluid's alcohol concentration and blood alcohol concentration must be established according to scientifically acceptable standards.

Under these proposed Model Specifications, alcohol screening devices would be tested at 0.008 and 0.032 BAC under normal laboratory conditions to determine their precision and accuracy at detecting the presence of 0.020 or more BAC (Test 1), and at 0.000 BAC to determine the performance of these devices when providing blank readings (Test 2). The 0.008 and 0.032 BAC levels were selected based on criteria for precision and accuracy that are equivalent to those used for EBTs. They require that devices perform at a level of accuracy within 0.005 of 0.020 BAC (thereby establishing target values within 0.015 and 0.025 BAC), and a level of precision which yields a standard deviation not greater than 0.0042. To achieve a confidence rate of 95% in the results of these 20 tests, we propose to establish measurement points at 1.73 standard deviations (or 0.007 BAC) below and above the lower and upper values, respectively (i.e., 0.015 + 0.007 = 0.02 BAC and 0.025 + 0.007 = 0.032 BAC). NHTSA proposes to use a Breath Alcohol Sample Simulator (BASS), non-alcoholic human breath, and a calibrating unit to test breath devices. The agency proposes to use preparations of bodily fluids or scientifically acceptable substitutes for non-breath devices. For example, the agency proposes to use aqueous alcohol test solutions equivalent to blood or saliva on a one-to-one basis to test saliva devices.

The agency proposes to conduct 40 trials under Test 1 (20 at .008 BAC and 20 at .032 BAC) and 20 trials under Test 2 (at .000 BAC). For reusable devices, these 60 trials would be conducted using a single unit. For disposable devices, these 60 trials would be conducted using 60 separate units. Some alcohol screening devices indicate the presence of alcohol in a manner that is unambiguous and requires no interpretation, such as by the use of a light or numerical reading. For these devices, NHTSA proposes that Tests 1 and 2 (at .008, .032 and .000 BAC) would be performed by an investigator at the DOT Volpe National Transportation Systems Center (VNTSC). To conform with the Model Specifications, the device must perform with no positive results at .000 BAC, not more than one positive result at .008 BAC and not more than one non-positive result at .032 BAC. If the device is capable of providing a reading of greater than .000 BAC and less than .020 BAC, the device must perform with not more than one such result at .000 BAC.

Other devices indicate the presence of alcohol in a manner that requires interpretation and may involve some ambiguity, such as by the use of color changes. For these devices, NHTSA proposes that Tests 1 and 2 (at .008, .032 and .000 BAC) would be performed by ten individuals who have no knowledge of test BACs and are not aware of test results. VNTSC would select these individuals using manufacturer's restrictions, if any. These individuals would be asked to read the manufacturer's instructions for the interpretation of the device's read-out, and interpret the test results independently. To conform with the Model Specifications, the device must perform, with each interpreter, with no positive results at .000 BAC, not more than one positive result at .008 BAC and not more than one non-positive result at .032 BAC. If the device is capable of providing a reading of greater than .000 BAC and less than .020 BAC, the device must perform, with each interpreter, with not more than one such result at .000 BAC.

Through the independent interpretation of ten individuals, NHTSA believes the Model Specifications would ensure that the results of tested devices are visible and will remain so for a reasonable period of time (the tests require approximately two hours to run), and are likely to be interpreted in a consistent manner. NHTSA requests comments on this aspect of the proposed Model Specifications.

To NHTSA's knowledge, no reusable devices use interpretive readings. Typically, these readings are produced using a chemical reaction, which results in a color change, a method which lends itself more readily to a single use device. For this reason, the agency believes it is unlikely that manufacturers would begin to use such interpretive readings in reusable devices. Accordingly, NHTSA has not proposed a methodology for testing reusable interpretive devices. We request comments on this aspect of the agency's proposal.

For disposable devices that use interpretive readings, the Model Specifications propose to combine Tests 1 and 2, and number the units and expose them to the three BAC levels using a methodology that would not reveal to the person interpreting the test the dosage received by any particular unit. NHTSA requests comments on this proposed methodology.

Devices would also be tested to determine whether acetone or, in the case of breath or saliva devices, cigarette smoke affects the functioning of the instruments. NHTSA requests comments on whether devices should be tested for interference from other substances. In addition, high (40°C) and low (10°C) ambient temperature and vibration tests would be conducted for these devices to determine their ability to function under a range of environmental conditions. NHTSA proposes that these tests (3.1, 3.2, 4.1, 4.2 and 5) would be performed by an investigator at VNTSC. Five trials would be conducted at .000 BAC under Test 3.2. Forty trials (including 20 at .008 and 20 and .032 BAC) would be conducted under each of these other tests.
with no positive results at each test performed at .008 BAC and not more than one non-positive result at each test performed at .032 BAC. If the device is capable of providing a reading of greater than 0.000 BAC and less than 0.020 BAC, the device must perform with not more than one such result at .000 BAC.

When devices such as these are used for medical purposes, the manufacturers of the devices are required to obtain marketing clearance from the Food and Drug Administration (FDA), in accordance with FDA regulations that address issues such as quality assurance in manufacturing, shelf-life and labeling. Currently, FDA does not assert jurisdiction (provide marketing clearance) for alcohol screening devices used for law enforcement purposes and workplace testing. However, because of the nature of alcohol screening devices and the conditions under which they are to be used, NHTSA believes it is important for manufacturers of these devices to conform with certain requirements, imposed by FDA on devices used for medical purposes, prior to the inclusion of the devices on NHTSA's CPL.

Accordingly, NHTSA proposes to require that each device submitted for testing under the Model Specifications must be accompanied by a self-certification from the manufacturer, certifying that it meets the requirements contained in FDA's Good Manufacturing Practices regulations for devices used for medical purposes (21 CFR Part 820), and that the device's label meets the requirements contained in FDA's Labeling regulations for devices used for medical purposes (21 CFR Part 809.10), even if the devices are not to be used for medical purposes. By requiring a self-certification, NHTSA is not requiring that manufacturers obtain FDA marketing clearance, but simply that they self-certify that they believe that they have met the above-referenced requirements. (For technical assistance or a copy of the Devices Good Manufacturing Practices Manual for Medical Devices, manufacturers should contact FDA's Division of Small Manufacturers by calling toll free at 1-800-636-2041.)

This notice includes, as an Appendix, a proposed set of Labeling Instructions for Alcohol Screening Devices that has been prepared in consultation with FDA to assist manufacturers of alcohol screening devices in developing a label that conforms to 21 CFR Part 809.10. The template addresses issues such as restrictions that may apply to operators of the device and conditions under which the device should or should not be operated. These Model Specifications are not regulations. Organizations and agencies may adopt these Model Specifications and rely on NHTSA's test results or may conduct their own tests according to their own procedures and specifications. It should be noted, however, that transportation employers covered by 49 CFR Part 40, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, are required to use only alcohol testing devices that meet the criteria established by that regulation. See DOT's final rule published elsewhere in today's Federal Register.

Once the Model Specifications for Alcohol Screening Devices are finalized and a CPL of conforming devices is published, DOT will issue procedural rules for using approved alcohol screening devices in transportation workplaces, including provisions for how and where such devices could be used and the steps that must be taken to collect bodily fluids.

Procedures

NHTSA proposes that testing of products submitted by manufacturers to these Model Specifications would be conducted by the DOT Volpe National Transportation Systems Center (VNTSC), DTS 75, Kendall Square, Cambridge, MA 02142. Tests would be conducted semiannually, or as necessary. Manufacturers would be required to apply to NHTSA for a test date by writing to the Office of Alcohol and State Programs (OASP), NTS-21, NHTSA, 400 Seventh Street, SW., Washington, DC 20590. Normally, at least 30 days would be required from the date of notification until the test could be scheduled.

One week prior to the scheduled initiation of the test program, a manufacturer would be required to deliver its devices to VNTSC. If the devices are disposable, the manufacturer would be required to deliver 300 such devices; if the devices are reusable, the manufacturer would be required to deliver a single device. If a manufacturer wishes to submit a duplicate, backup instrument, however, it may do so. The manufacturer would be responsible for ensuring that the devices operate properly and are packaged correctly. The manufacturer would also be required to deliver the operator's manual (or instructions) and the maintenance manual (if any) supplied with the purchase of the device, as well as specifications and drawings which fully describe these devices. Proprietary information would be respected. (See 49 CFR Part 512, regarding the procedure by which NHTSA will consider claims of confidentiality.)

In addition, the manufacturer would be required to submit a self-certification, certifying that the device meets the requirements in FDA's Good Manufacturing Practices regulations for devices used for medical purposes (21 CFR Part 820), and that the device's label meets the requirements in FDA's Labeling regulations for devices used for medical purposes (21 CFR 809.10) even if the devices are not to be used for medical purposes. See Appendix to this notice.

NHTSA proposes that the manufacturer would have the right to check its devices between the time of their arrival at VNTSC and the start of the tests, but would have no access to the devices during the tests. Any malfunction of a device which results in failure to complete any of the tests satisfactorily would result in a determination that the device does not conform to the Model Specifications. If a device is found not to conform, it may be resubmitted for the next testing series after appropriate corrections have been made.

Following publication of this notice and the public comment period, NHTSA plans to publish a second notice in the Federal Register containing the final Model Specifications. After the second notice is published, NHTSA plans to begin testing of alcohol screening devices to determine whether they comply with the performance criteria included in the Model Specifications.

Conforming Products List (CPL) will be published and updated periodically. It will include a list of alcohol screening devices that were submitted with the proper certifications and found to meet or exceed the proposed Model Specifications. NHTSA proposes to modify and improve these Model Specifications as new data and test procedures become available and to alter the test procedures, if necessary, to meet unique design features of a specific device. For each such modification, NHTSA would provide notification in the Federal Register and would retest devices when necessary.

OASP would be the point of contact for information about acceptance testing and field performance of devices. NHTSA requests that users of these devices provide both acceptance and field performance data to OASP when such data are available. Information from users would help NHTSA monitor whether alcohol screening devices are...
performing according to the NHTSA Model Specifications. If information gathered indicates that a device on the CPL is not performing in accordance with the Model Specifications, NHTSA would direct VNTSC to conduct a special investigation. An investigation may include visits to users and additional tests of the device obtained from the open market. If the investigation indicates that the devices actually sold on the market are not meeting the Model Specifications, the manufacturer would be notified that the device may be removed from the list. In this event, the manufacturer would have 30 days from the date of notification to reply. Based on the VNTSC investigation and any data provided by the manufacturer, NHTSA would decide whether the device should remain on the list. If the device is removed from the list, the manufacturer would be permitted to resubmit an improved device to VNTSC for testing when it believes the problems causing its non-compliance have been resolved. Upon resubmission, the manufacturer would be required to submit a statement describing what has been done to overcome the problems which led to failure of the device.

If information gathered indicates that the manufacturer of a device on the CPL does not comply with the requirements in FDA’s Good Manufacturing Practices regulations for devices used for medical purposes or that the device’s label does not comply with the requirements in FDA’s Labeling regulations for devices used for medical purposes, NHTSA would investigate the matter in consultation with FDA and would notify the manufacturer that the device may be removed from the list. The manufacturer would have 90 days from the date of notification to respond. Based on any data provided by the manufacturer and investigative findings, NHTSA would decide whether the device should remain on the list. If the device is removed from the list, the manufacturer would be permitted to resubmit a self-certification, certifying that the manufacturer complies with these FDA requirements when it believes the problems causing its non-compliance have been resolved. Upon resubmission, the manufacturer would be required to submit a statement describing what has been done to overcome the problems which led to non-compliance.

Comments

Interested persons are invited to comment on this proposal. Comments are sought on the proposed conversion factors included in these proposed Model Specifications, particularly for saliva, and what may constitute acceptable criteria for bodily fluids other than saliva, blood and breath.

Related issues regarding screeners that are of interest include the potential of interfering substances (i.e., nicotine and acetone) to affect results, and whether the Model Specifications should test for additional potentially interfering substances.

NHTSA also requests comments, particularly from manufacturers or users (and potential users) of these devices, regarding problems that have occurred or could arise due to insufficient labeling or manufacturing practices. Commentors should identify issues they believe need to be addressed by NHTSA’s notice regarding manufacturing practices and labeling requirements, and indicate whether they believe FDA regulations are most appropriate to address these issues. Alternatively, if commentors believe there is not a need to apply manufacturing practices and labeling requirements to alcohol screening devices when used for law enforcement and workplace testing purposes, they should submit comments to this effect and include the reasons for their belief.

It is requested but not required that 10 copies be submitted. Comments must not exceed 15 pages in length (49 CFR 553.221). Necessary attachments may be appended to those submissions without regard to the 15 page limit. This limitation is intended to encourage commentors to detail their primary arguments in a concise fashion.

All comments received before the close of business on the comment closing date indicated above will be considered, and will be available for examination in the docket at the above address, both before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the Model Specifications may be published at any time after that date, and any comments received after the closing date and too late for consideration with regard to the action will be treated as suggestions for future revisions to the specifications. NHTSA will continue to file relevant material in the docket after the closing date as it becomes available. It is recommended that interested persons continue to examine the docket for new material.

Those persons who desire to be notified upon receipt of their comments in the docket should enclose a self-addressed stamped postcard in the envelope with their comments. Upon receiving the comments, the docket supervisor will return the postcard by mail.

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 and it has been determined that it has no federalism implication that warrants the preparation of a federalism assessment.

In accordance with the foregoing, the proposed Model Specifications for performance testing of alcohol screening devices are set forth below.


Michael B. Brownlee,
Associate Administrator for Traffic Safety Programs.

Model Specifications for Alcohol Screening Devices

1. Purpose and Scope

These specifications establish performance criteria and methods for testing of alcohol screening devices. Alcohol screening devices use bodily fluids to detect the presence of 0.020 or more BAC with sufficient accuracy for screening purposes. These specifications are intended primarily for use in the conformance testing of alcohol screening devices.

2. Classification

2.1 Disposable Alcohol Screening Devices

Alcohol screening devices designed for a single use.

2.2 Reusable Alcohol Screening Devices

Alcohol screening devices designed to be reused.

3. Definitions.

3.1 Alcohol

The intoxicating agent in beverage alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

3.2 Alcohol Screening Device

A device that is used to detect the presence of 0.020 or more BAC. The device may measure any bodily fluid for alcohol, ethyl alcohol or other low molecular weight alcohols including methyl or isopropyl alcohol.

3.3 Blood alcohol concentration (BAC)

Grams alcohol per 100 milliliters of blood or grams alcohol per 210 liters of breath in accordance with the Uniform Vehicle Code, Section 11–903(a)(5)2

(BrAC is often used to indicate that the

2 Available from the National Committee on Traffic Laws and Ordinances, 405 Church Street, Evanston IL 60201.

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(BrAC is often used to indicate that the
measurement is a breath measurement; or grams alcohol per 100 milliliters of saliva.

3.4 Calibrating Unit
A device that produces an alcohol-in-air test sample of known concentration that meets the NHTSA Model Specifications for Calibration Units (49 FR 48865).

3.5 Breath Alcohol Sample Simulator (BASS)
A device that provides an alcohol-in-air test sample with known and adjustable alcohol concentration profile, flow rate, and air composition at 34° centigrade. (See NBS Special Publication 480-41, July 1981 for a description of a BASS unit suitable for use in the required testing.)

3.6 Bodily Fluid
Any bodily fluid capable of being used to estimate alcohol concentration, provided the relationship between such bodily fluid and BAC has been established according to scientifically acceptable standards. Such fluids include but are not limited to blood, exhaled deep lung breath and saliva.

3.7 Scientifically Acceptable Substitutes
Fluids that have been scientifically accepted as equivalent to bodily fluids for testing purposes, such as aqueous alcohol test solutions on a one-to-one basis for blood or saliva.

4. Test Methods and Requirements
Testing will be performed according to the instructions which normally accompany the submitted device and under the conditions specified in the tests below.

4.1 Test 1. Precision and Accuracy.
Perform 40 trials under normal laboratory conditions, including 20 trials at 0.008 BAC and 20 trials at 0.032 BAC. Use the BASS device for breath devices and preparations of bodily fluids or scientifically acceptable substitutes for non-breath devices.

For disposible alcohol screening devices that indicate the presence of alcohol in a manner that requires interpretation, combine Tests 1 and 2, in accordance with 4.3 below.

For alcohol screening devices that indicate the presence of alcohol in a manner that requires interpretation, perform the test using a VN'TSC investigator. To conform, no positive results. If the device is capable of providing a reading of greater than 0.000 BAC and less than 0.020 BAC, not more than one such result.

4.2 Test 2. Blank Reading.
Perform 20 trials under normal laboratory conditions at 0.000 BAC. Use non-alcoholic human breath for breath devices and preparations of non-alcoholic bodily fluids or scientifically acceptable substitutes for non-breath devices.

For disposible alcohol screening devices that indicate the presence of alcohol in a manner that requires interpretation, combine Tests 1 and 2, in accordance with 4.3 below.

For alcohol screening devices that indicate the presence of alcohol in a manner that does not require interpretation, perform the test using a VN'TSC investigator. To conform at 0.008 BAC, not more than one positive result. To conform at 0.032 BAC, not more than one non-positive result.

4.4.2 Test 3.2. Cigarette smoke (breath and saliva test devices only).
Perform five trials at 0.000 BAC. Use non-alcoholic human breath for breath devices and preparations of non-alcoholic bodily fluids or scientifically acceptable substitutes for non-breath devices.

Select a person who smokes cigarettes for this test. Ask the person selected to smoke approximately one half of a cigarette. Within one minute after smoking, or after a waiting period specified in the manufacturer's instructions, ask him or her to blow into the screening device according to manufacturer's instructions. Then ask the person to smoke another inhalation and repeat the test to produce a total of five trials.

To conform, no positive results.

4.5 Temperature.
Test at low and high ambient temperature.

4.5.1 Test 4.1 Low Ambient Temperature.
Perform 40 trials at 10°C, including 20 trials at 0.008 BAC and 20 trials at 0.032 BAC. Use a calibrating unit for this test for breath devices and preparations of bodily fluids or scientifically acceptable substitutes for non-breath devices.

To conform at 0.008 BAC, not more than one positive result. To conform at 0.032 BAC, not more than one non-positive result.

4.5.2 Test 4.2 High Ambient Temperature.
Perform 40 trials at 40°C, including 20 trials at 0.008 BAC and 20 trials at 0.032 BAC. Use a calibrating unit for this test for breath devices and preparations of bodily fluids or scientifically acceptable substitutes for non-breath devices.

To conform at 0.008 BAC, not more than one positive result. To conform at 0.032 BAC, not more than one non-positive result.

4.6 Test 5. Vibration.
Perform 40 trials, including 20 trials at 0.008 BAC and 20 trials at 0.032 BAC.

4.4.1 Test 3.1. Acetone.
Perform 40 trials, including 20 trials at 0.008 BAC and 20 trials at 0.032 BAC. Use a calibrating unit for this test for breath devices and preparations of bodly fluids or scientifically acceptable substitutes for non-breath devices.

Prepare test BACs to include an acetone concentration equivalent to a BAC of 0.010 grams per 100 milliliters blood. For breath screening devices, add 115 microliters of acetone per 500 milliliters of solution for use in the calibrating unit. To conform at 0.008 BAC, not more than one positive result. To conform at 0.032 BAC, not more than one non-positive result.

4.6.3 Test 6. Air Purge.
Perform 20 trials at 0.008 BAC and 20 trials at 0.032 BAC.

4.4 Based on an experimentally determined water to air partition factor 365 to 1 at 34°C to yield acetone-in-air concentrations of 0.5 milligrams per liter.
Use a calibrating unit for this test for breath devices and preparations of bodily fluids or scientifically acceptable substitutes for non-breath devices. Mount the screening device on a shake table and vibrate the table in simple harmonic motion through each of its three major axes, as specified below. Sweep through each frequency range in 2.5 minutes, then reverse the sweep to the starting frequency in 2.5 minutes. The 40 disposable testers may be placed in a suitable box mounted on the shake table. Test after vibration.

<table>
<thead>
<tr>
<th>Frequency (hertz)</th>
<th>Amplitude (inches, peak to peak)</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 to 30</td>
<td>0.30</td>
</tr>
<tr>
<td>30 to 60</td>
<td>0.15</td>
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</tbody>
</table>

To conform at 0.008 BAC, not more than one positive result. To conform at 0.032 BAC, not more than one non-positive result.

Appendix—Labeling Instructions for Alcohol Screening Devices

**Intended Use**

Provide the intended use including the specimen matrix (e.g., saliva, breath), the assay type (quantitative, semi-quantitative) the purpose of performing the assay and the individual designated to perform the assay.

E.g. This product is intended for the determination of alcohol in—define matrix (for e.g., saliva, breath, sweat) to perform screening alcohol assays. This product is recommended for use by individuals who have been trained in the administration of screening devices.

**Description of Testing System**

Provide the principles of the procedure for performing the alcohol screening assay.

E.g. This product uses alcohol dehydrogenase, infrared technology, etc. to perform the test.

**Chemical Reaction Sequence**

Describe the chemical reaction sequence, if applicable.

**Reagents**

List the concentration, strength, composition of the reactive ingredients. List the non-reactive ingredients.

**Reagent Preparation and Storage**

Provide instructions for preparing the reagents, if applicable.

Provide the instructions for storing the reagents, if applicable.

Provide any signs of deterioration of the reagents, if applicable.

Provide the reagent's shelf life and opened expiration dating, if applicable.

E.g. Unopened tests are stable until the date printed on the product container when stored at 22–28°C. Opened test must be used at once.

Provide a caution not to use the reagents beyond the expiration dating.

**Precautions**

1. List any reagents that may be hazardous such as caustic compounds, sodium azide or other hazardous reagents and instructions for disposal, if applicable.

2. If visually read, warn the user the result should not be interpreted by readers who are color-blind or visually impaired.

3. Provide warning to user to treat all samples as potentially infective. Include instructions for handling and disposal of the sample.

**Specimen Collection**

Provide instructions for collecting and handling the sample.

Provide criteria for specimen rejection, if applicable.

**Calibration**

Disposable tests are pre-calibrated. No additional calibration is required.

Reusable (Instrumented) tests require calibration.

Provide information regarding how calibrations are to be conducted, if applicable, including the number and concentration of calibrators, and the frequency of calibration.

Provide instructions for calibration and recalibration.

Provide the criteria for acceptability of calibration.

**Test Procedure (Disposable)**

Provide adequate step-by-step instructions for performing the test.

If the test is disposable (non-instrumented) and involves a color reaction, include the time frame for which the test must be read and recorded.

E.g. Read within 15 minutes.

**Test Procedure (Reusable/Instrumented)**

Provide adequate step-by-step instruction for performing the test.

Provide the installation procedures and, if applicable, any special requirements.

Provide the space and ventilation requirements.

Provide the description of the required frequency of equipment maintenance and function checks.

Provide the instructions for any remedial action to be taken when the equipment performs outside of operating range.

Provide any operational precautions and limitations.

Provide the instructions for the protection of equipment and instrumentation from fluctuations or interruptions in electrical current that could adversely affect test results and reports, if applicable.

**Quality Control (QC)**

**Disposable Tests**

If applicable, the function and stability of the test can be determined by examination of the procedural “built in” controls contained in the product. If these controls are not working, the test is invalid and must be repeated.

**Disposable/Instrumented Devices**

If external quality control materials are used, provide number, type, matrix and concentration of the QC materials.

Provide directions for performing quality control procedures. Provide an adequate description of the remedial action to be taken when the QC results fail to meet the criteria for acceptability.

Provide directions for interpretation of the results of quality control samples.

**Results**

Describe how the user obtains the test results, from a colored bar, instrument read-out, printout, etc.

Describe the results in terms of blood alcohol concentration.

Describe what concentration indicates a positive result and what concentration indicates a negative result.
Limitations

List the substances or factors that may interfere with the test and cause false results including technical or procedural errors.

Dynamic Range

Provide the operating range of the product.

Precision and Accuracy

Precision and Accuracy specifications are included in the National Highway Traffic Safety Administration’s (NHTSA’s) Model Specifications for Alcohol Screening Devices. Only devices that meet these model specifications will be included on NHTSA’s Conforming Products List for alcohol screening devices.

Specificity

List the substances that have been evaluated with your product that do or do not interfere at the concentration indicated.

References

Provide pertinent bibliography

Technical Assistance

List an 800 number the user may contact for further information or technical assistance.

[FR Doc. 94–1858 Filed 2–3–94; 1:00 pm]
Part IV

Department of Transportation

Federal Aviation Administration

14 CFR Parts 61, et. al.
Alcohol Misuse Prevention Program and Antidrug Program for Personnel and Employees of Foreign Air Carriers Engaged in Specified Aviation Activities; Rule and Proposed Rules
SUMMARY: This final rule prescribes regulations establishing the aviation industry alcohol misuse prevention program. It includes requirements for an alcohol testing program for air carrier employees who perform safety-sensitive duties, in implementation of the FAA-related provisions of the Omnibus Transportation Employee Testing Act of 1991, which was enacted on October 28, 1991. Employees who perform safety-sensitive duties directly or by contract for aviation employers that hold a certificate issued under certain FAA regulations, operators as defined in the regulations, or air traffic control facilities not operated by the FAA or the U.S. military must be subject to an FAA-mandated alcohol misuse prevention program (AMPP). This final rule requires alcohol testing of these employees, proscribes certain alcohol-related conduct, and establishes specified consequences for engaging in alcohol misuse. Employers must provide written materials to covered employees explaining the program and educating employees about the dangers of alcohol misuse. Employers must also submit reports to the FAA on the results of the program. This rule is intended to ensure that public safety is maintained by preventing alcohol misuse by safety-sensitive aviation employees.

DATES: This rule is effective on March 17, 1994.

FOR FURTHER INFORMATION CONTACT: 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 Final Rule

Any person may obtain a copy of this final rule 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 final rule.

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

On December 15, 1992, the FAA published a notice of proposed rulemaking (NPRM) in which it proposed to require air carriers to institute alcohol misuse prevention programs similar to the antidrug programs already in place (57 FR 59458). The NPRM was published as part of a coordinated effort by the Office of the Secretary of Transportation (OST) and four other DOT agencies to address the issue of alcohol misuse in the transportation industries. With the exception of the NPRM published by the Research and Special Programs Administration, the rulemakings were initiated under the provisions of the Omnibus Transportation Employee Testing Act of 1991 (Pub.L. 102−143, Title V).

In conjunction with OST and the other DOT agencies, the FAA held a series of public hearings on the regulations proposed in the NPRM. The FAA-specific provisions of each of these hearings were recorded by a court reporter and the transcripts of the hearings with copies of any material submitted to the hearing panel have been placed in the docket. The testimony and written materials were considered in development of this final rule.

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 or while having 0.04 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 63.12(a).) 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 FAA 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 stringent monitoring 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 Comments and Final Rule

The Common Preamble

A common preamble to all of the related NPRMs proposing alcohol testing rules was published on December 15, 1992 (57 FR 59382, et seq.). This common preamble contained a thorough discussion of the comments submitted to the DOT advance notice of proposed rulemaking (ANPRM) published on November 2, 1989, and an overview of the general issues related to alcohol use in the transportation industries. A similar introductory discussion is found in the common preamble to this final rule and the final alcohol misuse prevention rules published by the other affected DOT agencies elsewhere in today’s Federal Register. The common preamble also responds to comments submitted to the various DOT agency dockets that raise multimodal aspects of the final rules or
the Act. This common preamble is incorporated into this final rule by reference. Because the majority of the issues raised in comments were addressed in the common preamble, the FAA did not address comments addressed to other DOT agencies as part of its docket, even though copies of those comments are not physically stored with the other comments. Interested persons can request access to those comments through the FAA docket. Any aspects of the final rule that are not discussed below are addressed in the common preamble.

**Alcohol Misuse Prevention Program (AMPP)**

The essential provisions of the AMPP proposed by the FAA in the NPRM have remained largely unchanged in this final rule. The rule uses three primary tools for reducing the threat of alcohol misuse in aviation. First, by amending parts 65, 121, and 135, the rule prohibits certain alcohol-related conduct by employees performing safety-sensitive duties.

Second, under the provisions of new appendix J to part 121, such employees must be subject to pre-employment, random, post-accident, reasonable suspicion, return to duty, and follow-up alcohol testing. This testing is federally mandated but will be administered by the affected employers. Third, in accordance with requirements in appendix J, employees subject to the rule must 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**

Only a few commenters addressed the issue of possible conflicts or confusion regarding company-required programs and FAA-mandated programs. These commenters (representing both labor and management) focused on the issue of alcohol test results of 0.02 to 0.059. The commenters noted that although the FAA's NPRM proposed specific actions for test results falling within this range, an employer is not precluded from taking severe employment action based on these results should the employer so choose. A number of labor organizations wanted the FAA to preclude such action in its final rule.

The FAA has not adopted these comments. The choice of whether to continue to employ an individual should properly remain within the discretion of the employer. We also note that employment or other consequences outside those required by the rule may be subject to both State law and labor-management negotiation.

With respect to the establishment of a separate company policy, a number of commenters noted that companies already had alcohol testing or prevention programs in place. These commenters stated that established programs should suffice for compliance with the FAA's rule, or that the FAA's rule would unnecessarily duplicate these programs.

The FAA recognizes that, as was the case when the antidrug rule was first implemented, some employers might have programs that encompass some or all of this rule's requirements. To ensure complete and uniform compliance with a single regulatory standard, however, we are not permitting company programs to substitute for programs required by this rule. Should an aviation employer determine that, as a matter of company policy, a different program should be established or continued, the program must be clearly separate from the program required under this rule, with appropriate notice given prior to tests under this rule. The FAA will not permit commingling of employer-directed and FAA-mandated programs.

**Employers Required To Establish Programs**

The NPRM reflected the FAA's best assessment, based on the developments in the FAA's industry antidrug program, of the categories of employers that should be subject to the alcohol misuse rule. Like the antidrug rule, the FAA determined that the minimal benefit to public safety that might accrue from inclusion of operators that did not hold part 121 or part 135 certificates did not warrant the cost and intrusiveness of alcohol testing. A few commenters addressed this issue and requested additional relief for the small aviation employers we did propose to cover. The FAA has assessed its requirements and has elected to retain most of its regulatory provisions unchanged from the NPRM. We have, however, reduced the reporting requirement burden, which will be addressed below.

The final rule will 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 by or under contract to the U.S. military. The FAA has chosen to retain the categories of covered employees proposed in the NPRM. These categories primarily identified refuelers and deicers as categories of employees that should be subject to alcohol testing.

The FAA has not adopted the comments of those who believe that employment of a person with a record of alcohol misuse should not be subject to the program. We are not permitting company programs to substitute for programs required by this rule. Should an aviation employer determine that, as a matter of company policy, a different program should be established or continued, the program must be clearly separate from the program required under this rule, with appropriate notice given prior to tests under this rule. The FAA will not permit commingling of employer-directed and FAA-mandated programs.
FAA has determined that it is essential that the individuals who perform aircraft maintenance activities be subject to this rule. (The term preventive maintenance has been added to maintenance not because the FAA intends to increase the reach of the rule, but rather to ensure that, as was intended in the NPRM, the rule clearly parallels the coverage of the antidrug rule.) The FAA carefully reviewed the comments supporting the inclusion of additional categories of covered employees. For a number of reasons, the FAA has elected not to adopt these recommendations. First, the FAA is aware that the costs associated with this rule will be significant. Each additional requirement that was considered was therefore scrutinized with respect to the cumulative burden that would accrue. Based on that consideration, the FAA has determined that the possible marginal benefit that might be achieved by adding categories of covered employees is outweighed by the burden associated with such a change.

**Prohibited Alcohol-Related Conduct**

This rule will prohibit specific alcohol-related conduct by covered employees and will also prohibit an employer from using a covered employee if the employer has actual knowledge that the employee has 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. With the exception of use of alcohol after an accident, each prohibition is limited to prohibiting alcohol use that may affect the performance of covered functions. Some commenters requested that the FAA list the specific actions within a safety-sensitive function that trigger coverage under this rule. Given the variety of tasks encompassed within each category and the differences in the conduct of aviation operations by different employers, however, a comprehensive regulatory listing of such activities is not possible. Therefore, as was proposed in the NPRM, coverage under the rule will 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.

The identification of the activities that will subject employees to this rule shall be included in the company policy required under appendix J and are subject to FAA review.

The specific prohibitions are:

**Alcohol Concentration:** The ODOT common preamble contains a detailed discussion of the prohibited alcohol concentrations and a disposition to the comments regarding this issue. It should be noted however, that although this rule will contain a bifurcated system of test results and consequences (0.02–0.039 and 0.04 or greater) the rule will not affect the current regulatory provision in 14 CFR 91.17 under which crewmembers are subject to sanction by the FAA for having a blood alcohol concentration of 0.04% or greater. **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. While the FAA’s experience in enforcing this provision indicates that it is a useful tool in preventing alcohol misuse, it has been determined that such a prohibition in the context of an employer-based program, with no intervention by a Federal agency or right to review, could lead to unacceptable treatment of employees. This provision has therefore been removed as a violation of the rule.

The concept of “under the influence” remains present in this final rule, however, as part of the reasonable suspicion testing requirement. Under the final rule, if an employer were to determine that sufficient evidence existed to believe that a covered employee was under the influence of alcohol, the employer would be required to administer a reasonable suspicion test. If no test could be performed, safety would still be protected because the employee must be removed from performing safety-sensitive duties temporarily.

This rule does not 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 of less than 0.04 or no test at all, that the employee was impaired. As noted previously, the employer must remove the employee, at least temporarily, if the employee's alcohol concentration was 0.02 or greater but less than 0.04 or if no test could be performed. Any action other than a temporary removal in either the absence of a test result or with a test result under 0.04 would have to be under the employer’s independent authority.

**On-duty use:** A number of commenters expressed concern that the FAA’s proposed definition of “performing safety-sensitive functions” could result in the application of the on-duty use prohibition to employees who might be at home on reserve status for days at a time. Given the dramatic effect of a violation of this provision (i.e., it invokes the permanent bar addressed below), these commenters requested clarification of this provision. This provision applies to any covered employee who, while not actually performing a safety-sensitive function, could be called at any time to perform. The FAA intends the provision to reach only employees who are at work. Affected employees include, for example, a maintenance supervisor who is in her office who could be called at any time to take over on a maintenance task. Such employees would have to refrain from using alcohol or would be in violation of the on-duty use provision. On-call or reserve employees who are not at work, such as those mentioned above, will, however, be subject to the prohibitions on pre-duty use of alcohol.

Additionally, the rule should not be read as permitting on-duty use to be prohibited if alcohol concentration above the prohibited levels. This would of necessity require the application of back extrapolation to the results, which, as analyzed in detail in the common preamble, is not permitted. To assert a violation of this provision, the employer would have to have clear evidence of consumption of alcohol by a safety-sensitive employee (e.g., an admission, credible witnesses). One important aspect of the prohibition is that it is triggered by the consumption of items other than alcoholic beverages. Use of a medication containing alcohol while on duty will violate this rule and will trigger the permanent bar provisions discussed below. The FAA encourages employers and labor organizations to take appropriate steps to warn affected employees of this prohibition.

**Pre-duty use:** As was proposed in the NPRM, this rule provides a two-tiered prohibition with respect to pre-duty use of alcohol. No commenter opposed prohibiting alcohol use by a crewmember prior to duty, and many commenters wanted the prohibition extended for up to 24 hours before a flight. 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 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. 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. Additionally, in order to ensure consistency between the prohibitions affecting FAA and other air traffic controllers, the pre-duty use period for these employees has been changed to 8 hours.

Although with respect to crewmembers, this provision does, to some extent, duplicate the restrictions in 14 CFR 91.17(a), it is limited in application to the covered employees of the specified employers under the rule. The rule also prohibits the employers from using covered employees who have impossibly used alcohol—a restriction on employers that does not currently exist in the FAA's regulations.

A number of commenters objected to the FAA proposal to add a 4-hour pre-duty use limitation for other classes of covered employees. Some commenters believed that imposition of a 4-hour rule on all covered employees would have little safety benefit while intruding significantly into the lives of employees. The FAA agrees that the nature of the safety-sensitive functions other than crewmember duties is 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 lives of aviation industry employees. The FAA continues to believe, however, that the minimal disruption that might be caused by a 4-hour limitation is outweighed by the safety benefit that is achieved by moderating the use of alcohol by safety-sensitive employees before they perform their duties.

The FAA is also not adopting a suggestion made in the public hearings regarding other DOT agencies' rules under which employees subject to short notice calls to work would have to abstain from consuming alcohol for 4 hours prior to duty or after being called to duty, whichever is shortest. The FAA does not believe that in the context of the aviation industry there is any situation in which the need for the employee to perform safety-sensitive functions is so exigent that a 4- or 8-hour limitation should be waived.

Use following an accident: As proposed in the NPRM, 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 clearly affect those employees whose performance of duties just around the time of the accident may have contributed to the accident and whose consumption of alcohol prior to the time of the accident would be relevant information.

A number of commenters questioned the FAA's ability to enforce this provision and the employees' ability to comply. Some commenters stated that it was unfair of the FAA to consider denying individuals who had been traumatized by an accident the relief that a drink might provide. The FAA recognizes that the rule might be difficult to enforce, and we encourage employers to attempt to control the actions of the affected employees as circumstances permit. The final rule also includes, as in the NPRM, an actual knowledge exception for employees who are unaware of an accident or who do not realize that their performance of duties may be implicated are not held to have violated the rule if, unknowingly, they use alcohol during the post-accident period. The FAA notes that the prohibition only applies if an employee performed a safety-sensitive function on the aircraft involved in an accident at or near the time of the accident. The rule does not, for example, affect individuals who performed maintenance on the aircraft days or weeks prior to the accident.

Despite the potential difficulties associated with this provision, however, and the commonly accepted practice of using alcohol to handle stressful situations, the prohibition is necessary to ensure that an employee who performed an accident and whose consumption of alcohol prior to the accident may have contributed to the accident. The rule does not, for example, affect individuals who performed maintenance on the aircraft days or weeks prior to the accident.

Refusal To Submit to a Required Alcohol Test

A number of commenters objected to the FAA's proposal to treat refusal to submit to random, post-accident, reasonable suspicion, or follow-up testing as a rule violation (as discussed in the common preamble), or as a potential basis for the denial, suspension, or revocation of a certificate issued under 14 CFR part 61, 63, or 65. A few of these commenters stated that because alcohol testing was unconstitutional there should be no sanction attached to refusing to be tested. The Constitutional aspects of this rule are addressed in the common preamble.

A number of labor groups expressed concern that employees who were subjected to harassing tests or who became aware that proper procedures were not being followed (e.g., the breath alcohol technician (BAT) reuses a mouthpiece) would be in the position of having to submit to questionable tests or face possibly severe sanctions. As with any potentially problematic test, the employee will have to determine whether to proceed with the test or to decline. It would then be for the employer in either situation to evaluate the facts, review the provisions of this rule and in 49 CFR part 40, and make a decision on the validity of the test or the legitimacy of the employee's asserted bases for declining the test. The FAA would have to similarly evaluate all of the available information if the FAA considers taking action in the case of an alleged refusal. As a practical matter, these situations can be avoided if each employer ensures that its supervisors and BATs are thoroughly trained and knowledgeable. An employer representative is available to respond quickly to concerns raised during the course of an alcohol test.

No commenter objected to the FAA's decision not to attach any consequences other than preclusion from performing a safety-sensitive function to an individual's choice not to submit to pre-employment or return to duty testing. These provisions are consistent with the FAA's choice in the antidrug rule not to base certificate action on refusals of pre-employment drug tests, and therefore, these provisions remain unchanged.

Required Alcohol Testing

The common preamble discusses in detail the types of alcohol tests that are required under this rule and those of the other DOT agencies. There are, however, certain aspects of alcohol testing raised by the commenters that are specific to the aviation industry. Those issues are addressed below. Pre-employment testing: As discussed more fully in the common preamble, the nomenclature used to describe this type of test has been changed from "pre-employment/pre-duty," as used in the NPRM, to simply "pre-employment." It should be noted that this change is not intended to affect the substantive requirements for this type of testing.

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before actual commencement of duties; or, in the case of a current employee, prior to transferring the employee from performing non-safety-sensitive duties to performing safety-sensitive duties. In the NPRM, the FAA requested specific comment on whether the proposed procedure for using the results of prior pre-employment alcohol tests would be useful. The majority of commenters did not feel that the provision should be retained. Labor groups were concerned that the test confidentiality of information regarding employees' past alcohol use would be breached by this provision. Many employers expressed concern about the possibility of liability if they released the results, even in response to a specific employee consent. One commenter recommended that the FAA develop a standard consent form to be used for release of alcohol misuse information from an employee to any third party. Finally, some commenters stated that even if the use of prior test results was authorized, they would not use the option. They saw little utility in the option or expressed reservations about relying on tests the quality of which the employer could not ensure.

Although the FAA recognizes that few employees may choose to use the option of relying on an applicant's past test results, the FAA has elected to retain this option. The difficulties, if any, associated with choosing this option would be one accepted voluntarily by the employer who so chooses. Further, the FAA notes that even in the absence of such a provision, a prospective employer could still seek information regarding the performance of an applicant. The FAA has not adopted the recommendation to prepare a standard consent form for use in this or any other disclosure situation. The rule does contain specific language regarding the content of the consent; the FAA expresses no preference as to the format of the document.

Finally, one commenter stated that the pre-employment testing provision did not meet the requirements of the Act because it does not require testing for use of alcohol in violation of law or Federal regulation. While a strict reading of the Act may indicate that this commenter is correct, upon review of the legislative history of the Act, the FAA believes that the pre-employment testing provision in this rule meets the intent of Congress.

Post-accident testing: The NPRM proposed that post-accident alcohol testing would be essentially the same as in the antidrug rule. The triggering event would be an aircraft accident (as specifically defined in the rule) and 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.

Although commenters generally supported the concept of post-accident testing, some were concerned about the practical difficulties associated with determining which employees to test and ensuring the tests are performed in the very short and usually extremely hectic period just following an accident. Some commenters specifically cited the difficulty faced in determining if persons performing maintenance may have contributed to the accident and problems associated with reaching the remote locations in which aircraft accidents can occur. These same concerns have arisen in the context of post-accident drug testing. With respect to identifying employees for post-accident rules, some recommended that the decisions must be based on the best available information. Although the purpose of a post-accident alcohol test is to identify individuals who should be removed from safety-sensitive duties, the focus of a post-accident alcohol test is evidence of alcohol use that may have affected the performance of safety-sensitive functions that contributed to the accident. Test subjects should be restricted to those for whom an alcohol test conducted after an accident would be relevant to whether the individual possibly contributed to the accident as a result of impossibly using alcohol.

A number of commenters also questioned the requirement that individuals who may be subject to post-accident testing must, with limited exceptions, remain at the scene of the accident. These commenters noted that an aircraft accident is always an extremely traumatic event for the crewmembers involved and it would be unduly harsh to prevent these crewmembers from leaving the immediate vicinity of the accident. The FAA accepts these concerns and has amended the provision in the final rule to require the employee to remain readily available for testing. This could include going to a crew lounge or airline office; however, the employee would have to take appropriate steps to ensure that if the employer determined that the employee must undergo post-accident testing, the employer would be able to rapidly locate the employee and have him or her tested. It would not, for example, be acceptable for the employee to leave the scene of the accident at an airport without informing both the employer or a designated point of contact of the employee's location—even if the employee remained at the airport and technically "available" for testing.

These issues associated with remote site testing and conduct of tests within the required timeframes were addressed in the common preamble. As mentioned in that document, the FAA is not adopting the recommendation that employers be allowed to substitute for FAA-mandated tests post-accident tests conducted by law enforcement officers (LEOs) for law enforcement purposes. The FAA already has in place a provision (14 CFR 91.17) under which crewmembers required to submit to alcohol tests by LEOs may be required to provide the results of such tests to the FAA. The possible conflicts between the employer's obligations and the intent of post-accident tests under this rule and those of LEOs outweigh any benefit that might be achieved from such a proposal. (As discussed in the preamble to 49 CFR part 40, however, a LEO could serve as an employer's BAT, but any tests would have to be conducted pursuant to this rule and 49 CFR part 40.)

Random testing: As required by the Act, the 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 antidrug plans must be used to ensure randomness of testing.

The majority of commenters received on random testing (other than those asserting it was unconstitutional and/or unnecessary) cited the particular difficulties associated with testing of crewmembers at or near the time of the flight. These commenters noted that pre-flight time for crewmembers, especially pilots, is very tightly scheduled, with little built in flexibility. The commenters asserted that employers would be faced with two choices: either arrange for all crewmembers to report for duty early every day (because testing is supposed to be both unannounced and random) to ensure that the employees were available for testing if they were selected, or accept that a certain number of flights might be delayed to accommodate the additional time required to test. These commenters asked that the FAA revise its rule to eliminate random testing or to permit all random testing to occur after flights terminate.

While the FAA is extremely sensitive to the financial and operational implications of this rule, it cannot adopt the recommendation of these commenters. Random alcohol testing is required by the Act. An effective random testing program must be designed to detect and deter all of the
prohibited conduct: pre-duty use of alcohol, on-duty use of alcohol, and reporting for duty or remaining on duty with an impermissible alcohol concentration. Because post-flight testing (especially on long flights) would realistically only address on-duty use of alcohol, it would not serve the overall purpose of random alcohol testing. Similarly, if all testing were performed before flights (as recommended by one commenter), the testing procedure would have no deterrent effect for on-duty use of alcohol. The FAA intends to work with the aviation industry to assist employers in implementing the most cost-effective random alcohol testing programs possible.

The final rule retains the provision from the NPRM under which employees selected for testing must proceed immediately to the testing site. The rule also provides that an employee notified of his or her selection while in the midst of performing a safety-sensitive function would be directed to cease performing the function and proceed to the testing site as soon as possible. Obviously, the FAA does not expect any safety-sensitive employee to simply abandon his or her duties upon notification of selection for random testing. Such an employee would have to arrange for a replacement or otherwise cease performing the safety-sensitive function as soon as it could be safely terminated. The term “immediately” was used by the FAA intentionally. To the extent possible, employees notified of selection for a random test should take whatever steps are necessary to report to the testing site without any delay or detour. The time between notification and testing should be the absolute minimum necessary. The FAA recognizes that in some situations employees will have to advise supervisors that the employees must report for testing. Employers should ensure that they have instituted procedures to accommodate this provision (for example, the employer could arrange for the BAT to coordinate with designated supervisors to approve the employees’ departure to a testing site before notifying the selected employees). The FAA expects that, with limited exceptions, the time between notification and testing will be no more than the requisite travel time to the testing site. If notification and testing occur at an airport, this time should be a matter of minutes. Reasonable suspicion testing: Most of the commenters to the NPRM supported the provision for reasonable suspicion alcohol testing, although some labor organizations asserted that two supervisors should be required. The FAA has not adopted this recommendation. The common preamble discusses in detail the substantive revisions to this provision.

Return to duty and follow-up testing: The specific requirements for these types of tests are discussed in the common preamble.

Restesting after result of 0.02 or greater but less than 0.04: In the NPRM, the FAA sought 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. Because most commenters supported a single cut-off level, very few addressed this provision. One commenter stated that if the bifurcated cut-off system was adopted, all employees testing between 0.02 and 0.039 should be subject to another test before returning to work: employers should not have the option of waiting until the next duty period in lieu of a test. The FAA has not adopted this recommendation. The primary intent of this rule is to protect safety, and that goal is adequately accomplished whether an employee tests below 0.02 or is made to wait at least 8 hours before performing safety-sensitive functions. No additional benefit would be achieved by instituting a return-to-duty testing requirement for all employees who test in the 0.02 to 0.039 range. Further, the rule does not preclude, and would in fact require, the employer to conduct a reasonable suspicion test if, when the employee next reported for duty, the employee showed indicators of alcohol misuse.

Recordkeeping and Reporting: Confidentiality

The requirements of the final rule with respect to recordkeeping are largely unchanged from the NPRM. The records must be maintained in a secure location and are releasable only as required under the rule or with the express written consent of the employee. This rule requires the release of employee-specific information to a subsequent employer or other identified individual if the original employer receives a written request from the employee. Contrary to the concerns expressed by some commenters, the FAA believes that providing a regulatory mandate for such release and removal of employer discretion will minimize possible liability. The rule also provides express authority to the FAA to conduct on-site inspections of employer’s alcohol programs, including the alcohol testing process. As stated in the preamble to the NPRM, the FAA’s experience with compliance monitoring under the antidrug rule has indicated that the individuals managing employers’ programs 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 is necessary to ensure industry awareness of the FAA’s authority to monitor compliance.

Although the NPRM proposed reporting of statistical information by all employers and other aviation entities with separate AMPPs, this final rule has been revised to limit the number of entities required to submit reports. The FAA similarly amended its antidrug rule, primarily to relieve the burdens associated with these rules on small employers. The formats to be used for reporting the statistical information are published as exhibits following this rule. No other form, including another DOT Agency’s form is acceptable for submission to the FAA.

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 FAAAct) 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 FAAAct contain a section entitled “Prohibition on service,” which does not appear in the amendments to the other DOT agencies’ statutes.

The “Prohibition on Service” section is found at new FAAAct 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 rule addressing prohibited conduct (see, e.g., 14 CFR 65.46a). Each 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, appendix J, section V, paragraph A expressly prohibits an employee who has engaged in conduct prohibited by the rule from performing safety-sensitive functions. This section, consistent with the rules of the other DOT agencies, also requires removal from duty for refusal to submit to a required alcohol test.

Section 614(b)(2) of the FAAct, "Effect of prohibition," 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 FAAct. Section 614(c)(1) requires the Administrator to prescribe regulations that provide, at a minimum, for the identification of employees in need of 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 appendix J, section V, paragraph E, "Required evaluation." This section requires that the employee be evaluated in accordance with section VI of the appendix prior to performing covered functions. The evaluation process is discussed further below.

The rule also contains a provision, analogous to the one in the antidrug rule, under which employers are 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 tests). The employer also has to forward to the FAA copies of the evaluations conducted by the SAP. The Federal Air Surgeon will use this information to determine whether further action should be taken with respect to the medical certificate. No employee requiring an airman medical certificate shall return to the performance of safety-sensitive functions without the Federal Air Surgeon's recommendation.

Section 614(b)(3) of the FAAct, "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 FAAct and has no parallel in the amendments to the other DOT agencies' 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 apply in two distinct circumstances. The second 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.

This rule implements the prohibitions in two ways. First, appendix J, section V, paragraph B, "Permanent disqualification for service" applies if an employee is determined to have violated the on-duty use prohibition or if the employee twice violated other provisions of the rule after its effective date. Under this section the employee is permanently barred from performing the safety-sensitive functions he or she performed before such a determination.

As proposed in the NPRM, this bar would have applied to the performance of any safety-sensitive function. The FAA noted in the NPRM that a narrow limit, limited only to the safety-sensitive functions the individual previously performed, could lead to anomalous results. Commenters differed in responding to the proposed bar, some favoring a broad exclusion while another wanted the bar removed as inconsistent with the Americans with Disabilities Act (ADA). The latter commenter failed to note that the Act requires a permanent bar and that the regulations implementing the ADA provide for the necessity of complying with the regulations of another Federal agency (29 CFR 1630.15(e)). However, the FAA has concluded that a bar limited to the statutory requirement is more likely to be seen as clearly consistent with the ADA and other legal constraints, and has thus adopted this change in the final rule. It should be noted that employers retain any discretion they may have under independent authority to preclude such employees from performing other safety-sensitive functions. The FAA expects that employers will exercise responsible judgment in deciding whether employees not expressly barred from service will be permitted to perform other safety-sensitive functions.

As addressed in the NPRM, the bar on two-time violators will apply both to persons who had gone through rehabilitation and to those who, after evaluation by a substance abuse professional (SAP), are 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.

A number of commenters objected to the FAA's proposal to apply the permanent bar to individuals who engage in multiple instances of alcohol misuse. They noted that recidivism is often a normal part of the rehabilitative process. Given the Act's requirements, these comments cannot be adopted. The Act requires that individuals complete rehabilitation prior to returning to safety-sensitive functions. Therefore, once an employee has been deemed by the SAP to have completed rehabilitation and is returned to the performance of safety-sensitive functions, the employee must conform his or her conduct to the requirements of the rule.

The bar following a refusal or failure of rehabilitation is implicitly implemented in this rule 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 does not meet the requirements, whether by failure or refusal, will be precluded from returning to the performance of safety-sensitive functions. Commenters supported the FAA's decision in the NPRM not to propose a definite time period during which the employee must comply. They agreed that the rule will 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

In the NPRM, the FAA specifically sought comment on whether the rule should include alcohol awareness training for all employees. Commenters split almost equally between two positions: Labor organizations and employees favored employee training, and employers stated that such training would be unnecessary and costly. The common preamble addresses these issues in greater detail; however, it should be noted that while the FAA is not requiring formal employee training, the FAA did adopt the recommendation to provide more detailed written materials to employees. Further, nothing in this rule precludes an employer from providing training to its employees under the employer's own authority.

Employee Referral, Evaluation, and Treatment

As was noted in the NPRM, the FAA recognized the sometimes conflicting needs of employer flexibility and employee health. The FAA did not propose to prescribe regulations with respect to specific types of rehabilitation and maintains that position in the final rule. This rule does include the process proposed in the NPRM under which each covered employee who engages in alcohol misuse or who refuses to submit to testing must be advised of all resources available to the employee. It also requires that each such employee be evaluated by a SAP to determine whether and what assistance the employee needed in resolving problems associated with alcohol misuse.

Some commenters, primarily labor organizations and employees, stated that the rule should include a mechanism to protect employees from overzealous, biased, or unprofessional SAPs. These commenters suggested that employees be entitled to obtain a second opinion from another SAP, that the SAP evaluations be reviewed by a medical review officer, or that the employee be permitted to choose the SAP. The FAA has not adopted these suggestions. Each person authorized by this rule to act as an SAP has obligations independent of this rule which require him or her to perform the duties in this rule professional and ethical manner. Aside from the financial restrictions discussed in the common preamble, the FAA does not believe that any additional protection of employees is necessary. The use of a second opinion system would be especially difficult and problematic in a program such as this one where, in the exercise of reasonable, good faith analysis of a case, two SAPs could very possibly arrive at different conclusions on the appropriate therapeutic intervention. As was the case in the NPRM, however, the final rule provides that selection of the SAP should be made in accordance with employer/employee agreements and employer policies.

Employer Alcohol Misuse Prevention Program Plans; Certification Statements

The FAA proposed in the NPRM to include a requirement that employers submit detailed alcohol misuse prevention program (AMP) plans to the FAA for approval prior to implementation of a program under the rule. Many commenters stated that the use of specific plans would be unduly cumbersome in the context of an AMP. These commenters stated that unlike drug testing, in which a single laboratory is generally used, it is likely that alcohol testing will be conducted using a variety of breath testing devices. Additionally, since the SAPs must personally evaluate each employee who violates the rule, large companies will probably arrange to have many SAPs available wherever they are necessary. These commenters requested that the FAA limit its plan submission requirements to address these concerns.

The FAA agrees with these comments. Although the use of detailed, preapproved plans was and remains beneficial in the context of the antidrug rule, the FAA has chosen to minimize the requirements for the final alcohol rule. Instead, the FAA will require submission of a certification statement that will provide specified identifying information and an agreement to comply with this rule. Like the plan submission requirement, the certification statements will provide the FAA with the ability to readily determine which companies are failing or refusing to comply with the rule. Commenters generally supported the FAA proposal to permit companies whose employees perform covered services by contract to an employer to establish independent alcohol misuse prevention programs. Under the revised procedures in this rule, contractor companies are able to submit certification statements directly to the FAA and may be authorized to implement AMPPs for their own employees. An aspect of the NPRM that has not changed is the requirement that each entity that establishes an AMPP, whether a contractor company or an employer, must maintain its program in accordance with the final rule. A contractor company, for example, is required to maintain the confidentiality of records pertaining to its employees and must disclose such records only in accordance with the rule. The FAA has retained the ability to revoke its authorization for any contractor company that fails to properly implement its AMPP. Because employers are only able to use contractor employees who are subject to an FAA-mandated program, potential revocation of authorization to establish an AMPP provides a strong incentive to contractor companies to properly implement their programs.

The FAA has also retained the provisions under which employers and contractor companies may join consortia for purposes of complying with the rule. A consortium certification statement must set forth the aspects of the AMPP that the consortium intends to provide to aviation employers.

Generally, the final rule provides that aviation entities must submit the certification statements in duplicate. The FAA will annotate receipt on one of the copies and return it to the submitter, after which the submitter can implement its AMPP.

Phased Implementation

The NPRM included a proposed schedule for phased implementation of the AMPP for the aviation industry. Most commenters that addressed the schedule favored the FAA’s proposal and this schedule has been maintained in the final rule. For each class of employers, the rule requires submission of a certification statement by a certain date and implementation of the FAA-mandated AMP approximately 6 months later. Only one change was made in response to comments: As proposed, employers would have had 8 months after their specified submission date to ensure that contractor employees were subject to an approved program. Many commenters did not think, given the complexity of the new requirements, that they could both implement their own programs and monitor their contractor companies’ compliance. The FAA has therefore revised the timetable to require employers to ensure compliance by contractors 12 months after the date on which the employers’ must submit their certification statements.

Under the final rule, part 121 and large part 135 certificate holders (more than 50 covered employees) and air traffic control facilities are required to comply with the rule first, with implementation scheduled to occur on January 1, 1995. Part 135 certificate holders with 11 to 50 covered employees are in the second phase of implementation (June 1, 1995), and small part 135 certificate holders and
Employees Located Outside the U.S.

The NPRM proposed that the 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 NPRM also proposed that the FAA would not permit testing of such employees, however, if the FAA received 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. Upon review of the comments submitted to this docket and to FAA Docket Number 27066 (which addressed possible testing requirements for foreign air carriers), the FAA has determined that it will not require testing of any employees located outside the territory of the United States.

To ensure proper selection for random testing, an employer is required to remove from the random testing pool any employee assigned to perform covered functions solely outside the territory of the United States, since such an employee would not be available for testing. The employee must be returned to the random testing pool as soon as the employee once more begins to perform functions wholly or partially within the territory of the United States. Although the FAA is cognizant of concerns about safety and economic parity that would be raised by such an exclusion, the FAA has determined that extraterritorial application of this rule, with its significant logistical issues and possible conflicts with local laws, should not be pursued.

Paperwork Reduction Act Approval

Appendix J to part 121 requires each employer to submit to the FAA: An alcohol misuse prevention program certification statement; 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 are 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 in this final rule have been submitted to the Office of Management and Budget (OMB) for approval.

Information collection requirements are not effective until the paperwork reduction act package has been received.

Economic Summary

A full regulatory evaluation has been prepared by the FAA and placed in the docket that provides detailed estimates of the economic consequences of this regulatory action. The FAA certifies that the annual costs to be imposed on small operators will not exceed the thresholds for significant impact and that this rule will not have a significant economic impact on a substantial number of small entities.

International Trade Impact Analysis

The FAA finds that this rule affects all part 121 and part 135 air carriers. The FAA finds that this rule will 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.

Federalism Implications

This rule does 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 rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Significance

This rule 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. The FAA has determined, however, that this rule involves issues of substantial interest to the public.

Therefore, the FAA has determined that the rule is significant under the Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (49 FR 11034; February 12, 1979).

A Regulatory Impact Analysis of the rule has been placed in the regulatory docket. A copy may be obtained by contacting the office identified under “FOR FURTHER INFORMATION CONTACT.”

Other Regulatory Matters

The FAA has received three petitions for rulemaking that address issues concerning alcohol use in aviation. The docket numbers for those petitions are 24706, 26233, and 26872. Because the issues raised in the petitions have been resolved in this final rule, the FAA has closed these actions.

A number of commenters also asked that the FAA amend 14 CFR 91.13(a) to provide that crewmembers would only be held liable for the actions of a fellow crewmember if they have actual knowledge that the crewmember was impaired by drugs or alcohol. The comments cited the case of Johnson v. National Transportation Safety Board, 979 F.2d 618 (7th Cir. 1992), in which a pilot lost his airman certificate after his copilot was determined to have been intoxicated. Revision of this provision was neither explicitly nor implicitly contemplated in the NPRM, and the FAA finds that the issue is outside the scope of this rulemaking.

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 amends 14 CFR parts 61, 63, 65, 121, and 135 as follows:

PART 61—CERTIFICATION: PILOTS AND FLIGHT INSTRUCTORS

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

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 CREW-MEMBERS OTHER THAN PILOTS

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

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 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:

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.

PART 65—CERTIFICATION: FLIGHT CREW-MEMBERS OTHER THAN PILOTS

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 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: FLIGHT CREW-MEMBERS OTHER THAN PILOTS

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

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 if that employer has determined that the employee has an alcohol concentration of 0.04 or greater. No employer having actual knowledge that such an employee has used alcohol within 8 hours shall permit the employee to perform or continue to perform air traffic control duties.
(e) 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.
(f) 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:

10. Section 121.458 is added to subpart O 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 0.04 or greater. No certificate holder having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) 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.

(d) Pre-duty use. (1) No covered 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 covered employee shall perform safety-sensitive duties other than those specified in paragraph (d)(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.

(e) 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.

(f) 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 of 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 subpart O 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 being tested 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 made applicable to employers by this appendix.

C. Definitions. As used in this appendix—

(1) 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.

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

(3) Alcohol means the intoxicating agent in beverages, mixtures, or preparations, including wine, beer, distilled spirits, rum, whiskey, gin, vodka, brandy, or other low molecular weight alcohols, including methanol or isopropyl alcohol.

(4) 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 under this appendix.

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

(6) Confirmation test means a second test, following a screening test with a result 0.02 or greater, that provides quantitative data of alcohol concentration.

(7) 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 submitted a program certification statement to the FAA in accordance with this appendix.

(8) 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 testing only, the term “covered employee” includes a person applying to perform a safety-sensitive function.

DOT agency means an agency (or its operating administration) of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 65, 121, and 135; 49 CFR parts 198, 219, and 382) in accordance with 49 CFR part 40.

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

Performing (a safety-sensitive function) means 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 testing process.

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

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or an addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission) with knowledge of and clinical experience in the diagnosis and treatment of alcohol-related disorders.

Violation rate means the number of covered employees (as reported under section IV of this appendix) found during random tests given under this appendix to have an alcohol concentration of 0.04 or greater plus the number of employees who refused a random test required by this appendix, divided by the total reported number of employees in the industry given random alcohol testing under this appendix plus the total reported number of employees in the industry who refuse a random test required by this appendix.

B. 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 or local 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.
4. Aircraft dispatcher duties.
5. Aircraft maintenance or preventive maintenance duties.
7. Aviation screening duties.
8. Air traffic control duties.

III. Tests Required

A. Pre-employment

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 0.04. If a pre-employment test result under this paragraph indicates an alcohol concentration of 0.02 or greater but less than 0.04, 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 under 49 CFR part 40 within the previous 6 months, with a result indicating an alcohol concentration less than 0.04.
   b. The State criminal records of the 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, each 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 Administrator's determination, using the best available information at the time of the determination, that the covered 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 prepare and maintain on file a record 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 prepare and maintain the same record. Records shall be submitted to the FAA upon request of the Administrator or his or her designee.

3. A covered employee who is subject to post-accident testing shall remain readily available for such testing or 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. Except as provided in paragraphs 2-4 of this section, the minimum annual percentage rate for random alcohol testing will be 25 percent of the covered employees.

2. The Administrator's decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry. All information used for this determination is drawn from alcohol MIS reports required by the appropriate DOT agency. The reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the violation rate. Each year, the Administrator will publish the Federal Register the minimum annual percentage rate for random alcohol testing of covered employees. The new minimum annual percentage rate for random alcohol testing is based on the violation rate for the entire industry.

3. (a) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of this appendix for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

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

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

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

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

6. The employer shall randomly select a sufficient number of covered employees for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random alcohol testing determined by the Administrator. If the employer conducts random testing through a consortium, the number of employees to be tested may be calculated for the employer based on the total number of covered employees who are subject to random alcohol testing at the same minimum annual percentage rate for this appendix or any DOT alcohol testing rule.

7. Each employer shall ensure that random alcohol tests conducted under this appendix are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

8. Each employer shall require that each covered employee who is notified of selection for random testing proceeds to the testing site immediately; provided, however, that if the employee is performing a safety-sensitive function at the time of 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.

9. A covered employee shall only be randomly 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.

10. If a covered employee is subject to random alcohol testing under the alcohol
testing rules of more than one DOT agency, the employer shall be subject to random alcohol testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee's functions.

11. If an employer is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the employer may—
(a) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or
(b) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

D. Reasonable Suspicion Testing

1. An employer shall require a 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, just preceding, or just after the period of the work day that the covered employee is required to be in compliance with this rule. An employee may be directed by the employer to undergo reasonable suspicion testing for alcohol only while the employee is performing safety-sensitive functions; just before the employee has ceased performing such functions.

4. (a) If a test required by this section is not administered within 2 hours following the determination made under paragraph 2 of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination made under paragraph 2 of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(b) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, 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 the behavioral, speech, or performance indicators of alcohol misuse, nor shall an employer permit the covered employee to perform or continue to perform safety-sensitive functions until:

(1) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02;
(2) The start of the employee's next regularly scheduled duty period, but not less than 8 hours following the determination made under paragraph 2 of this section that there is reasonable suspicion that the employee has violated the alcohol misuse provisions in §65.46a, 121.458, or 135.253 of this chapter.

(c) Except as provided in paragraph 4(b), no employer shall take any action under this appendix against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with authority independent of this appendix from taking any action otherwise consistent with law.

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 0.02.

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. A covered employee shall be tested under this paragraph only while the employee is performing safety-sensitive functions; just before the employee has ceased performing such functions.

G. Retesting of Covered Employees With an Alcohol Concentration of 0.02 or Greater but Less Than 0.04

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 0.02 or greater but less than 0.04.

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. Permanence. 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 0.02 or greater.

(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 all test results below 0.02 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. Documents 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. Records relating to the refusal of any covered employee to submit to an alcohol test required by this appendix.
3. Records presented by a covered employee to dispute the result of an alcohol test administered under this appendix.
4. Records related to other violations of §§65.46a, 121.248, or 135.253 of this chapter.
5. 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 of alcohol misuse prevention programs shall be submitted to the FAA in the form and manner prescribed by the Administrator by March 15 of each year covering the previous year in accordance with the provisions below.

1. Each part 121 certificate holder shall submit an annual report each year.

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 shall include 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.

4. Each report shall be submitted in the form and manner prescribed by the Administrator.

5. Each report shall be signed by the employer's alcohol misuse prevention program manager or other designated representative.

6. Each report that contains information on an alcohol screening test result of 0.02 or greater or a confirmation of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following information elements:
   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. Number of screening tests by type of test and employee category.
   d. Number of confirmation alcohol tests indicating an alcohol concentration of 0.02 or greater, by type of test and employee category.
   e. Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.
   f. Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.
   g. Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 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 administrated 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 0.04 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 supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   k. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, the number of such refusals that were for random tests, and the action taken in response to each refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   l. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   m. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   n. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   o. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   p. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.
   q. Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of §§65.46a, 121.458, or 135.253 of this chapter shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)
      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) Number of screening tests by type of test and employee category.
      d) Number of covered employees who engaged in alcohol misuse 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).
      e) Number of covered employees who refused to submit to an alcohol test required under this appendix, and the action taken in response to the refusal.
      f) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

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 employees to perform safety-sensitive functions if the employer has determined that the employee has violated this paragraph.
B. Permanent Disqualification From Service

An employee who violates §§ 65.46a(c), 121.456(c), or 135.253(c) or who violates other alcohol misuse provisions of §§ 65.46a, 121.456, or 135.253 of this chapter shall be permanently precluded from performing for an employer the safety-sensitive duties that the employee performed before such violation.

C. Notice to the Federal Air Surgeon

1. An employer who determines that a covered employee who holds an airman medical certificate issued under part 67 who has engaged in conduct that violated the provisions of §§ 65.46a, 121.456, 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 alcohol testing 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), 407 7th Street SW, Washington, DC 20590.

4. No covered employee who holds a part 67 airman 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 67, who has refused to submit to an alcohol test required under this appendix.

2. Notifications should be sent to: Federal Aviation Administration, Aviation Standards National Field Office, Airman Certification Branch, AAM-600, 407 7th Street SW, Washington, DC 20590.

3. An employer is not required to notify the FAA of refusals to submit to pre-employment 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, 121.456, or 135.253 of this chapter shall perform safety-sensitive duties unless the employee has met the requirements of section VI, paragraph C of this appendix.

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 0.02 or greater but less than 0.04 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, unless:

(a) The employee’s alcohol concentration measures at or below 0.02;

(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 0.04. This does not prohibit an employer with authority independent of this rule from taking any action otherwise consistent with law.

VI. Alcohol Misuse Information, Training, and Referral

A. Employer Obligation to Promulgate a Policy on the Misuse of Alcohol

1. General requirements:

(a) Each employer shall provide educational materials that explain alcohol misuse requirements and the employer’s policies and procedures with respect to meeting those requirements.

(b) The employer shall ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the employer’s FAA-mandated alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.

(c) Each employer shall provide written notice to employees organizations of the availability of this information.

2. Required content:

(a) The identity of the person designated by the employer to answer employee questions about the misuse of alcohol;

(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, including the 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 0.02 or greater but less than 0.04.

(k) Information concerning the effects of alcohol misuse on an individual’s health, work, and personal life; signs and symptoms of alcohol problems; and available methods of evaluating and resolving problems associated with the misuse of alcohol; and intervening when an alcohol problem is suspected, including confrontation, referral to any available employee assistance program, and/or referral to management.

(l) Optional provisions:

(i) The materials supplied to covered employees may also include information on additional employer policies with respect to the use or possession of alcohol, including 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 distinguished 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 under alcohol testing under section II of this appendix receive at least 90 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, 121.456, 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, 121.456, 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, 121.456, 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 0.02.

(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 successfully completed a rehabilitation program prescribed under subparagraph 2 of this paragraph, and,
follow-up alcohol test administered by the employee following the employee's return to duty. The number and frequency of such follow-up testing shall be determined by a substance abuse professional. Such testing shall consist of at least six tests in the first 12 months following the employee's return to duty. The employer may direct the employee to undergo testing for drugs (both return to duty and follow-up), in addition to alcohol testing, if the substance abuse professional determines that drug testing is necessary for the particular employee. Any such drug testing shall be conducted in accordance with the requirements of 49 CFR part 40.

The number and frequency of such testing shall be conducted in accordance with the requirements of 49 CFR part 40. 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. Each employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(a) A public agency, such as a State, county, or city government;
(b) The employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;
(c) The sole source of therapeutically appropriate treatment under the employee's health insurance program; or
(d) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

6. The requirements of this paragraph with respect to referral, evaluation, and rehabilitation do not apply to applicants who refuse to submit to pre-employment testing or have a pre-employment test with a result indicating an alcohol concentration of 0.04 or greater.

VII. Employer's Alcohol Misuse Prevention Program

A. Schedule for Submission of Certification Statements and Implementation

1. Each employer shall submit an alcohol misuse prevention program (AMPP) certification statement as prescribed in paragraph B of section VII of this appendix. In duplicate, to the FAA, Office of Aviation Medicine, Drug Abatement Division (AAM-D), 20590, in accordance with the schedule below.

(a) Each employer that holds a part 121 certificate, each employer that 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 a certification statement to the FAA by July 1, 1994. Each employer must implement an AMPP meeting the requirements of this appendix on January 1, 1995. Contractors whose employees must be subject to an AMPP meeting the requirements of this appendix by July 1, 1995.

(b) Each employer that holds a part 135 certificate and directly employs from 11 to 50 covered employees shall submit a certification statement to the FAA by January 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix on July 1, 1995. Contractor employees to those employers must be subject to an AMPP meeting the requirements of this appendix by January 1, 1996.

(c) Each employer that 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 a certification statement to the FAA by July 1, 1995. Each employer must implement an AMPP meeting the requirements of this appendix on January 1, 1996. Contractor employees to those employers must be subject to an AMPP meeting the requirements of this appendix on January 1, 1996.

2. A company providing covered employees by contract to employers may be authorized by the FAA to establish an AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each contractor company that establishes an AMPP shall implement its AMPP in accordance with the provisions of this appendix.

(a) The FAA may revoke its authorization 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-mandated AMPP.

3. A consortium may be authorized to establish a consortium AMPP under the auspices of this appendix by submitting a certification statement meeting the requirements of paragraph B of section VII of this appendix directly to the FAA. Each consortium that so certifies shall implement the AMPP on behalf of the consortium members in accordance with the provisions of this appendix.

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

(b) Each employer that participates in an FAA-approved consortium remains individually responsible for ensuring compliance with all of the 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 parts 121 or 135 of this chapter after the effective date of this final rule shall submit an alcohol misuse prevention program (AMPP) certification statement to the FAA prior to beginning operations pursuant to the certificate. The AMPP shall be implemented concurrently with beginning such operations or on 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-mandated AMPP within 180 days of the implementation of the employer's AMPP.

5. Any person who intends to begin air traffic control operations as an employer as defined in 14 CFR 65.46(a)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after March 18, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or on the date specified in paragraph A.1 of this section, whichever is later. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within 180 days of the implementation of the facility's program.

6. Any person who intends to begin sightseeing operations as an operator under 14 CFR 135.1(c) after March 18, 1994 shall, not later than 60 days prior to the proposed initiation of such operations, submit an alcohol misuse prevention program (AMPP) certification statement to the FAA. The AMPP shall be implemented concurrently with the inception of operations or on 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-mandated AMPP within 180 days of the implementation of the employer's AMPP.

7. The duplicate certification statement shall be annotated indicating receipt by the FAA and returned to the employer, contractor company, or consortium.

8. Each consortium that submits an AMPP certification statement to the FAA must receive actual notice of the FAA's receipt of the statement prior to performing services as an FAA-approved consortium member under this appendix on behalf of employers or contractor companies.

9. Each employer, and each contractor company that submits a certification statement 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.) prior to the effective date of such change. The employer or contractor company must ensure that it is continuously covered by an FAA-mandated alcohol misuse prevention program.
B. Required Content of AMPP Certification Statements

1. Each AMPP certification statement submitted by an employer or a contractor company shall provide the following information:
   (a) The name, address, and telephone number of the employer/contractor company and for the employer/contractor company AMPP manager;
   (b) FAA operating certificate number (if applicable);
   (c) The date on which the employer or contractor company will implement its AMPP;
   (d) If the submitter is a consortium member, the identity of the consortium; and
   (e) A statement signed by an authorized representative of the employer or contractor company certifying an understanding of and agreement to comply with the provisions of the FAA’s alcohol misuse prevention regulations.

2. Each consortium certification statement shall provide the following information.
   (a) The name, address, and telephone number of the consortium’s AMPP manager;
   (b) A list of the specific services the consortium will be providing in implementation of FAA-mandated AMPPs (e.g., random testing, SAP).
   (c) A statement signed by an authorized representative of the consortium certifying an understanding of and agreement to comply with the provisions of the FAA’s alcohol misuse prevention regulations.

VIII. Employees Located Outside the U.S.

A. No covered employee shall be tested for alcohol misuse while located outside the territory of the United States.

1. Each covered employee who is assigned to perform safety-sensitive functions solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

2. Each covered employee who is removed from the random testing pool under this paragraph shall be returned to the random testing pool when the employee resumes the performance of safety-sensitive functions wholly or partially within the territory of the United States.

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

PART 135—AIR TAXI OPERATORS AND COMMERCIAL OPERATORS

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


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 those 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 subpart E 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 0.04 or greater. No certificate holder or operator having actual knowledge that an employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

(c) 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.

(d) Pre-duty use. (1) No covered 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 covered employee shall perform safety-sensitive duties other than those specified in paragraph (d)(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.

(e) 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.
(f) 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 operator or certificate holder shall permit a covered employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

16. Section 135.255 is added to subpart E 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.

Federico Pena,
Secretary of Transportation.
David R. Hinson,
Administrator.

Note: These exhibits will not appear in the Code of Federal Regulations.
Exhibits—FAA Alcohol Testing Management Information System Data Collection Forms
ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) DATA COLLECTION FORM

INSTRUCTIONS

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

This reporting form includes five sections. These sections address the data elements required in the FAA and the DOT alcohol testing regulations. The five sections, the page number for the instructions, and the page location on the reporting form are:

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions Page</th>
<th>Reporting Form Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. AVIATION EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i-ii</td>
<td>1</td>
</tr>
<tr>
<td>C. ALCOHOL TESTING INFORMATION</td>
<td>ii-v</td>
<td>2-4</td>
</tr>
<tr>
<td>D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION</td>
<td>v</td>
<td>4-5</td>
</tr>
<tr>
<td>E. ALCOHOL TRAINING/EDUCATION</td>
<td>v</td>
<td>5</td>
</tr>
</tbody>
</table>

Page 1 AVIATION EMPLOYER INFORMATION (Section A) requires the company name for which the report is prepared and a current address. Below the company names, list any other names the company uses ("Doing Business As") and the company’s FAA Plan Identification Number. Provide the FAA Operating Certificate Number held by the company (if any). Below the company name, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary. Finally, a signature and title with a date, are required certifying the correctness and completeness of the information provided on the form, and a current telephone number (including the area code) of the individual who prepared the report.

Page 1 COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under the FAA/DOT regulations. For the FAA, the covered employee categories are: "Flight Crewmember" which includes pilots, flight engineers, and navigators; "Flight Attendant"; "Flight Instructor"; "Aircraft Dispatcher"; "Maintenance", which includes employees who perform preventive maintenance; "Ground Security Coordinator"; "Aviation Screener"; and "Air Traffic Controller." 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 FAA covered personnel who also perform non-aviation duties covered by the alcohol rules of one or more DOT operating administration(s). **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).

**ALCOHOL TESTING INFORMATION** (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category, of employment for which the applicant was applying. The other categories are for employee testing and require information for company employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. If the value for an item is zero (0), place a zero (0) on the form. These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first column with the heading **NUMBER OF SCREENING TESTS**, requires a count of all screening alcohol tests performed for each employee category. It should not include refusals to test.

The second column with the heading **NUMBER OF CONFIRMATION TESTS**, requires a count of all confirmation alcohol tests performed for each employee category.

The third column with the heading **NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04**, requires a count for each employee category of test results equal to or greater than 0.02, but less than 0.04.

The fourth column with the heading **NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04**, requires a count for each employee category of test results equal to or greater than 0.04. Note: An employee may not return to a safety sensitive position if a result is equal to or greater than 0.02. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all return to duty results in the third column of the table.

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

A sample table is provided on page iv with example numbers.
Below the part of the table containing pre-employment testing information is a box with the heading "Number of persons denied a position as a covered employee following a pre-employment 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 C, ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Flight Crewmember" and "Flight Attendant" to illustrate the procedures for completing the form.

Screening tests were performed on 157 job applicants for flight crewmember positions during the reporting year. This information is entered in the first column of the table in the row marked "Flight Crewmember".

Confirmation tests were necessary for 6 of the 157 applicants for flight crewmember positions. Enter this information in the second column of the table in the row marked "Flight Crewmember". The confirmation test results for these 6 applicants were the following:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.05</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

The confirmation test results for 2 of the applicants for flight crewmember positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the third column of the table in the row marked "Flight Crewmember".

The confirmation test results for 3 of the applicants for flight crewmember positions were equal to or greater than 0.04. Enter this information in the fourth column of the table in the row marked "Flight Crewmember".

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for flight crewmember positions and 107 applicants for flight attendant positions were subjected to screening 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).

Please note that the sample data collection form also has information for flight attendants workers on line two. The same procedures outlined for flight crewmember should be followed.
for entering the data on flight attendants. With applicants for flight attendant positions, 107 screening tests were conducted resulting in 3 confirmation tests. No results were equal to or greater than 0.02, but less than 0.04; the confirmation test result for 1 of the flight attendant applicants was equal to or greater than 0.04. This information is entered in the row marked "Flight Attendant".

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flight Crewmember</td>
<td>157</td>
<td>6</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Flight Attendant</td>
<td>107</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>TOTAL</td>
<td>264</td>
<td>9</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

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 CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 3 Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide the "Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations)". This information should be available from the personnel office and/or drug or alcohol program manager.

Page 4 Next you must provide information on ACTIONS TAKEN ON VIOLATIONS OF THIS REGULATION. Indicate the number of employees subjected to the following actions:

- No longer employed with company - include covered employees who resigned or were terminated as the result of alcohol misuse.
- Reassigned to non-covered functions - include covered employees who were reassigned within the company to a non-covered position as the result of alcohol misuse.

- Entered rehabilitation, if applicable, and/or returned to covered functions - include covered employees who are undergoing or have completed a rehabilitation program and/or covered employees who have returned to a covered function.

- Other - include covered employees who did not fall under one of the previous options and specify the action taken.

Indicate the sum of the actions taken on the line marked TOTAL.

Page 4 OTHER ALCOHOL TESTING/PROGRAM INFORMATION (Section D) 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 4 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 4 VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION, requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. Other violations not delineated in this table may also be provided.

Page 5 EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires information on the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or other (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FAA regulation and the actions taken following the refusal.

Page 5 ALCOHOL TRAINING/EDUCATION (Section E) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.
FAA ALCOHOL TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19_

A. AVIATION EMPLOYER INFORMATION

<table>
<thead>
<tr>
<th>Company Name</th>
<th>FAA Plan No.</th>
<th>FAA Certificate No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Street Address/P.O. Box</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City</td>
<td>State</td>
<td>Zip Code</td>
</tr>
</tbody>
</table>

Other Part 121 and/or Part 135 certificate holders included in this report. (Attach additional sheets if necessary.)

<table>
<thead>
<tr>
<th>Company Name</th>
<th>Telephone No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Street Address/P.O. Box</td>
<td></td>
</tr>
<tr>
<td>City</td>
<td>State</td>
</tr>
</tbody>
</table>

I, the undersigned, certify that the information provided on this Federal Aviation Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature ____________________________

Title ____________________________

Date ____________________________

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.

The Federal Aviation Administration estimates that the average burden for this report form is 2.5 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: FAA Drug Abatement Division (AAM-800); U.S. Department of Transportation; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2120-0535); Washington, D.C. 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FAA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FHWA</td>
<td>FRA</td>
</tr>
</tbody>
</table>

Flight Crewmember
Flight Attendant
Flight instructor
Aircraft Dispatcher
Maintenance
Ground Security Coordinator
Aviation Screener
Air Traffic Controller

TOTAL
READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).

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 the FAA alcohol testing regulations.

   • The information provided 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 D ['OTHER ALCOHOL TESTING/PROGRAM INFORMATION']. Do not include refusals for testing in other sections of this 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.

C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
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<tr>
<td>Flight Crewmember</td>
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<td>Flight Attendant</td>
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<td>Flight Instructor</td>
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<td>Aircraft Dispatcher</td>
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<td>Maintenance</td>
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<td>Ground Security Coordinator</td>
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<td>Aviation Screener</td>
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<td>Total</td>
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</tbody>
</table>

Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater
### C. ALCOHOL TESTING INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
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</thead>
<tbody>
<tr>
<td>POST-ACCIDENT</td>
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<tr>
<td>Flight Crewmember</td>
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<td>Air Traffic Controller</td>
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<td>Total</td>
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<tr>
<td>REASONABLE SUSPICION</td>
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<td>RETURN TO DUTY</td>
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<td>Air Traffic Controller</td>
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<tr>
<td>Total</td>
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</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations): 3
### C. ALCOHOL TESTING INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Follow-Up</td>
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<tr>
<td>Flight Crewmember</td>
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<td>Flight Instructor</td>
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<tr>
<td>Maintenance</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Ground Security Coordinator</td>
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<td></td>
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<tr>
<td>Aviation Screener</td>
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<tr>
<td>Air Traffic Controller</td>
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<tr>
<td>Total</td>
<td></td>
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</tbody>
</table>

### Actions Taken on Violations of This Regulation

<table>
<thead>
<tr>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>No longer employed with company:</td>
</tr>
<tr>
<td>Reassigned to non-covered functions:</td>
</tr>
<tr>
<td>Entered rehabilitation, if applicable, and/or returned to covered functions:</td>
</tr>
<tr>
<td>Other (specify):</td>
</tr>
<tr>
<td>TOTAL</td>
</tr>
</tbody>
</table>

### D. OTHER ALCOHOL 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

<table>
<thead>
<tr>
<th>NUMBER OF COVERED EMPLOYEES</th>
<th>VIOLATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Covered employee used alcohol while performing safety-sensitive function.</td>
</tr>
<tr>
<td></td>
<td>Covered employee used alcohol within 4/8 hours of performing safety-sensitive function.</td>
</tr>
<tr>
<td></td>
<td>Covered employee used alcohol before taking a required post-accident alcohol test.</td>
</tr>
</tbody>
</table>
### D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST</th>
<th>NUMBER OF REFUSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>RANDOM TESTS</td>
</tr>
<tr>
<td>Number of covered employees who refused to submit to an alcohol test required under the FAA rule:</td>
<td></td>
</tr>
<tr>
<td>ACTION TAKEN</td>
<td>NUMBER</td>
</tr>
<tr>
<td>No longer employed with company:</td>
<td></td>
</tr>
<tr>
<td>Reassigned to non-covered functions:</td>
<td></td>
</tr>
<tr>
<td>Entered rehabilitation, if applicable, and/or returned to covered functions:</td>
<td></td>
</tr>
<tr>
<td>Other (specify):</td>
<td></td>
</tr>
</tbody>
</table>

### E. ALCOHOL TRAINING/EDUCATION

<table>
<thead>
<tr>
<th>ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FAA alcohol testing regulations:</td>
<td></td>
</tr>
</tbody>
</table>
INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Aviation Administration (FAA) and the U.S. Department of Transportation (DOT) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there are no screening tests with results equal to or greater than 0.02 and no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes three sections. These sections address the data elements required in the FAA/DOT alcohol testing regulations.

SECTION A - AVIATION EMPLOYER INFORMATION requires the company name for which the report is prepared, a current address, the company’s FAA Plan Identification Number, and the FAA Operating Certificate Number held by the company (if any). Below the company name, list the name, address, and telephone number for any other aviation companies covered under the report, attaching additional sheets, if necessary. Finally, a signature and title with a date are required certifying the correctness and completeness of the information provided on the form, and a current telephone number (including the area code) of the individual who prepared the report.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the FAA/DOT regulations. For the FAA, the covered employee categories are: "Flight Crewmember", which includes pilots, flight engineers, and navigators; "Flight Attendant"; "Flight Instructor"; "Aircraft Dispatcher"; "Maintenance", which includes employees who perform preventive maintenance; "Ground Security Coordinator"; "Aviation Screener"; and "Air Traffic Controller." 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 FAA covered personnel who also perform non-aviation duties covered by the alcohol rules of one or more other 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).

SECTION C - ALCOHOL TESTING INFORMATION requires information for alcohol testing. The first table requests information on the NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED by employee category and type of test. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the applicant was applying. The other categories are for employee testing and require information for company employees in covered positions only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. The testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. If no testing occurred zeroes should be entered. These numbers do not include refusals for testing. Each column in the table should be added and the answer entered in the row marked "TOTAL".
Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations). This information should be available from the personnel office and/or alcohol program manager.

SECTION D - OTHER ALCOHOL TESTING/PROGRAM INFORMATION requires information on the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or other (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FAA regulation and the action taken following the refusal. Indicate the number of employees subjected to the following actions:

- **No longer employed with company** - include covered employees who resigned or were terminated as the result of a refusal to submit to an alcohol test.

- **Reassigned to non-covered functions** - include covered employees who were reassigned within the company to a non-covered position as the result of a refusal to submit to an alcohol test.

- **Entered rehabilitation, if applicable, and/or returned to covered functions** - include covered employees who are undergoing or have completed a rehabilitation program and/or covered employees who have returned to a covered function.

- **Other** - include covered employees who did not fall under one of the previous options and specify the actions taken.

SECTION E - ALCOHOL TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.
FAA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM

**YEAR COVERED BY THIS REPORT:** 19

<table>
<thead>
<tr>
<th>A. AVIATION EMPLOYER INFORMATION</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Company Name</strong></td>
<td></td>
</tr>
<tr>
<td><strong>FAA Plan No.</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Street Address/P.O. Box</strong></td>
<td></td>
</tr>
<tr>
<td><strong>City</strong></td>
<td></td>
</tr>
<tr>
<td><strong>State</strong></td>
<td></td>
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<tr>
<td><strong>Zip Code</strong></td>
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</tr>
</tbody>
</table>

Other Part 121 and/or Part 135 certificate holders included in this report. (Attach additional sheets if necessary.)

<table>
<thead>
<tr>
<th>Company Name</th>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Telephone No.</strong></td>
<td>(_ _ _ _ _ _ _ _ _)</td>
</tr>
<tr>
<td><strong>Street Address/P.O. Box</strong></td>
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<td><strong>City</strong></td>
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<td><strong>State</strong></td>
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<td><strong>Zip Code</strong></td>
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</tbody>
</table>

I, the undersigned, certify that the information provided on this Federal Aviation Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

__________________________
Signature

__________________________
Date

__________________________
Title

__________________________
Telephone 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.

The Federal Aviation Administration estimates that the average burden for this report form is 1 hour. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: FAA Drug Abatement Division (AAM-800); U.S. Department of Transportation; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2120-0535); Washington, D.C. 20503.

### B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>COVERED EMPLOYEES</th>
<th>NUMBER OF FAA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>FHWA</td>
<td>FRA</td>
</tr>
<tr>
<td>Flight Crewmember</td>
<td></td>
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<tr>
<td>Flight Attendant</td>
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<tr>
<td>Flight Instructor</td>
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<tr>
<td>Aircraft Dispatcher</td>
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<tr>
<td>Maintenance</td>
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<tr>
<td>Ground Security Coordinator</td>
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<tr>
<td>Aviation Screener</td>
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<td></td>
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<tr>
<td>Air Traffic Controller</td>
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<td></td>
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</tbody>
</table>

**TOTAL**
### C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>PRE-EMPLOYMENT</th>
<th>RANDOM</th>
<th>POST-ACCIDENT</th>
<th>REASONABLE SUSPICION</th>
<th>RETURN TO DUTY</th>
<th>FOLLOW-UP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Flight Crewmember</td>
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<tr>
<td>Flight Attendant</td>
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<tr>
<td>Total</td>
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</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FAA regulations):

### D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST</th>
<th>NUMBER OF REFUSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>RANDOM TESTS</td>
</tr>
<tr>
<td></td>
<td>OTHER TESTS</td>
</tr>
</tbody>
</table>

Number of covered employees who refused to submit to an alcohol test required under the FAA rule:

**ACTION TAKEN**

- No longer employed with company:
- Reassigned to non-covered functions:
- Entered rehabilitation, if applicable, and/or returned to covered functions:
- Other (specify):

### E. ALCOHOL TRAINING/EDUCATION

**ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD**

Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FAA alcohol testing regulations:
Antidrug Program for Personnel Engaged in Specified Aviation Activities

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On November 14, 1988, the FAA issued a final rule requiring specified aviation employers and operators to initiate antidrug programs, including drug testing, for personnel performing specified safety-related functions. Subsequently, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 (the Act) was enacted. Among other things, the Act provided a statutory mandate for drug testing in the aviation industry and required specific consequences for positive drug tests. This NPRM proposes amendments to certain provisions of the FAA’s antidrug rule to comply with the Act. The NPRM also proposes certain other changes to the antidrug rule that would clarify employer and medical review officer (MRO) responsibilities or address other issues that have been identified since the promulgation of the rule. These amending changes would facilitate implementation and enforcement of the final rule.

DATES: Comments must be received on or before April 18, 1994.

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. 25148, 800 Independence Avenue, SW., Washington, DC 20591. Comments that are delivered to this address must be marked “Docket No. 25148.” 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.

Background

On November 21, 1988, the FAA issued its final rule requiring certain aviation employers and operators to develop and to implement an antidrug program for employees performing specified aviation activities (53 FR 47024). Initially, the rule was issued under the general authority of the FAA Administrator to promulgate regulations relating to aviation safety; however, the Omnibus Transportation Employee Testing Act of 1991 (the Act) amended the Federal Aviation Act of 1958 (the FAAct) to provide a statutory mandate for drug testing of air carrier employees. The Act also prescribed certain consequences for prohibited drug use and mandated the use of split specimen testing. This notice proposes changes to the antidrug rule that would conform the rule to the requirements of the Act.

In addition to the conforming changes required by the Act, this notice also proposes certain other changes to the antidrug rule. Each of these changes would clarify the requirements of the rule, or otherwise address concerns that have been identified since the promulgation of the rule. These amending changes would facilitate implementation and enforcement of the final rule.

Amendments Required by the Act

Prohibition on Service; Rehabilitation and Evaluation

Among the amendments to the FAAct in the Omnibus Transportation Employee Testing Act is a section entitled “Prohibition on service” (found at new FAAct section 614(b)), which provides that no person who is determined to have engaged in illegal drug use may perform a safety-sensitive function after such determination. The FAA’s regulations that address use of prohibited drugs (see, e.g., 14 CFR 65.46(c), (d)) already include such a prohibition on continued duty; however, these sections would be revised slightly to reflect the fact that entities other than certificate holders (i.e., contractor companies) can require drug tests under the antidrug rule if they have an FAA-approved antidrug program.

Section 614(b)(2) of the FAAct, “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 FAAct. Section 614(c)(1) requires the Administrator to prescribe regulations that at a minimum provide for the identification and opportunity for treatment of employees in need of assistance in resolving problems with the use of controlled substances. Further, the section states that the Administrator shall determine the circumstances under which such employees shall be required to participate in such a program. This language recognizes 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 the proposed revisions to paragraph A, section VII, of appendix I. The legislative history of the Act reflected the fact that the FAA did not prescribe regulations with respect to specific...
types of rehabilitation in its antidrug rule. However, because the Act requires the FAA to prescribe regulations under which persons in need of assistance would be identified, this NPRM proposes to modify the MRO duties to include such identification.

As proposed, each covered employee who had a positive drug test or who refused to submit to testing would be advised of all relevant resources available to the employee. Further, each such employee would be evaluated by the MRO or, on referral by the MRO, by a substance abuse professional (SAP) who would determine whether and what assistance the employee needed in resolving problems associated with prohibited drug use. The SAP would have to be a qualified individual as defined in the NPRM with knowledge of and clinical experience in the diagnosis and treatment of drug use and abuse. This NPRM would not propose to change requirements concerning whether an employer would provide or pay for any required treatment, would continue to employ, or would hold a position open for the employee upon completion of the treatment. As is currently the case under the antidrug rule, these issues would be a matter for employer/employee negotiation.

New section 614(b)(3) of the FAA Act, "Performance of prior duties prohibited," provides sanctions for employees who engage in prohibited use of drugs. 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 prohibited drug use. 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 illegally uses drugs "while on duty." The remaining prohibitions all relate to rehabilitation: the absolute bar to returning to duty applies if an employee uses drugs after the date of enactment, and

1. Had previously used drugs 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, the applicable regulatory sections (14 CFR 65.46, 121.455, and 135.249) would be revised to prohibit employers from using anyone to perform the function specified in section III of appendix I that the individual was performing if that person had two verified positive drug tests or if the individual used a prohibited drug while performing such a specified function. In order to effectively administer this provision, the FAA is proposing that this prohibition would be effective for tests occurring after the effective date of the final rule proposed in this notice.

This bar would be limited to the narrow prohibition in the Act and would not affect the performance of other duties. While the FAA recognizes that a narrow bar could lead to anomalous results (for example, a person might be barred from performing screening duties but could serve as a pilot), to the statutory requirements is more likely to be consistent with the requirements of the Americans with Disabilities Act or other legal constraints. The FAA expects that employers would exercise responsible judgment in determining whether employees not expressly barred from service should be permitted to perform other safety-sensitive duties.

Second, the bar following a refusal to submit to testing would be implemented by requiring that employers undertake or failure to complete rehabilitation would be implemented by retaining the current requirement that prior to returning to duty performing safety-sensitive functions following a failure of an FAA-mandated drug test or refusal to submit to such a drug test, the employee would have to be evaluated by the MRO on the specific issue of compliance with any previously-established treatment program. This NPRM also retains the provisions regarding MRO recommendations for return to duty, with the modification that, based on the requirements of the Act, the MRO cannot recommend return to duty if an individual has failed to comply with a specified rehabilitation program. The FAA has chosen, however, not to propose a definite time period during which the employee must agree to undertake or complete the prescribed rehabilitation. This allows for the denial of the phase that most people go through when first confronted with evidence of a drug problem.

Split Specimen Testing

Split specimen testing is a procedure under which an original urine specimen is divided into two containers, each of which is sealed, labeled, and maintained separately. If the primary specimen tests positive, the split or secondary specimen can be tested to ensure that the confirmed positive was not caused by error or tampering. The FAA's final antidrug rule was silent on the issue of split specimen testing; however, the DOT final rule (49 CFR part 40) included a provision under which employers could offer the option of split specimen testing (49 CFR 40.25(f)(10)(ii)). In accordance with the requirements of the Act, DOT has revised its procedural rule to require split specimen testing for all drug testing performed under the auspices of the FAA antidrug rule (and those of the Federal Highway Administration, the Federal Railroad Administration, and the Federal Transit Administration). Under this proposal, split specimen testing would be in lieu of the right to request a retest of the original specimen (see proposed revisions to section VI, paragraph C of appendix I).

Both the Act and the DOT revised rule provide that an employee is entitled to split specimen testing if the employee requests such testing within 3 days of receiving notice of the positive test result. However, as provided in 49 CFR part 40, a request to have a split specimen tested made after the 3-day period must be honored if the employee provides an adequate explanation of the delay, and in other cases the employer may voluntarily agree to the test of the split specimen. Finally, as proposed, no employer or agency action would be stayed during the request period or while waiting for split specimen test results.

Clarifying Amendments

Rule Language

This NPRM provides notice that in the final rule subsequent to this NPRM, the FAA will amend the antidrug rule to change the terms "passing" and "failing" a drug test. All of the DOT agencies that require drug testing, including the FAA, have received reports of some confusion in their respective industries regarding the use of the terms passing and failing a drug test and how those terms relate to different drug test results (i.e.,
confirmed or verified positive or negative test, cancelled tests, etc.). Currently, under the antidrug rule, an individual does not "fail" a drug test until the test result has been verified positive by a MRO. Similarly, "passing" a drug test requires a verified negative test result. Although this NPRM does not include each affected section, the final rule will change these terms wherever they are used throughout the antidrug rule to the more accurate "verified positive" or "verified negative."

Contract Air Traffic Control Facilities

When the FAA’s final antidrug rule was published in 1988, air traffic control (ATC) facilities operated under contract with the FAA were explicitly excluded from coverage under the rule. It was originally intended that employees of such facilities would be included in the FAA’s program (for its own employees). Subsequently, however, it was determined that employees of contract ATC facilities should be subject to the FAA’s rules for the aviation industry. This notice proposes to change the definition of covered employers to include such facilities. The FAA’s air traffic control facilities and facilities operated by the military (whether directly or by contract) would not be affected by this proposal.

Refusal to Submit to Testing

The final antidrug rule included amendments to the airmen certification sections of the FAA’s regulations under which a refusal to submit to testing could be the basis for a certificate action. However, the rule did not have an express requirement for employers to notify the FAA of refusals or a specific mechanism for providing such notice. This proposed section (paragraph E of section V of appendix I to part 121) would correct this gap in the requirements of the rule. It should be noted that the current antidrug rule with respect to the limitation on sanctions for refusals of preemployment tests would not be changed. As is currently the case, an individual who refuses to submit to preemployment testing would be subject to follow-up testing (which is now called return to duty testing) if he or she is subsequently hired, because the individual might have refused based on recent drug use. The individual would not, however, be subject to certificate action for declining what is essentially a test taken voluntarily as a precondition to performing safety-sensitive duties (and, similarly, this rule does not propose certificate action for a refusal to submit to the recharacterized return to duty test).

Employees Covered By the Antidrug Rule

The NPRM proposes to modify the specified safety-sensitive duties slightly to parallel the classes of covered functions in the FAA’s new alcohol misuse prevention program rule (14 CFR part 121, appendix J). This modification is not intended to significantly change the antidrug rule’s coverage. The most significant changes are the elimination of flight test and ground instruction duties. The former category would be eliminated because the FAA has determined that as a practical matter, these duties are essentially subsumed in flight crewmember or flight instructor duties. Ground instruction duties would be eliminated based on the FAA’s desire to reduce the burden of the antidrug rule on the industry and the determination that individuals performing such duties could be removed from the program without jeopardizing public safety. Additionally, the FAA would propose an editorial change to the current category of “aviation security or screening duties.” As revised, separate categories of “aviation screening duties” and “ground security coordinator duties” would be established. This change would clarify the FAA’s original intent with respect to covered security functions. Preemployment Testing

This NPRM proposes to revise the antidrug rule’s preemployment testing provision (paragraph A of section V of appendix I) to make the provision less burdensome. The final antidrug rule required preemployment testing before an individual could be hired to perform a function specified in appendix I. As interpreted by the FAA, testing was required of individuals not currently employed by the employer, of current employees moving from a non-covered to a covered function, and in circumstances where an employee was removed from the random testing pool or unavailable for testing for an extended period of time. Individuals who had failed or refused another FAA-mandated drug test or refusal to submit to such testing were subject to follow-up testing if he or she was determined that as a practical matter, the threshold test necessary to ensure an employee is alcohol free following a failed or refused test would be best understood if it were called the “return to duty test” and unannounced testing conducted after the individual has been placed in a covered function is more accurately referred to as “follow-up” testing. The FAA proposes to amend the section V of appendix I to reflect this nomenclature. As revised, therefore, an individual who failed or refused a preemployment test would have to pass another preemployment test before performing safety-sensitive duties, and, after evaluation and compliance with any required rehabilitation, would then be subject to follow-up testing. An employee who failed or refused another type of test (e.g., random) would have to pass a return to duty test before returning to the performance of safety-sensitive duties, and would then be subject to follow-up testing if he or she

testing in other situations, such as when an employee has been on leave of absence or working outside the territory of the United States. Therefore, the FAA proposes to only require preemployment testing of an individual prior to the first time the individual performs a safety-sensitive function for an employer. Such an individual would have to pass a preemployment test prior to performing a safety-sensitive function and the employer could not permit the individual to perform such a function until the employer receives a negative preemployment test result. Employers would be permitted to require submission to preemployment testing in cases where an employee previously subject to random testing by that employer has been removed from the random testing pool for reasons other than a failure of an FAA-mandated drug test or refusal to submit to such testing.
was returned to safety-sensitive duties. Like all FAA-mandated tests, return to duty and follow up tests would have to be performed in accordance with the requirements of appendix I and the testing procedures in 49 CFR part 40.

The FAA is also proposing two other changes that would parallel the provisions of the alcohol rule. The first change would be the addition of a mandatory minimum number of drug tests during an individual’s first 12 months after being hired for or returning to safety-sensitive duties. This number of tests would be the same as the number of drug tests required during an individual’s first 12 months after being hired for or returning to safety-sensitive duties after a positive drug test.

The second change would permit the individual to be retested within the first 12 months after being hired for or returning to safety-sensitive duties. Like all FAA-mandated tests, return to duty and follow up tests would have to be performed in accordance with the requirements of appendix I and the testing procedures in 49 CFR part 40.

The FAA has not had the same experience with follow-up testing as it has with alcohol testing. The FAA has not had the same experience with follow-up testing as it has with alcohol testing. Published guidance is available from the FAA and from private sector entities, and antidrug programs are generally running smoothly at aviation entities of all sizes. Given the wealth of material and experience now available, there is no longer a reason to permit carriers to begin operations without having implemented an FAA-approved antidrug program.

The FAA noted in the preamble to the final rule that the timeframes for new businesses might be accelerated in the future (53 FR 47043; November 21, 1988), and, accordingly, this NPRM proposes amending the final rule to prohibit covered employers from beginning operations without an approved antidrug program. The program would have to be implemented, and all covered employees subject to testing, not later than the inception of operations. As proposed, any person hired by a new certificate holder to perform a covered function after the issuance of the certificate would have to undergo preemployment testing. Additionally, each new employer would have to ensure that any employee performing covered functions by contract were subject to an FAA-approved antidrug program within 60 days of the implementation of the employer’s program. This requirement will impose no significant burden on new operators and any burden is outweighed by the benefits gained by public safety.

Third, the consortium plan submission section would be revised to require that each consortium program must provide for notification to the FAA of changes in membership. Finally, a new provision (section IX, paragraph A.8.) would expressly state the now-implicit responsibility of covered employers to ensure that they are continuously covered under an approved antidrug program. This section reflects the FAA’s recognition of

Medical Review Officer Functions

As proposed in this NPRM, section VII of appendix I would be substantially revised. First, changes in the DOT final rule (49 CFR part 40), which establishes the duties of the MRO in the verification process, have superseded the FAA’s rule. Rather than reiterate the duplicative provisions of the DOT rule, which are subject to change, the FAA antidrug rule, as revised, would generally cite to the applicable provisions of the DOT rule and incorporate them (and therefore any future amendments) by reference. This is the same approach as that taken in the FAA’s current rule with regard to specimen collection.

The MRO duties would be revised to require the MRO to inquire whether an individual holds a part 67 airman medical certificate, to process requests for split specimen testing, and to evaluate or refer the individual to an SAP as discussed above. The NPRM would also clarify the MRO’s specific duties in the case of an employee or applicant who holds a part 67 airman medical certificate or who would be required to hold such a certificate to perform a covered function for an employer.

Although the final antidrug rule set forth some of the MRO duties with respect to airmen medical certificate holders, the FAA has determined from compliance inspections that these provisions are not sufficiently clear. The antidrug rule also did not include timeframes for submission of the reports required to be sent to the Federal Air Surgeon (FAS) and the address for submission is no longer correct. These omissions have led to confusion and occasionally to significant delays in notification to the FAS. As proposed, MROs would have 5 working days following verification of a positive test result in which to make a determination regarding dependency. They would be required to forward all documents pertaining to the test result, verification, dependency, and return to duty recommendations, if any, to the FAS within 7 working days of verifying the positive test result.

Finally, new provisions would be added to the MRO section to clarify the issue of recordkeeping by the MRO. Although MROs currently maintain records necessary for accomplishing their duties, essentially as agents of employers, there was no express authorization or requirement to maintain such records in the final antidrug rule. The proposed section would rectify this oversight.

Antidrug Program Plan Submission

Several changes are proposed in this NPRM to the plan submission provisions. First, the address to which plans are to be submitted would be changed. Second, the “transition” provisions of the rule for new aviation employers (paragraph A.5., section IX) would be changed to eliminate the substantial grace period previously provided. When the rule was first promulgated, it allowed all new covered employers a significant period of time to develop antidrug program plans, submit the plans to the FAA for approval, and implement the programs set forth in the plans. The delay was necessary because the antidrug rule was new both to the industry and to the FAA. Since the promulgation of the rule, however, the industry and the FAA have made great strides in incorporating drug testing in the normal course of the aviation business. Published guidance is available from the FAA and from private sector entities, and antidrug programs are generally running smoothly at aviation entities of all sizes. Given the wealth of material and experience now available, there is no longer a reason to permit carriers to begin operations without having implemented an FAA-approved antidrug program.
the fluid nature of the aviation industry, in which locations, contracts, and even corporate identities are subject to frequent changes.

**Employees Located Outside the U.S.**

The FAA’s final antidrug rule applied to employees performing covered functions for the specified employers regardless of whether the employees were located within the territory of the United States or were located in a foreign country. In recognition of the international implications of the rule, however, the effective date of the rule with respect to employees located outside the territory of the U.S. was deferred on a number of occasions, most recently to January 2, 1995. Although the FAA has been pursuing multilateral initiatives through the International Civil Aviation Organization (ICAO), there are still significant practical and legal concerns surrounding implementation of the antidrug rule outside the territory of the United States. Based on the issues and concerns that have been raised, the FAA is proposing to substantially revise the international section of the antidrug rule (section XII, appendix I).

As proposed, no employee located outside the territory of the United States could be tested for illegal drug use under the provisions of appendix I. To ensure proper selection for random testing, an employer would be required to remove from the random testing pool any employee assigned to perform covered functions solely outside the territory of the United States, since such an employee would not be available for testing. The employee would have to be returned to the random testing pool as soon as the employee once more began to perform functions wholly or partially within the territory of the United States. As noted above, the employer would have the option of requiring the employee to undergo a preemployment test prior to returning to the performance of a covered function within the territory of the United States (and therefore to the random testing pool). This section would be further amended to provide that the provisions of appendix I would not apply to employees performing functions specified in appendix I by contract outside the territory of the United States. Although the FAA is cognizant of concerns about safety and economic parity that would be raised by such an exclusion, the FAA proposes that extraterritorial application of the antidrug rule, with its significant logistical issues and possible conflicts with local laws, should not be pursued.

### Paperwork Reduction Act Approval

The recordkeeping and reporting requirements of the final antidrug 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. The OMB approval is under control number 2120-0535. The recordkeeping and reporting requirements proposed in this notice will be submitted to 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’s docket. The following is a synopsis of the paperwork burden associated with this notice:

**Title:** Antidrug Program for Personnel Engaged in Specified Aviation Activities

**Need for Information:** This information is needed to ensure compliance with the requirements of the FAA’s antidrug rule and the Omnibus Transportation Employee Testing Act of 1991.

**Proposed Use of Information:** The information submitted is intended to be used for monitoring industry implementation of and compliance with the FAA’s antidrug rule and in evaluating the effectiveness of the program.

**Frequency:**

- **Antidrug Program Plan:** One time submission for FAA review and approval.
- **Antidrug Program Plan Amendments:** One time submission for FAA review and approval as changes to plans occur or are required.

**Statistical Report:** Annual.

**Burden Estimate:** 11,993 hrs.

**Respondents:** Specified aviation employers.

- **Average Burden, Hours/Respondent/Year:** 10.5 (Reporting): 1.0 (Recordkeeping).

**Federalism Implications**

The amendments proposed in this NPRM 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 proposal does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

**Regulatory Evaluation Summary**

The FAA has determined that this proposal is not major as defined in Executive Order 12866. Therefore, a full regulatory analysis that includes identification and evaluation of cost-reducing alternatives to the proposal has not been prepared. Instead, the FAA has prepared a more concise regulatory evaluation that analyzes only this proposal. The FAA does not expect that this proposed rule would have a significant economic effect on a substantial number of small entities or on international trade.

A copy of the complete regulatory evaluation, regulatory flexibility determination, and international trade assessment has been placed in the docket. A copy may be obtained by contacting the office identified under "FOR FURTHER INFORMATION CONTACT."

**Significance**

This rule is not likely to result in an annual effect on the economy of $100 million or more, although it may result in a small increase in costs for consumers, industry, or Federal, State, or local agencies. The FAA has determined, however, that this rule involves issues of substantial interest to the public. Therefore, the FAA has determined that the rule is significant under the Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).

**List of Subjects**

- 14 CFR Part 65
  - Aircraft, Airmen, Air safety, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Safety, Transportation.
- 14 CFR Part 121
  - Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.
- 14 CFR Part 135
  - Air carriers, Aircraft, Aircraft pilots, Airmen, Airplanes, Air taxi, Air transportation, Aviation safety, Drug abuse, Drugs, Narcotics, Pilots, Safety, Transportation.

### Part 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

1. The authority citation for part 65 continues to read as follows:

2. Section 65.46 is amended by revising paragraphs (a)(2), (d), and (e) and by adding paragraph (g) to read as follows:

§ 65.46 Use of prohibited drugs.
(a) * * *
(2) An employer means an air traffic control facility not operated by the FAA or by or under contract to the U.S. military that employs a person to perform an air traffic control function.
   * * * * *
(d) Except as provided in paragraph (e) of this section, no employer may knowingly use any person to perform, nor may any person perform for an employer, either directly or by contract, any air traffic control function if that person failed or refused to submit to a drug test required by appendix I to part 121 of this chapter.
   * * * * *
(e) Paragraph (d) of this section does not apply to a person who has received a recommendation to be hired or to return to duty from a medical review officer in accordance with appendix I to this part or who has received a special issuance medical certificate after evaluation by the Federal Air Surgeon for drug dependency in accordance with part 67 of this chapter, provided, however, that no person shall be permitted to perform the function specified in appendix I that he or she was performing prior to failing a drug test if the person had previously failed a drug test required under that appendix, both such failures occurring after [THE EFFECTIVE DATE OF THE FINAL RULE].
   * * * * *
(g) No employer may knowingly use any person to perform, nor may any person perform for an employer, either directly or by contract, any air traffic control function if that person used a prohibited drug during the performance of an air traffic control function directly or by contract for an employer after [THE EFFECTIVE DATE OF THE FINAL RULE].
   * * * * *

§ 121.455 Use of prohibited drugs.
(c) Except as provided in paragraph (d) of this section, no certificate holder may knowingly use any person to perform, nor may any person perform for a certificate holder, either directly or by contract, any function listed in appendix I to this part if that person failed or refused to submit to a drug test required by that appendix.
(d) Paragraph (c) of this section does not apply to a person who has received a recommendation to be hired or to return to duty from a medical review officer in accordance with appendix I to this part or who has received a special issuance medical certificate after evaluation by the Federal Air Surgeon for drug dependency in accordance with part 67 of this chapter, provided, however, that no person shall be permitted to perform the function specified in appendix I that he or she was performing prior to failing a drug test if the person had previously failed a drug test required under that appendix, both such failures occurring after [THE EFFECTIVE DATE OF THE FINAL RULE].

Appendix I to Part 121—Drug Testing Program

III. Employees Who Must Be Tested

Each person who performs a function listed in this section directly or by contract for an employer must be tested pursuant to an FAA-approved antidrug program conducted in accordance with this appendix:

a. Flight crewmember duties.
b. Flight attendant duties.
c. Flight instruction duties.
d. Aircraft dispatcher duties.
e. Aircraft maintenance or preventive maintenance duties.
f. Ground security coordinator duties.
g. Aviation screening duties.
h. Air traffic control duties.

7. Section V of Appendix I (Types of Drug Testing Required) is amended by revising paragraphs A and F and adding a new paragraph G to read as follows:

Appendix I to Part 121—Drug Testing Program

V. Types of Drug Testing Required

A. Preemployment Testing

1. Prior to the first time an individual performs a function listed in section III of this appendix for an employer, the employer shall require the individual to undergo testing for prohibited drug use.
2. An employer is permitted to require preemployment testing of an individual if the following criteria are met:
   (a) The individual previously performed a covered function for the employer;
   (b) The employer removed the individual from the employer’s random testing program conducted under this appendix for reasons other than a failure of an FAA-mandated drug test or a refusal to submit to such testing; and
   (c) The individual will be returning to the performance of a function covered by this appendix.
3. No employer shall allow an individual required to undergo preemployment testing under section V, paragraphs A.(1) or (2) of this appendix to perform a covered function unless the employer has received the results of the drug test indicating that the individual has passed the test.
4. The employer shall advise each individual applying to perform a covered function at the time of application that the
individual will be required to undergo preemployment testing to determine the presence of marijuana, cocaine, opiates, phencyclidine (PCP), and amphetamines, or a metabolite of those drugs in the individual’s system. The employer shall provide this same notification to each individual required by the employer to undergo preemployment testing under section V, paragraph A.(5) of this appendix.

* * * * *

F. Return to Duty Testing

Each employer shall ensure that before an individual is returned to duty to perform a function specified in section III of this appendix after refusing to submit to a drug test required by this appendix or failing a drug test conducted under this appendix, the individual shall undergo a drug test. No employer shall allow an individual required to return to duty to perform a covered function unless the employer has received the results of the drug test indicating that the individual has passed the test.

G. Follow-up Testing

1. Each employer shall implement a reasonable program of unannounced testing of each individual who has been hired to perform or who has been returned to the performance of a function specified in section III of this appendix after refusing to submit to a drug test required by this appendix or failing a drug test conducted under this appendix.

2. The number and frequency of such testing shall be determined by the employer’s medical review officer, but shall consist of at least six tests in the first 12 months following the employee’s return to duty.

3. The employer may direct the employee to undergo testing for alcohol, in addition to drugs, if the medical review officer determines that alcohol testing is necessary for the particular employee. Any such alcohol testing shall be conducted in accordance with the provisions of 49 CFR part 40.

4. Follow-up testing shall not exceed 60 months after the date the individual begins to perform or returns to the performance of a function specified in section III of this appendix. The medical review officer may terminate the requirement for follow-up testing at any time after the first six tests have been conducted. If the medical review officer determines that such testing is no longer necessary.

8. Section VI of Appendix I (Administrative Matters) is amended by revising paragraph C and adding paragraph E to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

VI. Administrative Matters

* * * * *

C. Employee Request for Test of a Split Specimen

1. Not later than 72 hours after receipt of notice of a verified positive test result, an employee may submit a written request to the MRO for testing of the second, “split” specimen obtained during the collection of the primary specimen that resulted in the confirmed positive test.

2. The split specimen shall be tested in accordance with the procedures in 49 CFR part 40.

3. The MRO may proceed with verification of the primary test result pending receipt of the result of the split specimen test. If the primary test result is verified as positive, actions required under this rule (e.g., notification to the Federal Air Surgeon, removal from safety-sensitive position) are not stayed pending receipt of the split specimen test result.

* * * * *

E. Refusal to Submit to Testing

1. Each employer shall notify the FAA of any employee who holds a certificate issued under part 61, part 63, or part 65 who has refused to submit to a drug 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. Employees are not required to report refusals to submit to preemployment testing.

9. Section VII of Appendix I is revised to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

VII. Medical Review Officer

The employer shall designate or appoint a medical review officer (MRO) who shall be qualified in accordance with 49 CFR part 40 and shall perform the functions set forth in 49 CFR part 40 and this appendix. If the employer does not have a qualified individual on staff to serve as MRO, the employer may contract for the provision of MRO services as part of its drug testing program.

A. MRO Duties

1. During the MRO’s interview with an employee or applicant who has failed a drug test, the MRO shall inquire, and the individual must disclose, whether the individual holds an airman medical certificate issued under part 67 of this chapter or would be required to hold such certificate in order to perform a function listed in section III of this appendix for an employer, the MRO shall take the following actions after verifying a positive drug test result.

2. The MRO must process employee requests for testing of split specimens in accordance with section VI, paragraph C, of this appendix.

3. The MRO shall advise each employee who fails a drug test or refuses to submit to a drug test required under this appendix of the resources available to the employee in evaluating and resolving problems associated with illegal drug use, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

4. The MRO shall evaluate, or shall have evaluated by a substance abuse professional, each employee who fails a drug test or refuses to submit to a drug test required under this appendix to determine if the employee is in need of assistance in resolving problems associated with illegal drug use.

5. Prior to recommending that an employee be returned to the performance of a function listed in section III of this appendix after the employee has failed or refused to submit to a drug test required by this appendix, the MRO shall—

a. Ensure that an employee returning to the performance of a function has passed return to duty drug test conducted under section V, paragraph F of this appendix;

b. Ensure that each employee has been evaluated in accordance with section VII, paragraph A.4 of this appendix; and

c. Ensure that the employee demonstrates compliance with any rehabilitation program recommended following the evaluation required under section VII, paragraph A.4 of this appendix.

6. The MRO shall not recommend that an individual be hired to perform a function listed in section III of this appendix after such individual has failed or refused to submit to a preemployment drug test required by this appendix, the MRO shall—

a. Ensure that an individual has passed a preemployment drug test conducted under section V, paragraph A of this appendix;

b. Evaluate the individual, or have the individual evaluated by a substance abuse professional, for drug use or abuse; and

c. Ensure that the individual has complied with the requirements of any rehabilitation program in which the individual participated following the preemployment test the individual failed or to which the individual refused to submit.

B. MRO Determinations

In the case of an employee or applicant who holds an airman medical certificate issued under part 67 of this chapter, or who is or would be required to hold such certificate in order to perform a function listed in section III of this appendix for an employer, the MRO shall take the following actions after verifying a positive drug test result.

1. In addition to the evaluation required in section VII, paragraph A.4 of this appendix, the MRO shall make a determination of probable drug dependence or nondependence as specified in part 67 of this chapter, or who is or would be required to hold such certificate in order to perform a function listed in section III of this appendix for an employer, the MRO shall take the following actions after verifying a positive drug test result.

2. If the MRO determines that an individual is nondependent, the MRO may recommend that the individual be returned to duty, subject to the requirements of section VII, paragraph A.5 of this appendix. If the MRO makes a determination of probable drug
dependence or cannot make a dependency, return to duty.

3. After making the determinations in section VII, paragraphs B.1 and B.2 of this appendix, the MRO must forward the names of such individuals with identifying information, the determinations concerning dependence, return to duty recommendations, and any supporting information to the Federal Air Surgeon within 7 working days after verifying the positive drug test result of such individuals.

4. All reports required under this section shall be forwarded to the Federal Air Surgeon, Federal Aviation Administration, Attn: Drug Abatement Division (AAM—800), 400 7th Street SW., Washington, DC 20590.

C. MRO records

Each MRO shall maintain records concerning drug tests performed under this rule in accordance with the following provisions:

1. All records shall be maintained in confidence and shall be released only in accordance with the provisions of this rule and 49 CFR part 40.

2. Records concerning drug tests confirmed positive by the laboratory shall be maintained for 5 years. Such records include the MRO copy of the custody and control form, copies of dependency determinations where applicable, medical interviews, and any other documentation concerning the MRO’s verification process.

3. Records of drug test results shall be maintained for 12 months.

4. All records maintained pursuant to this rule by each MRO are subject to examination by the Administrator or the Administrator’s representative at any time.

5. Should the employer change MROs for any reason, the employer shall ensure that the former MRO forwards all records maintained pursuant to this rule to the new MRO within 10 working days of receiving notice from the employer of the new MRO’s name and address.

6. Any employer obtaining MRO services by contract shall ensure that the contract includes a recordkeeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

7. Each MRO shall maintain records concerning drug tests performed for the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM—800), 400 7th Street, SW., Washington, DC 20590.

B. The provisions of this appendix shall be returned to duty.

3. After making the determinations in section VII, paragraphs B.1 and B.2 of this appendix, the MRO must forward the names of such individuals with identifying information, the determinations concerning dependence, return to duty recommendations, and any supporting information to the Federal Air Surgeon within 7 working days after verifying the positive drug test result of such individuals.

4. All reports required under this section shall be forwarded to the Federal Air Surgeon, Federal Aviation Administration, Attn: Drug Abatement Division (AAM—800), 400 7th Street SW., Washington, DC 20590.

C. MRO records

Each MRO shall maintain records concerning drug tests performed under this rule in accordance with the following provisions:

1. All records shall be maintained in confidence and shall be released only in accordance with the provisions of this rule and 49 CFR part 40.

2. Records concerning drug tests confirmed positive by the laboratory shall be maintained for 5 years. Such records include the MRO copy of the custody and control form, copies of dependency determinations where applicable, medical interviews, and any other documentation concerning the MRO’s verification process.

3. Records of drug test results shall be maintained for 12 months.

4. All records maintained pursuant to this rule by each MRO are subject to examination by the Administrator or the Administrator’s representative at any time.

5. Should the employer change MROs for any reason, the employer shall ensure that the former MRO forwards all records maintained pursuant to this rule to the new MRO within 10 working days of receiving notice from the employer of the new MRO’s name and address.

6. Any employer obtaining MRO services by contract shall ensure that the contract includes a recordkeeping provision that is consistent with this paragraph, including requirements for transferring records to a new MRO.

7. Each MRO shall maintain records concerning drug tests performed for the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM—800), 400 7th Street, SW., Washington, DC 20590.

IX. Employer’s Antidrug Program Plan

A. * * * * *

IX. Employer’s Antidrug Program Plan

A. * * * * *

(1) Each employer shall submit an antidrug program plan to the Federal Aviation Administration, Office of Aviation Medicine, Drug Abatement Division (AAM—800), 400 7th Street, SW., Washington, DC 20590.

B. * * * * *

B. * * * * *

(3)(a) 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 antidrug program plan to the FAA for approval and must obtain such approval prior to beginning operations under the certificate. The program shall be implemented not later than the date of inception of operations. Contractor employees to a new certificate holder must be subject to an FAA-approved antidrug program within 60 days of the implementation of the employer’s program.

(b) 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 antidrug program plan to the FAA for approval. No operator may begin conducting sightseeing flights prior to receipt of approval; the program shall be implemented concurrently with the inception of operations. Contractor employees to a new operator must be subject to an FAA-approved program within 60 days of the implementation of the employer’s program.

(c) Any person who intends to begin air traffic control operations as an employer as defined by 14 CFR 65.46(e)(2) (air traffic control facilities not operated by the FAA or by or under contract to the U.S. military) after [THE EFFECTIVE DATE OF THE FINAL RULE] shall, not later than 60 days prior to the proposed initiation of such operations, submit an antidrug program plan to the FAA for approval. No air traffic control facility may begin conducting air traffic control operations prior to receipt of approval; the program shall be implemented concurrently with the inception of operations. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within 60 days of the implementation of the facility’s program.

(7) Any entity or individual whose employees perform functions listed in section III of this appendix pursuant to a contract with an employer (as defined in section II of this appendix), and any consortium of contractors or employers subject to this appendix, may submit an antidrug program plan to the FAA for approval on a form and in a manner prescribed by the Administrator.

(a) The plan shall specify the procedures that will be used to comply with the requirements of this appendix.

(b) Each consortium program must provide for reporting changes in consortium membership to the FAA within 10 working days of such changes.

(c) Each contractor or consortium shall implement its antidrug program in accordance with the terms of its approved plan.

(8) Each air traffic control facility operating under a contract to the FAA shall submit an antidrug program plan to the FAA (specifying the procedures for pre-employment testing required by this appendix) not later than [90 DAYS AFTER THE EFFECTIVE DATE OF THE FINAL RULE]. Each facility shall implement its antidrug program not later than 60 days after approval of the program by the FAA. Employees performing air traffic control duties by contract for the air traffic control facility (i.e., not directly employed by the facility) must be subject to an FAA-approved antidrug program within 60 days of implementation of the air traffic control facility’s program.

(9) Each employer, or contractor company that has submitted an antidrug plan directly to the FAA, shall ensure that it is continuously covered by an FAA-approved antidrug program, and shall obtain appropriate approval from the FAA prior to changing programs (e.g., joining another carrier’s program, joining a consortium, or transferring to another consortium).

* * * * *

11. Section XII of appendix I to part 121 is revised to read as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

XII. Employees Located Outside the Territory of the United States

A. No individual shall undergo a drug test required under the provisions of this appendix while located outside the territory of the United States.

1. Each employee who is assigned to perform functions specified in section III of this appendix solely outside the territory of the United States shall be removed from the random testing pool upon the inception of such assignment.

2. Each covered employee who is removed from the random testing pool under this section shall be returned to the random testing pool under the appropriate approval from the FAA prior to the proposed initiation of such operations, submit an antidrug program plan to the FAA for approval. No air traffic control facility may begin conducting air traffic control operations prior to receipt of approval; the program shall be implemented concurrently with the inception of operations. Contractor employees to a new air traffic control facility must be subject to an FAA-approved program within 60 days of the implementation of the facility’s program.

* * * * *

(7) Any entity or individual whose employees perform functions listed in section III of this appendix pursuant to a contract with an employer (as defined in section II of this appendix), and any consortium of contractors or employers subject to this appendix, may submit an antidrug program plan to the FAA for approval on a form and in a manner prescribed by the Administrator.

(a) The plan shall specify the procedures that will be used to comply with the requirements of this appendix.

(b) Each consortium program must provide for reporting changes in consortium membership to the FAA within 10 working days of such changes.

(c) Each contractor or consortium shall implement its antidrug program in accordance with the terms of its approved plan.

(8) Each air traffic control facility operating under a contract to the FAA shall submit an antidrug program plan to the FAA (specifying the procedures for pre-employment testing required by this appendix) not later than [90 DAYS AFTER THE EFFECTIVE DATE OF THE FINAL RULE]. Each facility shall implement its antidrug program not later than 60 days after approval of the program by the FAA. Employees performing air traffic control duties by contract for the air traffic control facility (i.e., not directly employed by the facility) must be subject to an FAA-approved antidrug program within 60 days of implementation of the air traffic control facility’s program.

(9) Each employer, or contractor company that has submitted an antidrug plan directly to the FAA, shall ensure that it is continuously covered by an FAA-approved antidrug program, and shall obtain appropriate approval from the FAA prior to changing programs (e.g., joining another carrier’s program, joining a consortium, or transferring to another consortium).

* * * * *
(d) Paragraph (c) of this section does not apply to a person who has received a recommendation to be hired or to return to duty from a medical review officer in accordance with appendix I to part 121 of this chapter or who has received a special issuance medical certificate after evaluation by the Federal Air Surgeon for drug dependency in accordance with part 67 of this chapter; provided, however, that no person shall be permitted to perform the function specified in appendix I that he or she was performing prior to failing a drug test if the person had previously failed a drug test required under that appendix, both such failures occurring after [THE EFFECTIVE DATE OF THE FINAL RULE].

(e) No certificate holder or operator may knowingly use any person to perform, nor may any person perform for a certificate holder or operator, either directly or by contract, the function specified in appendix I to part 121 of this chapter performed by that person if the person used a prohibited drug while performing such a function directly or by contract for an employer as defined in that appendix after [THE EFFECTIVE DATE OF THE FINAL RULE].

Federico Peña, Secretary of Transportation.
David R. Hinson, Administrator.

FOR FURTHER INFORMATION CONTACT:
Office of Aviation Medicine, Drug Abatement Division (AAM-800), Federal Aviation Administration, 400 7th Street, SW., Washington, DC 20590; telephone (202) 356–6710.

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. 27066.” 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 the FAA personnel concerned with this rulemaking will also be filed in the docket. Any comments provided to the docket in the preliminary portion of this rulemaking will be considered prior to any final action and need not be resubmitted.

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. The request 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 & Regulations

The Omnibus Transportation Employee Testing Act of 1991 (Pub. L. 102–143, Title V) was enacted on October 28, 1991. Among other things, the Act adds a new section 614 to the Federal Aviation Act of 1958 (FAAct), Section 614(a)(1) of the FAAct (49 U.S.C. 1434(a)(1)) directs the Administrator to prescribe regulations requiring the testing of air carrier and foreign air carrier employees for the use of alcohol and controlled substances.

The requirement to publish regulations applicable to foreign air carriers is consistent with other requirements of the Act to publish similar regulations for other modes of transportation.

Discussion

Pursuant to the requirements of the Act, this notice proposes to require foreign air carriers to establish antidrug and alcohol misuse programs like those required of U.S. carriers by January 1, 1996. The FAA is optimistic that recent efforts at the International Civil Aviation Organization (ICAO) will result in satisfactory multilateral action to prevent substance abuse in the international workplace, which consistent with the Act, could make FAA rulemaking unnecessary.

The FAA has general statutory authority to regulate safety in civil aviation under the FAAct. As recognized in section 1106 of the FAAct, the United States of America has complete and exclusive national
sovereignty in the airspace of the United States (49 U.S.C. app. 1506(e)). Pursuant to the Act, the FAA has the option of not imposing testing requirements on foreign air carriers if the FAA determines, based upon future developments within ICAO, that an FAA testing rule is not required. If no U.S. rule is to be adopted or the instant proposal warrants modification pursuant to ICAO action, the FAA will publish notice of such decision. Further analysis of the issue in light of any comments received in response to this notice also could assist the FAA in making the determination.

The FAA is encouraged by recent developments at ICAO, and has determined that an international agreement would be the preferred alternative to unilateral actions by individual ICAO member States. The FAA remains committed to the multilateral process underway at ICAO and will continue to make the determination if a satisfactory alternative is reached through bilateral or multilateral action. In the event that such is not forthcoming, the FAA is now seeking comments on the implementation of a direct application of U.S. drug testing requirements to foreign air carriers.

Discussion of Comments on ANPRM

The FAA recognized that foreign countries and foreign air carriers would have many concerns regarding the possible application of testing regulations to foreign air carrier employees. We therefore published an advance notice of proposed rulemaking (ANPRM) on this same subject in which we asked a number of questions about the legal, practical, and cultural issues associated with testing. The comment period for the NPRM, originally set for 60 days, was extended an additional 45 days to allow for translation of documents and coordination with management or government officials outside the United States. Many useful and cogent comments were received in response to the ANPRM and will be considered by the FAA prior to any final rulemaking. It is not necessary for commenters to this NPRM to resubmit those comments.

The FAA received 65 comments on the ANPRM, most of which were provided by foreign governments or foreign air carriers. Nineteen of the comments were procedural, requesting an extension of the comment period. Three comments were received that supported the concept of unilateral imposition of testing requirements on foreign air carriers. Two of these were from trade associations representing the U.S. air carriers (Regional Airline Association (RAA) and Air Transport Association (ATA)), and one was from a U.S. labor organization (Airline Dispatchers Federation (ADF)). Both RAA and ATA stated that foreign air carriers would have a competitive advantage if they did not have to implement testing programs that are required of U.S. air carriers.

ATA and ADF stated that passenger safety required holding safety-sensitive employees of foreign carriers to the same standard as similar employees of U.S. air carriers. The remaining comments were from foreign governments, foreign trade and labor associations, and foreign air carriers. These commenters objected in whole or in part to the possible unilateral imposition of testing requirements on foreign air carriers in the United States.

International Law

Most of the foreign air carriers and foreign governments commenting on the ANPRM asserted that any regulation that unilaterally required foreign air carriers to implement substance abuse testing programs would violate international law, exceeding the generally recognized limits to extraterritorial jurisdiction. A number of commenters also stated that testing requirements would conflict with foreign laws or regulations, primarily those affecting labor relations and privacy rights.

The majority of these commenters also asserted that unilateral action by the United States to impose a testing requirement would impermissibly implicate the qualifications of airmen, in contravention of the Chicago Convention. Airmen certification or licensure is within the jurisdiction of foreign governments commenting on the ANPRM did not propose any specific requirements. They also noted, however, that it was likely that imposition of drug and alcohol testing requirements could have a disproportionate financial impact on foreign carriers. British Airways (BA), for example, stated that it schedules its crews on flights from London to the U.S. West Coast under very tight time and duty constraints and does not generally have replacement crew available. For example, if an individual crewmember were selected for testing, the additional time required for the testing could put the individual beyond the allowable duty time. BA states that the flight would then have to be delayed, resulting in significant costs to BA.

Other commenters noted that imposing any regulations under which foreign air carrier employees or their urine samples would have to be transported to the United States for testing would pose significant increased costs on foreign air carriers.

FAA Response

In evaluating the international implications of its substance abuse programs for U.S. carriers, the FAA has become aware of the difficulties associated with evaluating testing programs established in foreign countries and with the FAA’s compliance monitoring activities outside the U.S. The regulatory evaluation does examine the system delay costs for foreign air carriers although it does not presume to determine how an individual air carrier would conduct testing or calculate the costs for an individual program.

International Civil Aviation Organization (ICAO)

A significant number of commenters noted that the ICAO was established under the Chicago Convention specifically to address issues of general applicability to international civil aviation. Many of these commenters supported proceeding through the ICAO process to reach a multilateral consensus on ways to achieve the ultimate goal of civil aviation workplaces free of substance abuse.
FAA RESPONSE

As noted in the ANPRM, the Act directs 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 (Section 614(e)(3) of the FAA Act; 49 U.S.C. app. 1434(e)(3)).

The FAA is aware that the problem of substance abuse may be different in the United States than in other countries. Some countries, for example, may have little or no problem with illegal drug use but a significant problem with workplace alcohol misuse. Further, other countries may have difficulty implementing U.S. testing and laboratory standards. It is for that reason that we prefer a multilateral solution through ICAO that would enable each country to tailor its substance abuse prevention efforts to its particular needs.

On September 30, 1992, a resolution offered by the United States, which was 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; EX17/3/9/92). 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, 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 efforts 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 member States of ICAO unanimously adopted this resolution, which indicates that substance abuse is recognized as a threat to international civil aviation safety. Since the adoption of the Assembly resolution, ICAO has made substantial progress in developing the mandated guidance material. On December 14, 1993, the ICAO group charged with developing the material adopted an outline including sections on education, treatment and rehabilitation, and testing. The group expects its work to be completed, and the guidance material published, by the end of 1994.

The FAA commends ICAO for its progress thus far and reiterates the United States commitment to resolve the problem of drug and alcohol misuse by transportation workers through this multilateral process.

The FAA remains optimistic that an international solution will be reached. However, to protect the public safety in the event a multilateral solution is not reached through ICAO, the FAA is continuing to develop an alternative testing requirement; the FAA must ensure that it has in place regulations to address the threat posed by substance abuse in the event that ICAO's efforts do not come to fruition in a timely fashion or are otherwise inadequate.

Discussion of the Proposed Rule

The FAA proposes to require foreign air carriers to establish antidrug and alcohol misuse prevention programs by January 1, 1996. Testing would be conducted using the procedures established by the Office of the Secretary of Transportation in 49 CFR part 40. Additional requirements or more specific guidance on implementation issues would be published as needed by the FAA. However, the FAA will not require foreign air carriers to establish antidrug and alcohol misuse programs if a multilateral action is taken by ICAO that supports an aviation environment free of substance abuse.

The proposal reflects the FAA's use of the outlined ICAO guidance, and in the event that the international obligations of the United States to maintain records and regulations of foreign air carriers could raise legal and technical implementation problems that could hinder achieving the ultimate goal of an international aviation environment free of substance abuse. The FAA invites comments on these issues. The FAA would prefer not to require testing if multilateral action or a series of bilateral agreements can be obtained.

Paperwork Reduction Act Approval

The proposal would require foreign air carriers operating within the territory of the United States to maintain records regarding drug and alcohol testing conducted by the foreign air carrier and to submit such records to the FAA or to provide access to such records to the Administrator upon request.

In accordance with the Paperwork Reduction Act of 1986 (Pub. L. 96–511), if recordkeeping and reporting requirements are included in the final rule, they will be submitted to the Office of Management and Budget (OMB) for approval after supplemental notice is given in the Federal Register.

Economic Summary

This Notice of Proposed Rulemaking (NPRM) serves to fulfill part of the requirements of the FAA-related provisions of the Omnibus Transportation Employee Testing Act of 1991 (the Act), which was enacted October 28, 1991. Congress has imposed a statutory obligation on the FAA Administrator to prescribe regulations that, among other things, establish an alcohol misuse testing program for air carrier employees who perform safety-sensitive duties. The Act also directs the FAA Administrator to prescribe regulations that require foreign air carriers to establish drug and alcohol misuse testing programs for employees performing safety-sensitive aviation functions. Such regulations must be consistent with the international obligations of the United States and take into consideration any applicable laws and regulations of foreign air carriers.

The FAA proposes to require foreign air carriers to establish anti-drug and alcohol misuse prevention programs by January 1, 1996, that are consistent with the international obligations of the United States. However, there would be no requirements if multilateral efforts to ensure an aviation environment free of substance abuse are reached or actions towards this end make an FAA testing rule unnecessary.

The proposed rule would apply the existing anti-drug program and the new
alcohol misuse prevention program to all part 129 air carriers. The anti-drug rule for domestic air carriers was published in 1988 and has been in effect since 1990. The alcohol misuse program for domestic air carriers will take effect in 1995. This proposed rule would require part 129 air carriers to begin implementing both such programs in January 1996.

Costs

The FAA estimated the number of part 129 employees subject to both drug and alcohol testing. These employees include all part 129 pilots, copilots, instructors, engineers, and navigators, part 129 flight attendants, and mechanics and repairmen who are employed by part 129 air carriers. The FAA assumes that foreign air carriers would set up their anti-drug and alcohol misuse programs similar to those of domestic air carriers. Hence, this analysis applies the assumptions described and used in the anti-drug and alcohol misuse prevention regulatory evaluations for domestic air carriers to foreign air carriers.

The applicable costs for the program include the program development costs, the Management Information System (M.I.S.) annual reporting costs, the costs for the individual type of tests, the setting up of an Employee Assistance Program (EAP) (applicable only for the anti-drug program), and system delay costs. The ten year discounted costs for the anti-drug and alcohol misuse prevention programs range from $17.8 million to $24.5 million.

Benefits

The FAA’s objective in proposing requiring mandatory anti-drug and alcohol misuse programs is to foster an environment free of drug use and alcohol misuse for personnel engaged in critical aviation safety occupations. The public expects, and is entitled to, an aviation environment free of substance abuse and misuse.

The FAA has determined that major benefits would accrue from these proposals. The first would be the prevention of potential injuries and fatalities and property losses resulting from accidents attributed to individuals whose judgement or motor skills may have been impaired by the presence of drugs or alcohol. The second would be the potential reduction in absenteeism, lost worker productivity, medical costs, and improved general safety in the workplace by the deterrence of alcohol misuse.

At this time, neither drug use nor alcohol misuse has been cited officially as a causative factor of any part 129 commercial aircraft accident. The absence of accidents, however, cannot be the baseline by which to measure the existence of a drug or alcohol problem in the aviation industry. No statistical database is available from which to estimate how many accidents were the consequence of impairment by drugs or alcohol of a pilot or any other safety-sensitive employee.

The FAA examined the seating capacity, average passenger load, and average replacement cost of a representative sample of both narrow-body and wide-body airplanes, in addition to the cost of the National Transportation Safety Board (NTSB) investigations. In calculating benefits, the FAA also evaluated the increased productivity from employees who are deterred from alcohol misuse. The total quantifiable discounted benefits that would result from promulgation of this proposed rule amount to $87.4 million discounted over ten years.

Cost/Benefit Analysis

In the Act, Congress imposed a statutory obligation on the FAA to prescribe regulations that, among other things, establish anti-drug and alcohol misuse testing programs for employees of part 129 air carriers who perform safety-sensitive duties. The FAA has evaluated the cost of setting up and administering these substance abuse and misuse programs, and has found that the ten-year discounted costs range from $17.8 million to $24.5 million. This is less than the ten-year discounted benefits of $87.4 million. Accordingly, the FAA finds these programs to be cost beneficial.

Initial Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) was enacted by Congress to ensure that small U.S. 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.” Because this proposed rule would only affect foreign carriers, the RFA is not applicable.

International Trade Impact Statement

In accordance with the Office of Management and Budget memorandum dated March 1983, federal agencies engaged in rulemaking activities are required to assess the effects of regulatory change on international trade. This proposed rule, if adopted, would place the same regulatory requirements on foreign air carriers that currently exist for U.S. air carriers (anti-drug abuse program) or are proposed for U.S. air carriers (alcohol misuse program). It is not expected that the proposed rule would have an adverse effect 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 foreign carriers as a consequence of this proposed rule, these costs will be offset by the benefits and an increase in public confidence.

Federalism Implications

Any rule arising from this NPRM will not have substantial direct effects on the States, on the relationship between the national government and the States, on the distribution of power and responsibilities among various levels of government. Therefore, in accordance with Executive Order 12866, the FAA has determined that this does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Significance

This notice of proposed rulemaking does not constitute a “significant regulatory action” under Executive Order 12866. It does involve issues of substantial interest to the public, however, and the FAA has therefore determined that the NPRM is significant under the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11034; February 2, 1979).


Federico Peña,
Secretary of Transportation.

David R. Hinson,
Administrator.

[FR Doc. 94–2035 Filed 2–3–94; 1:00 pm]

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Tuesday
February 15, 1994

Part V

Department of Transportation

Research and Special Programs Administration

49 CFR Part 199
Alcohol Misuse Prevention Program; Rule
DEPARTMENT OF TRANSPORTATION
Research and Special Programs
Administration
49 CFR Part 199
[Docket No. PS-128, Amtd. No. 199-9]
RIN 2137-AC21
Alcohol Misuse Prevention Program

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule.

SUMMARY: This final rule sets forth regulations requiring operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas (LNG) facilities subject to the pipeline safety regulations to implement alcohol misuse prevention programs for employees who perform safety-sensitive functions. This final rule is consistent with the alcohol rules of other operating administrations (OAs) published elsewhere in today's Federal Register, except that RSPA is not requiring pre-employment or random testing. The final rule requires only post-accident, reasonable suspicion, return-to-duty, and follow-up testing. This rule requires operators to remove from safety-sensitive functions employees who engage in prohibited alcohol conduct, and not permit them to return to those functions until specific requirements are met. Operators must provide covered employees with written materials that specifically identify the employees covered by the rule, explain the requirements of the rule, and establish the consequences of engaging in prohibited conduct. Operators must maintain records concerning their employees' alcohol misuse to RSPA annually. The rules are intended to ensure an alcohol-free workplace, and increase the overall safety of pipeline operations.

EFFECTIVE DATE: This rule is effective March 17, 1994.

FOR FURTHER INFORMATION CONTACT: Mr. Richard L. Rippert, Office of Pipeline Safety Compliance, RSPA, DOT, 400 Seventh Street, SW., Washington, DC 20590-0001 (202 366-6223); or the RSPA Dockets Unit, (202) 366-4453, for copies of this final rule or other material in the docket.

SUPPLEMENTARY INFORMATION:
Background

On December 15, 1992, RSPA published a notice of proposed rulemaking (NPRM) (57 FR 59712) to require pipeline operators of gas, hazardous liquid and carbon dioxide pipelines and liquefied natural gas (LNG) facilities, who are subject to 49 CFR part 192, 193, or 195, to implement alcohol misuse prevention programs for employees who perform certain covered functions. The NPRM proposed to exempt from the alcohol rules operators of “master meter systems” and “liquefied petroleum gas” (LPG) operators. The comment period on the NPRM closed on April 14, 1993, and all comments received were considered, including the testimony of 16 individuals who presented statements at the three public hearings held on February 26, 1993, in Washington, DC; on March 2, 1993, in Chicago, Illinois; and on March 5, 1993, in San Francisco, California. RSPA received written comments from 108 persons including 75 pipeline operators, eight pipeline industry associations, seven individuals, five labor unions, four state agencies, three contractors, two consortiums, two vendors, one law firm and one Federal agency. All written comments, as well as the hearing transcripts and any statements or other materials submitted at the hearings, have been placed in the docket.

OST Common Preamble

As part of the DOT-wide alcohol misuse prevention rulemaking effort DOT issued a common preamble to all of the related NPRMs that were published on December 15, 1993 (57 FR 59382, et seq.). The common preamble precedes this document in today's Federal Register and should be read first to ensure a complete understanding of today's substantive final rule. This common preamble contains a thorough discussion of the comments submitted to the DOT alcohol docket and responds to comments submitted to the various DOT agency dockets that raised multimodal aspects of the final rules or the Act.

Discussion of Comments

Authority for RSPA Regulation of Alcohol Misuse.

The majority of the commenters strongly objected to the mandatory imposition of alcohol misuse regulations, as proposed for the pipeline industry. They contended that: (1) Alcohol testing of pipeline operators is not required under the provisions of the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act); (2) the pipeline industry has an excellent safety record; (3) RSPA lacks a factual basis or statistical data that would support a finding of any alcohol-related pipeline accidents; and (4) the proposed alcohol regulations would violate the Fourth Amendment of the Constitution. However, some commenters expressed support for the limited alcohol testing program consisting of post-accident and reasonable suspicion testing elements and support for development of a “pilot or demonstration” alcohol program to be conducted by RSPA and various pipeline industry associations. The pilot program would be implemented by operators to develop statistical data which would support the need for an extensive alcohol testing program or data that would indicate implementation of a limited alcohol misuse prevention program was more feasible for the entire industry.

Most commenters opposed the proposed alcohol program, or suggested modifications to tailor the program to the needs of the pipeline industry.

Several commenters noted that the pipeline industry is not covered by the Omnibus Act. Commenters stated that there is no indication that there is an alcohol problem in the pipeline industry, and thus there is no justification for imposing Federal regulation. Commenters also stated that pipelines pose different safety risks than other forms of public transportation because they do not carry passengers. Commenters, therefore, requested that DOT issue a final rule on alcohol testing based on its own existing statutory authority to promote safety and to ensure general application of DOT's alcohol misuse regulations to all employees performing safety-sensitive functions in the transportation industries. The two statutes under which RSPA administers the pipeline safety program are the Natural Gas Pipeline Safety Act of 1968, as amended (49 App. U.S.C. 1671 et seg.) and the Hazardous Liquid Pipeline Safety Act of 1979, as amended (49 App. U.S.C. 2001 et seq.). The broad safety authority in these statutes is applicable to various aspects of pipeline facilities, including “design, installation, inspection, emergency plans and procedures, testing, construction, extension, operation, repair, and maintenance of pipeline facilities.” 49 App. U.S.C. 1672 and 2002. Under this authority, RSPA can promulgate regulations where those regulations would enhance pipeline safety.

The lack of data cited by some commenters could be the result of a lack of testing and industry alcohol prevention programs rather than the absence of an alcohol problem in the pipeline industry. Alcohol misuse is a problem in society generally, and it is
reasonable to expect that the pipeline industry is not immune to the problem of alcohol misuse. As noted in the preamble to the NPRM, RSPA's drug rule was upheld even though there was no evidence of a particularized drug problem in the pipeline industry. International Brotherhood of Electrical Workers v. Skinner, 913 F.2d 1454 (9th Cir. 1990). Pipeline safety is very important, and operator error can contribute to the accidents and incidents involving release of hazardous materials. Although pipelines do not carry people, they do transport very dangerous materials. Although pipelines do not cover testing in post-accident and reasonable suspicion situations. Some commenters indicated zero incidence of alcohol misuse by this population? RSPA agrees that the proposed definition of "employee" is adequate and has not expanded it. As discussed above, the final rule does not require either pre-employment or random testing. 2. Do pipeline operators have any data on the size of the population that would be affected and the incidence of alcohol misuse by this population? Many operators stated they currently have company-mandated alcohol testing policies in place. These provisions cover testing in post-accident and reasonable suspicion situations. Some commenters indicated zero incidence of alcohol misuse. During the development of the drug testing regulations, many commenters suggested that RSPA include alcohol testing as a tested substance in any required testing program. They also pointed out that alcohol is probably the substance most abused by the public. As discussed above, the lack of data in the pipeline industry does not mean that there is not a problem with alcohol misuse. Therefore, RSPA is requiring a limited alcohol misuse program for the pipeline industry. 3. What additional costs would be incurred by inclusion of other functions and what would be the offsetting benefits (e.g., in terms of accident prevention, productivity, employee lost time)? Many commenters agreed that increasing the scope of covered employees, especially if random testing were implemented, would substantially increase the costs associated with the regulations. Administrative costs and employee lost time would be increased. Furthermore, inconsistencies develop if alcohol regulations are implemented and differences in scope of coverage between the drug and alcohol testing programs were to occur. This would lead to drug and alcohol testing programs covering different employees. Therefore, the final alcohol rule applies to the same covered functions as the drug rule. 4. Does the industry or public have any information on alcohol-related accidents? Many commenters argued that RSPA, DOT and the National Transportation...
Safety Board (NTSB) have no statistical data to support alcohol-related accidents. Some commenters believe that in the absence of a comprehensive factual analysis, it is unreasonable to conclude that all the proposed types of federally-mandated alcohol testing should be required in the pipeline industry. As discussed above, RSPA has carefully evaluated all facets of the alcohol testing regulations including the required types of testing, categories of covered employees, costs associated with implementation of a testing program and the societal benefits. RSPA has determined that implementation of a limited alcohol testing program is appropriate.

5. Are there other ways that RSPA could reduce the burden on small operators?

Many commenters believe that a limited program such as post-accident and reasonable suspicion testing could be effectively implemented and would not adversely affect the numerous small gas operators. They suggested that allowing the use of non-evidential breath testing devices for screening would lower the overall costs of the entire program. Several commenters suggested that operators with less than 50 employees be excluded from the requirements of alcohol testing. To reduce the burden on small entities, the final rule exempts master meter operators and LPG operators. For all other operators, the final rule eliminates the requirement for random and pre-employment testing. In addition, RSPA has determined that small operators (50 or fewer covered employees) should be excluded from the annual submission of an alcohol MIS report to lessen the burden. RSPA will periodically conduct a sampling of the small operators alcohol programs. Discussion of alternatives for testing methods devices is contained in the common preamble published elsewhere in today's Federal Register. Although DOT is not permitting the use of non-evidential breath testing devices, the final rule permits the use for screening of certain evidential devices that are less costly and in the future will allow use of other devices (for screening) that we approve as meeting DOT criteria.

Reasonable Suspicion Testing

Many commenters indicated they were frustrated by use of the phrase “reasonable suspicion” for alcohol testing when the term “reasonable cause” is used in the drug testing regulations. Some commenters supported the NPRM proposal that a supervisor who makes the determination that reasonable suspicion exists to test a covered employee shall not conduct the breath alcohol test on that employee, if another supervisor is readily available. Other commenters indicated that alcohol testing should not be conducted by supervisors, but should be handled by the operator's contract collectors.

RSPA Response. RSPA considers the two terms to be synonymous. The term “reasonable suspicion” is used in the Omnibus Act, and for consistency with other OA alcohol rules, this final rule uses the term “reasonable suspicion.” RSPA will consider amending the drug rules to adopt the same terminology. RSPA is concerned about the potential for abuse and harassment of an employee, if the same supervisor who makes the determination that reasonable suspicion exists also conducts the breath test on the employee. Therefore, RSPA has revised this provision to stipulate that the supervisor who makes the determination that reasonable suspicion exists shall not conduct the breath alcohol test on that employee.

Pre-Duty Use

The NPRM proposed to require each operator to prohibit a covered employee from using alcohol within four hours prior to performing safety-sensitive functions. The final rule adopts an amended provision that prohibits using alcohol within four hours prior to performing covered functions, or within the period of time after an employee has been notified to report to duty to respond to an emergency. In the pipeline industry, an operator commonly has only a limited number of employees or a single employee qualified to respond in an emergency situation. In such a case, an employee may be in an unofficial “on-call” status. For example, an employee who finished work for the day and returned home, had a beer at 6 p.m., and was called at 8 p.m. to respond to an emergency, would be prohibited from using alcohol from 8 p.m. until completion of the safety-sensitive duties. This provision is intended to be used only for emergency situations where an operator has no other recourse. Even in an emergency situation, however, if an operator notifies an employee to report, and the operator believes the employee cannot perform because he or she is impaired by alcohol, the operator should not permit the employee to perform safety-sensitive functions.

Alcohol Plans

The NPRM proposed to require operators to develop, maintain, and follow a written alcohol misuse prevention plan. This type of plan proved beneficial in assisting the industry in establishing anti-drug testing programs and educating the industry about the requirements of the drug rule. RSPA requested operators to provide specific comments on whether a model drug and alcohol plan would be beneficial to employers to standardize the requirements of the rules and assist in compliance issues. A number of commenters were in favor of RSPA developing guidance material for use by operators. Commenters stated that guidance materials would aid the operators in the development of a written alcohol misuse prevention plan addressing the requirements contained in the RSPA final rule and part 40. Commenters, however, indicated that such guidance material should not be used as an enforcement tool in limiting an operator's plan to the same language contained in the guidance materials.

RSPA Response. RSPA is developing guidance materials for operators, to assist them in implementing alcohol misuse prevention plans, that we plan to publish prior to implementation of the regulations. The guidance materials could be used by operators and contractors that provide services to operators subject to the regulations. RSPA does not intend for the guidance materials to limit an operator's ability to provide more detail for its employees. The guidance materials for alcohol would be added to the existing drug testing guidance material for ease of reference.

Management Information System (MIS) Report

The NPRM proposed to require operators to report alcohol statistical information, as an essential tool for monitoring compliance with the rule. Many commenters were opposed to one or more of the reporting elements proposed in the NPRM. Comments submitted by Exxon and the Interstate Natural Gas Association of America addressed several areas of the form that they contended would present an undue burden in the collection and reporting of data. These comments included objections to the data on employee categories; dual coverage and reporting for employees covered by other DOT agencies; and the requirement to submit annual reports no later than February 15th. Some operators objected to the size and complexity of the report format and the numerous detailed instructions required to complete the form. One consortium indicated that costs of designing software and integrating this type of informational software into the current drug management programs...
would be immense. Another
consortium, replenishes numerous small
operators and municipalities,
suggested that consortia should be
allowed to report on behalf of the
companies they serve, thus reducing the
paperwork required. Many operators
provided suggested changes and
modifications to reduce the
recordkeeping and reporting burden.
RSPA Response. This final rule
requires the submission of annual
statistical data on each operator's
alcohol misuse prevention program.
To reduce the burden on small operators
(those with 50 or fewer covered
employees), those operators are not
required to submit annual reports. Small
operators are required to keep records
and submit to RSPA, upon written
request, reports on their alcohol
programs. To reduce the reporting
burden on operators who have no
verified positive test results, RSPA has
limited the information to be provided
and has developed a simplified “EZ
Form” for submitting their reports.
In addition, operators are not required to
report alcohol testing data for
contractors and their employees.
Operators, however, are required to keep
records on contractor data and make the records available for
inspections. To simplify reporting, RSPA
has eliminated the requirement to report
data on covered employees by function.
RSPA has incorporated these
amendments into the final alcohol MIS
report forms, which appear as exhibits
A and B immediately following the rule
text in this Federal Register. RSPA has
determined that while the alcohol
testing data elements are properly a
matter of regulation, the format in
which the data are reported should
remain within the discretion of the
Administrator. This will enable RSPA
to make any revisions to the format that
become necessary without undertaking
additional rulemaking. Because RSPA
does not have regulatory authority over
consortia, the final rule requires
operators to submit MIS reports. An
operator may make arrangements with a
consortium to provide data to the
operator in whatever format the operator
desires, but the responsibility for
submitting drug and alcohol MIS reports
to RSPA remains with the operator.

Contractor Compliance
The NPRM proposed that contractor
employees should be included in the
group of employees that must undergo
alcohol misuse testing because their job
performance is no less critical than the
performance of employees who work
directly for operators. RSPA proposed
limiting the employees, including
contractors, covered by the alcohol
misuse rule to those who perform
operation, maintenance, or emergency-
response functions, on the pipeline or
LNG facility, that are regulated under
part 192, 193, or 195. Seven commenters
indicated that RSPA should exclude
contractor employees from the
definition of “employee.” Some
commenters suggested that RSPA
should be responsible for ensuring that
contractor employees are in compliance
with parts 40 and 109.
RSPA Response. RSPA believes that
contractor employees must be included in
the group of employees subject to the
alcohol misuse provisions. The
performance of safety-sensitive
functions by contract employees is no
less critical than the performance of the
employees who work directly for
operators.

Advisory Committee Reviews
Section 4(b) of the Natural Gas
Pipeline Safety Act of 1968, as amended
(49 U.S.C. 1673(b)), and section 204(b)
of the Hazardous Liquid Pipeline Safety
Act of 1979, as amended (Pub. L. 97–
468, January 14, 1983), each provide
that proposed amendments to safety
standards established under the statutes
be submitted to the pipeline advisory
committees for consideration. Of the 14
bulllets received, 7 were in favor of
implementing an alcohol misuse
prevention program and 2 were
opposed. The advisory members
comments indicate they are generally in
favor of an alcohol testing prevention
program for the pipeline industry which
has limited testing provisions (post-
accident and reasonable suspicion) such
as those discussed in this final rule.
In January 1993, copies of the NPRM
were mailed to each member of the
Technical Pipeline Safety Standards
Committee and the Technical
Hazardous Liquid Pipeline Safety
Standards Committee. On November 29,
1993, RSPA mailed additional copies of
the NPRM to each member, and
requested that the committees vote by
mail on the proposals in the NPRM, and
provide any additional comments.

Regulatory Analyses and Notices
E.O. 12866 and DOT Regulatory Policies
and Procedures
The final rule is a significant
regulatory action under Executive Order
12866, and has been reviewed under
that order. It is significant under DOT
Regulatory Policies and Procedures (44
FR 11034; February 26, 1979) because it
is of substantial public interest. A
regulatory evaluation is available for
review in the docket. RSPA has
evaluated the industry-wide costs and
benefits relating to the implementation of
the alcohol misuse prevention
program for pipeline operators. RSPA
has calculated the total cost of this
program for the first year to be
$1,876,270. The exclusion of pre-
employment and random testing from
the final rule has provided a substantial
reduction in the total cost of the alcohol
program. We have projected yearly
program costs of $186,407, with a slight
increase every third year to allow for
major equipment overhaul which would
project a total program cost of $288,907.
The total 10-year program costs are
estimated to be $3,806,745. The total 10-
year discounted costs are projected to be
$3,270,684 (uses net present value at 7%).
RSPA believes that major cost benefits
will accrue from this rule, including the
prevention of potential injuries,
fatalities and property losses resulting
from accidents attributed to alcohol
misuse, and improved worker
productivity and estimates the savings
to be $15,344,000.

Paperwork Reduction Act
The final rule sets forth new alcohol
misuse prevention program
requirements and includes information
collection requirements subject to the
Paperwork Reduction Act. These
requirements have been submitted to the
Office of Management and Budget (OMB)
for approval under the
Paperwork Reduction Act of 1980 (44
U.S.C. Chapter 35) and 5 CFR Part 1320.
Information collection requirements are
not effective until Paperwork Reduction
Act clearance has been received.

Regulatory Flexibility Act
The final rule affects all entities
subject to part 192, 193, or 195, except
operators of master meter systems and
liquefied petroleum gas (LPG) operators,
which are exempt. Master meter systems
and LPG operators constitute the bulk of
small businesses or other small entities
that operate gas pipeline systems subject
to part 192. There are few, if any, small
entities that operate hazardous liquid or
carbon dioxide pipelines subject to part
195, or LNG facilities subject to part
193. Therefore, I certify under section
605 of the Regulatory Flexibility Act (5
U.S.C.) that this final rule will not have a
significant economic impact on a
substantial number of small entities.

Executive Order 12612
This regulation will not have
substantial direct effects on states, on
the relationship between the Federal
Government and the states, or on the
distribution of power and
functions for operators of certain
employees who perform covered
from the misuse of alcohol by
prevent accidents and injuries resulting
establish programs designed to help
§ 199.200 Purpose.
The purpose of this subpart is to
establish programs designed to help
prevent accidents and injuries resulting
from the misuse of alcohol by
employees who perform covered
functions for operators of certain
pipeline facilities subject to parts 192,
193, or 195 of this chapter.
§ 199.201 Applicability.
This subpart applies to gas, hazardous
liquid and carbon dioxide pipeline
operators and liquefied natural gas
operators subject to parts 192, 193, or
195 of this chapter. However, this
subpart does not apply to operators of
master meter systems defined in § 191.3
or liquefied petroleum gas (LPG)
operators as discussed in § 192.11 of
this chapter.
§ 199.202 Alcohol misuse plan.
Each operator shall maintain and
follow a written alcohol misuse plan
that conforms to the requirements of
this subpart and the DOT procedures in
part 40 of this title. The plan shall
contain methods and procedures for
compliance with all the requirements of
this subpart, including required testing,
recordkeeping, reporting, education and
training elements.
§ 199.203 Alcohol testing procedures.
Each operator shall ensure that all
alcohol testing conducted under this
subpart complies with the procedures
set forth in part 40 of this title. The
provisions of 49 CFR part 40 that
address alcohol testing are made
applicable to operators by this subpart.
§ 199.205 Definitions.
As used in this subpart:
Accident means an incident
reportable under part 191 of this chapter
involving gas pipeline facilities or LNG
companies, or an accident reportable
under part 195 of this chapter involving
hazardous liquid or carbon dioxide
pipeline facilities.
Administrator means the
Administrator of the Research and
Special Programs Administration
(RSPA), or any person who has been
delegated authority in the matter
concerned.
Alcohol means the intoxicating
gent in beverage alcohol, ethyl alcohol or
other low molecular weight alcohols
including methyl or isopropyl alcohol.
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 under this
subpart.
Alcohol use means the consumption
of any beverage, mixture, or preparation,
including any medication, containing
alcohol.
Confirmation test means a second test,
following a screening test with a result
0.02 or greater, that provides
quantitative data of alcohol
concentration.
Consortium means an entity,
including a group or association of
employers, recipients, or contractors,
that provides alcohol testing as required
by this subpart or other DOT alcohol
testing rules and that acts on behalf of
the operators.
Covered employee means a person
who performs on a pipeline or at an
LNG facility an operation, maintenance,
or emergency-response function
regulated by parts 192, 193, or 195 of
this chapter. Covered employee and
individual or individual to be tested
have the same meaning for the purposes
of this subpart. The term covered
employee does not include clerical,
truck driving, accounting, or other
functions not subject to parts 192, 193,
or 195. The person may be employed by
the operator, be a contractor engaged by
the operator, or be employed by such a
contractor.
Covered function (safety-sensitive
function) means an operation,
maintenance, or emergency-response
function that is performed on a pipeline
or LNG facility and the function is
regulated by parts 192, 193, or 195.
DOT agency An agency (or operating
administration) of the United States
Department of Transportation
administering regulations requiring
alcohol testing (49 CFR parts 61, 63,
65, 121, 135; 49 CFR parts 199, 219, 382,
and 654) in accordance with part 40 of
this title.
Employer or operator means a person
who owns or operates a pipeline or LNG
facility subject to parts 192, 193, or 195
of this chapter.
Performing (a covered function): An
employee is considered to be
performing a covered function (safety-
sensitive function) during any period in
which he or she is actually performing,
ready to perform, or immediately
available to perform such covered
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 the provisions of this subpart, or
engages in conduct that clearly obstructs
the testing process.
Screening test means an analytical
procedure to determine whether a
covered employee may have a
prohibited concentration of alcohol in
his or her system.
State agency means an agency of any
of the several states, the District of
Columbia, or Puerto Rico that
participates under section 5 of the
Natural Gas Pipeline Safety Act of 1968
(49 App. U.S.C. 1674) or section 205 of

Subpart B—Alcohol Misuse Prevention
Program
§ 199.200 Purpose.
The purpose of this subpart is to
establish programs designed to help
prevent accidents and injuries resulting
from the misuse of alcohol by
employees who perform covered
functions for operators of certain newfound responsibilities among the various
texts of Government. Therefore, in
accordance with Executive Order 12612
(52 FR 41685; October 30, 1987), RSPA
has determined that this regulation does
not have sufficient federalism
implications to warrant preparation of a
Federalism Assessment.
List of Subjects in 49 CFR Part 199
Alcohol testing, Drug testing, Pipeline
safety, Recordkeeping and reporting.
In consideration of the foregoing,
RSPA is amending 49 CFR part 199 as
follows:
1. The title for part 199 is revised to
read as follows:
PART 199—DRUG AND ALCOHOL
TESTING
2. The authority citation for part 199
continues to read as follows:
Authority: 49 App. U.S.C. 1672, 1674a,
1681, 1804, 1808, and 2002; 49 CFR 1.53.
3. Sections 199.1 through 199.25 are
designated as subpart A, and subpart B
is added to read as follows:
Subpart B—Alcohol Misuse Prevention
Program
Sec.
199.200 Purpose.
199.201 Applicability.
199.202 Alcohol misuse plan.
199.203 Alcohol testing procedures.
199.205 Definitions.
199.207 Preemption of State and local laws.
199.209 Other requirements imposed by
operators.
199.211 Requirement for notice.
199.213 Starting date for alcohol testing
programs.
199.215 Alcohol concentration.
199.217 On-duty use.
199.219 Pre-duty use.
199.221 Use following an accident.
199.223 Refusal to submit to a required
alcohol test.
199.225 Alcohol tests required.
199.227 Retention of records.
199.229 Reporting of alcohol testing results.
199.231 Access to facilities and records.
199.233 Removal from covered function.
199.235 Required evaluation and testing.
199.237 Other alcohol-related conduct.
199.239 Operator obligation to promulgate a
policy on the misuse of alcohol.
199.241 Training for supervisors.
199.245 Contractor employees.

§ 199.200 Purpose.
The purpose of this subpart is to
establish programs designed to help
prevent accidents and injuries resulting
from the misuse of alcohol by
employees who perform covered
functions for operators of certain
§ 199.207 Preemption of State and local laws.
(a) Except as provided in paragraph (b) of this section, this subpart preempts any State or local law, rule, regulation, or order to the extent that:
(1) Compliance with both the State or local requirement and this subpart is not possible;
(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this subpart; or
(3) The State or local requirement is a pipeline safety standard applicable to interstate pipeline facilities.
(b) This subpart 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.

§ 199.209 Other requirements imposed by operators.
Except as expressly provided in this subpart, nothing in this subpart shall be construed to affect the authority of operators, or the rights of employees, with respect to the use or possession of alcohol, including authority and rights with respect to alcohol testing and rehabilitation.

§ 199.211 Requirement for notice.
Before performing an alcohol test under this subpart, each operator shall notify a covered employee that the alcohol test is required by this subpart. No operator shall falsely represent that a test is administered under this subpart.

§ 199.213 Starting date for alcohol testing programs.
(a) Large operators. Each operator with more than fifty covered employees on February 15, 1994 shall implement the requirements of this subpart beginning on January 1, 1996.
(b) Small operators. Each operator with fifty or fewer covered employees on February 15, 1994 shall implement the requirements of this subpart beginning on January 1, 1996.
(c) All operators commencing operations after February 15, 1994 shall have an alcohol misuse program that conforms to this subpart by January 1, 1996, or by the date an operator begins operations, whichever is later.

§ 199.215 Alcohol concentration.
Each operator shall prohibit a covered employee from reporting for duty or remaining on duty requiring the performance of covered functions while having an alcohol concentration of 0.04 or greater. No operator having actual knowledge that a covered employee has an alcohol concentration of 0.04 or greater shall permit the employee to perform or continue to perform covered functions.

§ 199.217 On-duty use.
Each operator shall prohibit a covered employee from using alcohol while performing covered functions. No operator having actual knowledge that a covered employee is using alcohol while performing covered functions shall permit the employee to perform or continue to perform covered functions.

§ 199.219 Pre-duty use.
Each operator shall prohibit a covered employee from using alcohol within four hours prior to performing covered functions, or, if an employee is called to duty to respond to an emergency, within the time period after the employee has been notified to report for duty. No operator having actual knowledge that a covered employee has used alcohol within four hours prior to performing covered functions or within the time period after the employee has been notified to report for duty shall permit that covered employee to perform or continue to perform covered functions.

§ 199.221 Use following an accident.
Each operator shall prohibit a covered employee who has actual knowledge of an accident in which his or her performance of covered functions has not been discounted by the operator as a contributing factor to the accident from using alcohol for eight hours following the accident, unless he or she has been given a post-accident test under § 199.225(a), or the operator has determined that the employee's performance could not have contributed to the accident.

§ 199.223 Refusal to submit to a required alcohol test.
Each operator shall require a covered employee to submit to a post-accident alcohol test required under § 199.225(a), a reasonable suspicion alcohol test required under § 199.225(b), or a follow-up alcohol test required under § 199.225(d). No operator shall permit an employee who refuses to submit to such a test to perform or continue to perform covered functions.

§ 199.225 Alcohol tests required.
Each operator shall conduct the following types of alcohol tests for the presence of alcohol:
(a) Post-accident. (1) As soon as practicable following an accident, each operator shall test each surviving covered employee for alcohol that might impair the employee's performance of a covered 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 operator's determination, using the best available information at the time of the determination, that the covered 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 operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by paragraph (a) is not administered within 8 hours following the accident, the operator shall cease to administer an alcohol test and shall state in the record the reasons for not administering the test.
(3) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the operator or operator representative of his/her location if he/she leaves the scene of the accident prior to submission to such test, may be deemed by the operator 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.
(b) Reasonable suspicion testing. (1) Each operator shall require a covered employee to submit to an alcohol test when the operator has reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.
(2) The operator'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 (b)(2) of this section are made during, just preceding, or just after the period of the work day that the employee is required to be in compliance with this subpart. A covered employee may be directed by the operator to undergo reasonable suspicion testing for alcohol only while the employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing covered functions.

(4) (i) If a test required by this section is not administered within 2 hours following the determination under paragraph (b)(2) of this section, the operator shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within 8 hours following the determination under paragraph (b)(2) of this section, the operator shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test. Records shall be submitted to RSPA upon request of the Administrator.

(ii) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, an operator shall not permit a covered employee to report for duty or remain on duty requiring the performance of covered functions while the employee is under the influence of or impaired by alcohol, as shown by the behavioral, speech, or performance indicators of alcohol misuse, nor shall an operator permit the covered employee to perform or continue to perform covered functions, until:

(A) An alcohol test is administered and the employee’s alcohol concentration measures less than 0.02; or

(B) The start of the employee’s next regularly scheduled duty period, but not less than 8 hours following the determination under paragraph (b)(2) of this section that there is reasonable suspicion to believe that the employee has violated the prohibitions in this subpart.

(iii) Except as provided in paragraph (b)(4)(ii), no operator shall take any action under this subpart against a covered employee based solely on the employee’s behavior and appearance in the absence of an alcohol test. This does not prohibit an operator with the authority independent of this subpart from taking any action otherwise consistent with the law.

(c) Return-to-duty testing. Each operator shall ensure that before a covered employee returns to duty requiring the performance of a covered function after engaging in conduct prohibited by §§199.215 through 199.223, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(d) Follow-up testing. (1) Following a determination under §199.234(b) that a covered employee is in need of assistance in resolving problems associated with alcohol misuse, each operator 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 §199.243(b)(2)(ii).

(2) Follow-up testing shall be conducted when the covered employee is performing covered functions; just before the employee is to perform covered functions; or just after the employee has ceased performing such functions.

(e) Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04. Each operator shall retest a covered employee to ensure compliance with the provisions of §199.237, if an operator chooses to permit the employee to perform a covered function within 8 hours following the administration of an alcohol test indicating an alcohol concentration of 0.02 or greater but less than 0.04.

§199.227 Retention of records.

(a) General requirement. Each operator 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.

(b) Period of retention. Each operator shall maintain the records in accordance with the following schedule:

(1) Five years. Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, employee evaluation and referrals, and MIS annual report data shall be maintained for a minimum of five years.

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

(3) One year. Records of all test results below 0.02 (as defined in 49 CFR part 40) shall be maintained for a minimum of one year.

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

(1) Records related to the collection process:

(i) Collection log books, if used.

(ii) Calibration documentation for evidential breath testing devices.

(iii) Documentation of breath alcohol technician training.

(iv) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(v) Documents generated in connection with decisions on post-accident tests.

(vi) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) Records related to test results:

(i) The operator’s copy of the alcohol test form, including the results of the test.

(ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this subpart.

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

(3) Records related to other violations of this subpart.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee’s need for assistance.

(ii) Records concerning a covered employee’s compliance with the recommendations of the substance abuse professional.

(5) Record(s) related to the operator’s MIS annual testing data.

(6) Records related to education and training:

(i) Materials on alcohol misuse awareness, including a copy of the operator’s policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of §199.231.

(iii) 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.

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

§199.229 Reporting of alcohol testing results.

(a) Each large operator (having more than 50 covered employees) shall
submit an annual management information system (MIS) report to RSPA of its alcohol testing results in the form and manner prescribed by the Administrator, by March 15 of each year for the previous calendar year (January 1 through December 31). The Administrator may require by written notice that a small operator (50 or fewer covered employees), not otherwise required to submit annual MIS reports, submit such a report to RSPA.

(b) Each operator 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. This identification will by be the total number of covered employees. 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.

(c) Each report, required under this section, shall be submitted to the Office of Pipeline Safety Compliance (OPS), Research and Special Programs Administration, Department of Transportation, room 2335, 400 Seventh Street, SW., Washington, DC 20590.

(d) Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of §§ 199.215 through 199.223 shall be submitted on “RSPA Alcohol Testing MIS Data Collection EZ Form” and include the following informational elements:

| 1 | Number of covered employees. |
| 2 | Number of covered employees subject to testing under the alcohol misuse rule of another operating administration identified by each agency. |
| 3 | (i) Number of screening tests by type of test. |
| 4 | (ii) Number of confirmation tests by type of test. |

(4) Number of covered employees who refused to submit to an alcohol test required under this subpart, and the action taken in response to the refusal. (5) Number of supervisors who have received required training during the reporting period in determining the existence of reasonable suspicion of alcohol misuse.

(e) Each report with no screening alcohol test results of 0.02, or greater or violations of the alcohol misuse provisions of §§ 199.215 through 199.223 of this subpart shall be submitted on “RSPA Alcohol Testing MIS Data Collection EZ Form” and include the following informational elements. (This “EZ” report may only be submitted if the progress results meet these criteria)

| 1 | Number of covered employees. |
| 2 | Number of covered employees subject to testing under the alcohol misuse rule of another operating administration identified by each agency. |
| 3 | Number of screening tests by type of test. |
| 4 | Number of confirmation tests by type of test. |

(f) A consortium may prepare reports on behalf of individual pipeline operators for purposes of compliance with this reporting requirement. However, the pipeline operator shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.

§ 199.231 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this subpart, no employer shall release covered employee information that is contained in records required to be maintained in § 199.227. (b) 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 operator shall promptly provide the records requested by the employee.

(c) Each operator shall permit access to all facilities utilized in complying with the requirements of this subpart to the Secretary of Transportation, any DOT agency, or a representative of a state agency with regulatory authority over the operator.

(d) Each operator shall make available copies of all results for employer alcohol testing conducted under this subpart and any other information pertaining to the operator’s alcohol misuse prevention program, when requested by the Secretary of Transportation, any DOT agency with regulatory authority over the operator, or a representative of a state agency with regulatory authority over the operator.

(1) An operator shall make records available to a subsequent employer upon receipt of the written request from the covered employee. Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the employee’s written request.

(2) An operator may disclose information required to be maintained under this subpart pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the individual, and arising from the results of an alcohol test administered under this subpart, or from the operator’s determination that the covered employee engaged in conduct prohibited by §§ 199.215 through 199.223 (including, but not limited to, a worker’s compensation, unemployment compensation, or other proceeding relating to a benefit sought by the employee).

(i) An operator 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.
§ 199.233 Removal from covered function. Except as provided in §§ 199.239 through 199.243, no operator shall permit any covered employee to perform covered functions if the employee has engaged in conduct prohibited by §§ 199.215 through 199.223 or an alcohol misuse rule of another DOT agency.

§ 199.235 Required evaluation and testing. No operator shall permit a covered employee who has engaged in conduct prohibited by §§ 199.215 through 199.223 to perform covered functions unless the employee has met the requirements of § 199.243.

§ 199.237 Other alcohol-related conduct.
(a) No operator shall permit a covered employee tested under the provisions of § 199.225, who is found to have an alcohol concentration of 0.02 or greater but less than 0.04, to perform or continue to perform covered functions, until—
(1) The employee's alcohol concentration measures less than 0.02 in accordance with a test administered under § 199.225(e); or
(2) The start of the employee's next regularly scheduled duty period, but not less than eight hours following administration of the test.

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

§ 199.239 Operator obligation to promulgate a policy on the misuse of alcohol.
(a) General requirements. Each operator shall provide educational materials that explain these alcohol misuse requirements and the operator's policies and procedures with respect to meeting those requirements.
(1) The operator shall ensure that a copy of these materials is distributed to each covered employee prior to start of alcohol testing under this subpart, and to each person subsequently hired for or transferred to a covered position.
(2) Each operator shall provide written notice to representatives of employee organizations of the availability of this information.
(b) Required content. The materials to be made available to covered employees shall include detailed discussion of at least the following:
(1) The identity of the person designated by the operator to answer covered employee questions about the materials.

§ 199.241 Training for supervisors. Each operator shall ensure that persons designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 199.225(b) receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

(a) Each covered employee who has engaged in conduct prohibited by §§ 199.215 through 199.223 of this subpart shall be advised of the resources available to the covered 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.
(b) Each covered employee who engages in conduct prohibited under §§ 199.215 through 199.223 shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.
(c)(1) Before a covered employee returns to duty requiring the performance of a covered function after engaging in conduct prohibited by §§ 199.215 through 199.223 of this subpart, the employee shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.
(2) 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 that the employee has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and
(ii) Shall be subject to unannounced follow-up alcohol tests administered by the operator 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. In addition, follow-up testing may include testing for drugs, as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40. 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.

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

(e) The operator shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional’s private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

1. A public agency, such as a State, county, or municipality;
2. The operator or a person under contract to provide treatment for alcohol problems on behalf of the operator;
3. The sole source of therapeutically appropriate treatment under the employee’s health insurance program; or
4. The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

§ 199.245 Contractor employees.

(a) With respect to those covered employees who are contractors or employed by a contractor, an operator may provide by contract that the alcohol testing, training and education required by this subpart be carried out by the contractor provided:

(b) The operator remains responsible for ensuring that the requirements of this subpart and part 40 of this title are complied with; and

(c) The contractor allows access to property and records by the operator, the Administrator, any DOT agency with regulatory authority over the operator or covered employee, and, if the operator is subject to the jurisdiction of a state agency, a representative of the state agency for the purposes of monitoring the operator’s compliance with the requirements of this subpart and part 40 of this title.

Federico Peña,  
Secretary of Transportation.  
Ana Sol Gutiérrez,  
Acting Administrator, Research and Special Programs Administration.

Note: The following appendix and exhibit will not appear in the Code of Federal Regulations.

BILLING CODE 4910-06-P
APPENDIX B - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information in the Research and Special Programs Administration (RSPA) and the U.S. Department of Transportation (DOT) Alcohol Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages ii-iii as an example to facilitate the process of completing the form correctly.

This reporting form includes three sections. Collectively, these sections address the data elements required in the RSPA and the DOT alcohol testing regulations. The three sections, the page number for the instructions, and the page location on the reporting form are:

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions Page</th>
<th>Reporting Form Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. PIPELINE EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>C. ALCOHOL TESTING INFORMATION</td>
<td>ii-iv</td>
<td>2</td>
</tr>
</tbody>
</table>

Page 1

EMPLOYER INFORMATION (Section A) requires the company name for which the report is done, a current address, and the name of the person responsible for completing the form. Be sure to check which one of the five categories (gas gathering; gas transmission; gas distribution; transportation of hazardous liquids; and transportation of carbon dioxide) characterizes the primary nature of your operation. Finally, a signature, date, and current telephone number (including the area code) are required certifying the correctness and completeness of the form.

Page 1

COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under DOT regulations. There is only one category of covered employees for RSPA -- Operation/Maintenance/Emergency Response. 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.

Additional information must be completed if your company employs personnel who perform duties covered by the 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).

Page 2

ALCOHOL TESTING INFORMATION (Section C) requires information for alcohol testing by category of testing. These categories include: (1) post-accident, (2) reasonable suspicion, (3) return to duty, and (4) follow-up testing. All numbers entered into this table should be for company employees in a covered position only. Each part of this table must be completed for each category of testing.
These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iii.

Four types of information are necessary to complete this table. The first blank column with the heading "NUMBER OF SCREENING TESTS" requires a count of all screening alcohol tests performed. It should not include refusals to test. The second blank column with the heading "NUMBER OF CONFIRMATION TESTS" requires a count of all confirmation alcohol tests performed.

The third blank column with the heading "NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04" refers to the number of test results equal to or greater than 0.02, but less than 0.04.

The fourth blank column with the heading "NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04" refers to the number of specimens with a result equal to or greater than 0.04. Note: For return to duty testing, a confirmation test result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

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

### SAMPLE TEST RESULTS TABLE

The following example is for Section C, ALCOHOL TESTING INFORMATION, which summarizes post-accident testing results. The procedures detailed here also apply to the other categories for testing in Section C which require you to summarize testing results for covered employees. This example will use "Post-Accident" testing to illustrate the procedures for completing the form.

**A**

Screening tests were performed on 47 covered employees during the reporting year. This information is entered in the first blank column of the table in the row marked "POST-ACCIDENT".

**B**

Confirmation tests were necessary for 6 of the 47 covered employees. Enter this information in the second blank column of the table in the row marked "POST-ACCIDENT". The confirmation test results for these 6 employees were the following:

<table>
<thead>
<tr>
<th>Employee</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.06</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

**C**

The confirmation test results for 2 of the covered employees were equal to or greater than 0.02, but less than 0.04. Enter this information in the third blank column of the table in the row marked "POST-ACCIDENT".
The confirmation test results for 3 of the covered employees were equal to or greater than 0.04. Enter this information in the fourth blank column of the table in the row marked "POST-ACCIDENT".

<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>POST-ACCIDENT</td>
<td>47</td>
<td>6</td>
<td>2</td>
<td>3</td>
</tr>
</tbody>
</table>

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 CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all categories of testing in the table in Section C.

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the "Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in RSPA regulations)". This information should be available from the personnel office and/or the drug and alcohol program manager.

Next you must provide information on ACTIONS TAKEN ON ALCOHOL TEST RESULTS EQUAL TO OR GREATER THAN 0.04. Indicate the number of employees subjected to the following actions:

- No longer employed with company - include covered employees who resigned or were terminated as the result of a confirmation test result equal to or greater than 0.04.
- Reassigned to non-covered functions - include covered employees who were reassigned within the company to a non-covered position as the result of a confirmation test result equal to or greater than 0.04.
- Entered rehabilitation, if applicable, and/or returned to covered functions - include covered employees who are undergoing or have completed a rehabilitation program and/or covered employees who have returned to a covered function.
• Other - include covered employees who did not fall under one of the previous options and specify the action taken.

Enter the sum of the number of actions taken on the line marked TOTAL.

Page 2 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 2 VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION, requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these RSPA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.

Page 2 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 required under the RSPA regulation and the action taken following the refusal.

Page 2 ALCOHOL TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.
RSPA ALCOHOL TESTING MIS DATA COLLECTION FORM

A. PIPELINE EMPLOYER INFORMATION

Company ___________________________ Year Covered by This Report: __________
Address ___________________________ Person responsible for completing the form:

Check the one box that indicates the primary nature of your operation.

☐ Gas gathering   ☐ Transportation of hazardous liquids
☐ Gas transmission ☐ Transportation of carbon dioxide
☐ Gas distribution

I, the undersigned certify that the information provided on this Research and Special Programs Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature ___________________________ Date of Signature ___________________________
Title ___________________________ 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.

The Research and Special Programs Administration estimates that the average burden for this report form is 3.1 hours.

You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Pipeline Safety, RSPA, DOT; 400 7th St., S.W.; Washington, DC 20590; OR Office of Management and Budget, Paperwork Reduction Project (2137-0579); Washington, DC 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF RSPA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>FAA</td>
</tr>
<tr>
<td>Operation/Maintenance/Emergency Response</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM

1. All items refer to the current reporting period only (for example January 1, 1994 - December 31, 1994)

2. This report is only for testing REQUIRED BY THE RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION (RSPA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT)
   • Results should be reported only for employees in COVERED POSITIONS as defined by RSPA/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 the table "EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST. Do not include refusals for testing in other sections of this 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.
### C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>POST-ACCIDENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>REASONABLE SUSPICION</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RETURN TO DUTY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FOLLOW-UP</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in RSPA regulations):

<table>
<thead>
<tr>
<th>ACTION TAKEN ON ALCOHOL TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No longer employed with company:</td>
<td></td>
</tr>
<tr>
<td>Reassigned to non-covered functions:</td>
<td></td>
</tr>
<tr>
<td>Entered rehabilitation, if applicable, and/or returned to covered functions:</td>
<td></td>
</tr>
<tr>
<td>Other (specify):</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
</tr>
</tbody>
</table>

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:

<table>
<thead>
<tr>
<th>VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER OF COVERED EMPLOYEES</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Covered employee used alcohol while performing safety-sensitive function.</td>
</tr>
<tr>
<td>Covered employee used alcohol within 4 hours of performing safety-sensitive function.</td>
</tr>
<tr>
<td>Covered employee used alcohol before taking a required post-accident alcohol test.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST</th>
<th>NUMBER OF REFUSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of employees who refused to submit to an alcohol test required under the RSPA rule:</td>
<td></td>
</tr>
<tr>
<td>ACTION TAKEN</td>
<td>NUMBER</td>
</tr>
<tr>
<td>No longer employed with company:</td>
<td></td>
</tr>
<tr>
<td>Reassigned to non-covered functions:</td>
<td></td>
</tr>
<tr>
<td>Entered rehabilitation, if applicable, and/or returned to covered functions:</td>
<td></td>
</tr>
<tr>
<td>Other (specify):</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ALCOHOL TRAINING/EDUCATION</th>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by RSPA alcohol testing regulations:</td>
<td></td>
</tr>
</tbody>
</table>
EXHIBIT B - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
"EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Research and Special Programs Administration (RSPA) and the U.S. Department of Transportation (DOT) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there is no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes three sections. These sections address the data elements required in the RSPA and DOT alcohol testing regulations.

SECTION A - PIPELINE EMPLOYER INFORMATION requires the company name for which the report is done, a current address, and the name of the person responsible for completing the form. Be sure to check which one of the five categories (gas gathering; gas transmission; gas distribution; transportation of hazardous liquids; and transportation of carbon dioxide) characterizes the primary nature of your operation. Finally, a signature, date, and current telephone number (including the area code) are required certifying the correctness and completeness of the form.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the RSPA regulation. There is only one category of covered employees for RSPA --- Operation/Maintenance/Emergency Response. 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.

Additional information must be completed if your company employs personnel who perform duties covered by the 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).

SECTION C - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and education/training. The first table requests information on the NUMBER OF SCREENING TESTS CONDUCTED in each category for testing. All numbers entered into this table should be for applicants or company employees in covered positions only. Each part of this table must be completed for each category of testing including: (1) post-accident, (2) reasonable suspicion, (3) return to duty, and (4) follow-up testing. These numbers do not include refusals for testing. Simply enter the number of alcohol screening tests conducted for each category of testing.

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in RSPA regulations). This information should be available from the personnel office and/or alcohol program manager.
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 required under
the RSPA regulation and the action taken following the refusal. Indicate the number of
employees subjected to the following actions:

- No longer employed with company - include covered employees who resigned or were
terminated as the result of a refusal to submit to an alcohol test.

- Reassigned to non-covered functions - include covered employees who were reassigned
within the company to a non-covered position as the result of a refusal to submit to an
alcohol test.

- Entered rehabilitation, if applicable, and/or returned to covered functions - include
covered employees who are undergoing or have completed a rehabilitation program
and/or covered employees who have returned to a covered function.

- Other - include covered employees who did not fall under one of the previous options
and specify the action taken.

ALCOHOL TRAINING/EDUCATION requires information on the number of supervisory personnel
who have received the required alcohol training during the current reporting period.
RSPA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM  OMB No. 2137-0579
(No Alcohol Misuse)

A. PIPELINE EMPLOYER INFORMATION

Company ____________________________________________ Year Covered by This Report: ________
Address ____________________________________________ Person responsible for completing the form: ______________________________

Check the one box that indicates the primary nature of your operation.

☐ Gas gathering ☐ Transportation of hazardous liquids
☐ Gas transmission ☐ Transportation of carbon dioxide
☐ Gas distribution

I, the undersigned, certify that the information provided on the attached Research and Special Programs Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature __________________________ Date of Signature __________________________
Title __________________________ 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.

The Research and Special Programs Administration estimates that the average burden for this report form is 3.0 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Pipeline Safety, RSPA, DOT; 400 7th St., S.W.; Washington, DC 20590; OR Office of Management and Budget, Paperwork Reduction Project (2137-0579); Washington, DC 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>COVERED EMPLOYEES</th>
<th>NUMBER OF RSPA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMPLOYEE CATEGORY</td>
<td></td>
<td>FAA</td>
</tr>
<tr>
<td>Operation/Maintenance/Emergency Response</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>NUMBER OF SCREENING TESTS CONDUCTED</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMPLOYEE CATEGORY</td>
</tr>
<tr>
<td>Operation/Maintenance/Emergency Response</td>
</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in RSPA regulations).
C. ALCOHOL TESTING INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST</th>
<th>NUMBER OF REFUSALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of employees who refused to submit to an alcohol test required under the RSPA rule:</td>
<td></td>
</tr>
</tbody>
</table>

**ACTION TAKEN**

<table>
<thead>
<tr>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>No longer employed with company:</td>
</tr>
<tr>
<td>Reassigned to non-covered functions:</td>
</tr>
<tr>
<td>Entered rehabilitation, if applicable, and/or returned to covered functions:</td>
</tr>
<tr>
<td>Other (specify):</td>
</tr>
</tbody>
</table>

**ALCOHOL TRAINING/EDUCATION**

<table>
<thead>
<tr>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by RSPA alcohol testing regulations:</td>
</tr>
</tbody>
</table>

[FR Doc. 94–2034 Filed 2–3–94; 1:00 pm]  
BILLING CODE 4910–05–C
Part VI

Department of Transportation

Federal Railroad Administration

49 CFR Part 219
Alcohol Testing; Amendments to Alcohol/Drug Regulations; Final Rule
International Application: Alcohol/Drug Regulations; Proposed Rule
DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
49 CFR Part 219
[Docket No. RSR8-6; Notice No. 38]
RIN 2130-AA81
Alcohol Testing; Amendments to
Alcohol/Drug Regulations
AGENCY: Federal Railroad Administration (FRA), DOT.
ACTION: Final rule.
SUMMARY: FRA issues a final rule to conform its regulations on control of alcohol and drug use in railroad operations to the requirements of the Omnibus Transportation Employee Testing Act of 1991 (Act). Among other changes, FRA now requires pre-employment and random alcohol testing and makes the reasonable suspicion component of for cause testing mandatory for both alcohol and drugs. FRA also amends its procedures to incorporate split sample testing and to incorporate the departmental alcohol testing procedures published elsewhere in today's Federal Register.
EFFECTIVE DATES: This final rule is effective January 1, 1995, except that the amendment to §219.707 and §219.708 are effective August 15, 1994.
ADDRESSES: Any petition for reconsideration should be submitted in triplicate to the Docket Clerk, Docket No. RSR8-6, Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street SW., room 8201, Washington, DC 20590.
FOR FURTHER INFORMATION CONTACT: Walter C. Rockey, Executive Assistant to the Associate Administrator for Safety (RRS-3), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 366-0975) or Patricia V. Sun, Trial Attorney (RCC-30), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 366-4004).
SUPPLEMENTARY INFORMATION:
Background
On December 15, 1992, FRA published a notice proposing to amend its regulations on alcohol and drug misuse (49 CFR part 219) in response to the testing requirements mandated by the Omnibus Transportation Employee Testing Act of 1991 (57 FR 35558). At hearings in Washington, DC, Chicago, and San Francisco, FRA heard testimony from over 20 parties, including the major industry trade associations (the American Association of Railroads (AAR) and the American Short Line Railroad Association (ASLRA)) and labor organizations (the Brotherhood of Locomotive Engineers (BLE), the Brotherhood of Railroad Signallers (BRS), and the Railway Labor Executives' Association (REALA)). FRA also received oral or written comment from the American Public Transit Association (APTA), the Transportation Trades Department (TTD) of the AFL-CIO, the National Transportation Safety Board (NTSB), individual freight and commuter railroads, service providers, and state and local governments, among others. FRA has reconsidered some of its proposals in light of the comments received.
First, the effective date for this rule is January 1, 1995, to ensure that EBTs that meet part 40 specifications will be widely available and to allow for implementation of quality control systems. This will also allow railroads time to purchase evidential breath testing devices (EBTs) and phase in other part 40 requirements such as breath alcohol technician training. To ensure a smooth transition, existing provisions will remain in effect and voluntary compliance before the effective date will not be allowed. (However, urine split sample drug testing is effective beginning on August 15, 1994. See part 40 and §§219.707 and 219.708 of this final rule.
Second, FRA permits screening tests to be conducted on preliminary breath testing devices (PBTs) found on the Conforming Products List (CPL) of the National Highway Traffic Safety Administration (NHTSA). EBTs that currently qualify for the CPL but do not meet the specifications listed in DOT's amended "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (49 CFR Part 40) may be used as PBTs. As discussed in part 40, NHTSA will develop model specifications for a new CPL to qualify other alcohol testing devices (such as saliva tests and breath tubes) as PBTs. Procedures for these additional PBTs will be addressed in future rulemakings.
Third, in a separate notice issued by the Office of the Secretary (OST), the Department proposes to allow blood testing for screening and confirmation tests in the case of reasonable suspicion or after qualifying accidents (for modes other than rail). Combined, the use of PBTs and blood would be an alternative testing methodology that could be used in remote or unusual circumstances when EBTs are inaccessible. Allowing a blood test option for for cause testing would substantially reduce the costs of alcohol testing, since railroads would not have to ensure system-wide availability of breath testing devices (BATs) and EBTs for unplanned testing events. Railroads would then be free to plan the deployment or contracting of BATs and EBTs for the remaining types of testing (pre-employment, return to service, follow-up, and random) which are all, of course, scheduled by the railroads.
Since FRA has repealed its existing breath and blood testing procedures (§219.104(e) and former §219.303), for cause testing will be conducted exclusively under today's amended part 40 procedures, which contain new breath testing safeguards. For now, FRA allows only breath to be used in for cause testing. As mentioned above, however, the Department is proposing part 40 blood testing procedures (see the DOT notice titled "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (RRS-3), Office of the Chief Counsel, Federal Railroad Administration, 400 7th Street SW., room 8201, Washington, DC 20590). The Department adopts this proposal, and allows for cause blood alcohol testing, FRA will allow railroads to conduct for cause blood alcohol testing under part 40 procedures.
Also, FRA moves the authority for optional post-accident breath testing formerly contained in §219.303 from for cause testing to post-accident testing. Although urine and blood samples must still be collected and sent to FRA's post-accident laboratory for full toxicological testing, the EBT breath testing option allows railroads to obtain immediate test results. (Post-accident breath testing must be conducted in accordance with part 40, however, since FRA will not retain §219.303's procedures for circumstances when BATs or EBTs are inaccessible. In effect, that the categorical standards used in subpart C of today's Federal Register will govern, rather than the reasonable cause criteria of subpart D.)
Additional discussion of alcohol testing methodology can be found below and in a separate departmental final rule, "Procedures for Transportation Workplace Testing Programs" (49 CFR part 40), also published elsewhere in today's Federal Register.
Finally, for random alcohol testing, FRA will introduce performance-based testing by industry. Performance-based testing was widely supported by commenters. As proposed, FRA will use a graduated submission and implementation schedule similar to the one used to phase-in random drug testing. Railroads will initially be required to conduct random alcohol testing at a 25 percent rate. Performance-based testing, as determined by the Administrator, will begin a year after industry-wide
implementation of random alcohol testing has occurred. (In a separate departmental NPRM in today's Federal Register, FRA also proposes to implement performance-based testing for random drug testing. See "Random Drug Testing Program.")

The section-by-section analysis discusses these and other amendments contained in the final rule. (Editorial changes and several proposed amendments that did not receive comment are adopted without further discussion.)

Interested parties should also review the departmental preamble (common preamble) published by the Office of the Secretary of Transportation elsewhere in today's Federal Register, which is incorporated herein by reference. (The Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Research and Special Projects Administration (RSPA) are also publishing alcohol testing rules in today's Federal Register.) Although the common preamble discusses issues pertaining to all of the modal rules, some of its discussion is not directly applicable to FRA's rule. The basis for any differences can be found in the section-by-section analysis.

For convenience and ease of reference, the entire rule text as amended is republished.

Multi-modal Coverage

For railroads, multi-modal coverage primarily affects those employees (mainly signal maintainers) who both perform covered service and hold Commercial Driver's Licenses (CDLs). These employees are subject to FRA and FHWA regulations. CDL holders who do not perform covered service (such as maintenance of way and shop employees) are subject only to FHWA's regulations.

The ASLRA and rail labor wanted all railroad employees to be covered by FRA only. The AAR, on the other hand, recommended that FHWA regulations determine coverage for railroad commercial vehicle drivers, although testing would be conducted in accordance with FRA's regulations. Estimating that approximately 1,000 rail drivers per major railroad are subject to dual coverage, the AAR expressed concern about how to resolve differences between FRA and FHWA regulations and pointed out that this group of employees could be subject to a different random testing rate if performance-based rates are set by industry.

While sympathetic to these industry concerns, FRA and DOT believe that modal coverage, like reportability (see Annual Reporting Requirements; Amendments to Alcohol/Drug Regulations, 58 FR 68232), must be determined by employee function to be logically consistent. As guidance, FRA's policy for CDL holders who perform covered service (and other employees subject to dual coverage) is as follows:

For pre-employment and random testing, an employee is covered by whichever operating administration (OA) covers more than 50% of that employee's function. For post-accident and reasonable suspicion testing, however, coverage is determined by the function the employee was performing at the time of the accident or incident. Finally, for return to service and follow-up testing, the employee is covered by the same OA to which the initial positive was reported.

For example, a signalman who holds a CDL but performs less than 50% of his time driving is covered by FRA for pre-employment and random testing. If that signalman were to have a reportable accident while driving a commercial motor vehicle, however, the post-accident and any return to service tests and follow-up tests would be governed by FHWA. On the other hand, if in another instance a supervisor determined that the same signalman was impaired by a controlled substance while performing covered service under FRA's regulations, the reasonable suspicion test result and any post-positive return to service and follow-up test results would be governed by FRA.

Under the management information system (MIS), test results should be reported to whichever OA governed the particular type of test. Each OA will calculate the violation rate for its industry, based on reported random test results. It is possible, therefore, that CDL holders covered by FHWA regulations could be tested at a different rate from those under FRA regulations.

See the common preamble for further discussion of this issue.

Section by Section Analysis

Subpart A—General

§ 219.3 Application.

Paragraph (b)(2)

FRA continues to exempt small railroads from subparts D, E, F and G. Although they are exempt from mandatory reasonable suspicion testing, small railroads must enforce the prohibitions contained in §§ 219.101 and 219.102 (presumably through the industry's longstanding Rule G and their own for cause testing programs). Additionally, even though small railroads are exempted from the employee assistance requirements of subpart E, they may provide information on substance abuse services to their covered employees, as required by § 219.23.

Paragraph (b)(3)

As mentioned above, FRA recently published a final rule implementing the drug testing portion of the management information system, a new reporting system for alcohol and drug program information that replaces the data that railroads currently submit in their annual reports under § 217.13(d). For reasons discussed in the drug MIS rule, FRA exempts railroads with fewer than 400,000 manhours from all MIS reporting requirements (including the alcohol program data elements added in today's final rule).

Foreign Application

Foreign railroads have been subject to portions of FRA's regulations on the control of alcohol and drug use (49 CFR part 219) since February 10, 1986. In a Notice of Termination of Rulemaking Proceedings published elsewhere in today's Federal Register, FRA withdraws its advance notice of proposed rulemaking (ANPRM) on application of the Act's new requirements to foreign railroads operating within the United States (57 FR 59605). In lieu of a separate rulemaking on this issue, FRA revises § 219.3(c) to continue and make permanent its current level of application of alcohol and drug testing to foreign railroads operating within the United States.

As applied, FRA's current approach affects only Canadian employees, since Mexican employees do not operate in U.S. territory. FRA does not seek extra-territorial application of its regulations. A covered service employee whose primary place of service or point of departure ("home terminal") for rail transportation services is located outside the U.S. continues to be subject to limited exceptions in coverage, since the primary terms and conditions of his or her employment were established under foreign law. Thus, the employee is subject to FRA's prohibitions and return to service conditions, as well as post-accident and for cause testing, only when operating in U.S. territory.

(Pursuant to the Act, the employee is subject to mandatory reasonable suspicion alcohol and drug testing while on U.S. soil, although the accident/incident and rules violation components of FRA's for cause testing program remain discretionary.)

Employee assistance policies (subpart
E), pre-employment testing (subpart F) and random testing (subpart G) remain subject to the law of the country where the employee is based (as determined by the employee's home terminal or reporting point). A U.S.-based covered service employee of a foreign railroad continues to be subject to all components of FRA's program, as amended. For both U.S.-based and foreign based covered service employees, all testing pursuant to part 219 must be conducted under the procedures set forth in part 219 and part 40, as amended in today's Federal Register.

§ 219.5 Definitions.

FRA amends its proposed definition of substance abuse professional (SAP), to include professional addiction counselors who have been certified by the National Association of Alcoholism and Drug Abuse Counselors Commission. This DOT-wide amendment is discussed in more detail in the common preamble. FRA also substitutes substance abuse professional for EAP counselor wherever that term appeared in the text of the Locomotive Engineer Certification regulation. Commenters did not offer any other changes to conform the language of 49 CFR part 240 to the language of this part.

FRA adds a definition, “violation rate,” which measures the rail industry's overall random alcohol “positive” rate. Each year, the Administrator will examine the violation rate to determine whether the industry testing rate should be adjusted, as explained in § 219.600 on performance-based testing.

§ 219.9 Responsibility for compliance.

Paragraphs (a) and (c)

The recently enacted Rail Safety Enforcement and Review Act (RSREA), Public Law No. 102-365, amended the Federal Railroad Safety Act of 1970 (FRSA) (See 45 U.S.C. 438(a)) to clarify that FRA's safety jurisdiction extends to all entities that may violate the railroad safety laws. FRA amends this section to make clear that this part, like all regulations issued under authority of the FRSA, applies not only to railroads directly affecting railroad safety and are subject to the law of the country where they operate, but also to any other entity that may violate this part, including independent contractors who provide goods and services to railroads and the employees of such contractors.

FRA also substitutes substance abuse professional for EAP counselor throughout the FRSA, applies not only to railroads directly affecting railroad safety and are subject to the law of the country where they operate, but also to any other entity that may violate this part, including independent contractors who provide goods and services to railroads and the employees of such contractors.

Metro-North and the Metropolitan Transit Authority commented that this amendment appeared to make a railroad responsible for administering substance abuse programs for its independent contractor employees. That is not FRA's intent. FRA is concerned at this time only with ensuring that all persons who perform covered service for a railroad are subject to the same testing, regardless of whether the person has a direct employment relationship with the railroad. For FRA purposes, a railroad is in compliance if it contracts with its contractors who perform covered service to assure their compliance with part 219. The railroad may then, for example, attach copies of these contracts as part of its random alcohol testing plan submission. In practice, FRA anticipates that many contractors will develop a single substance abuse program for their employees, which can be recognized by all the railroads that the contractor serves. FRA has added regulatory text to clarify what is intended here.

FRA will publish a separate notice to make conforming revisions to the penalty schedule set out in Appendix A to part 219.)

§ 219.11 General conditions for chemical tests.

Paragraph (g)

As proposed, FRA continues to require supervisors to receive a minimum of three hours of combined training on alcohol and drugs. FRA received little comment on this issue. While two commenters felt that 60 minutes should be sufficient, particularly if offered as an annual refresher course, a commuter railroad that already provides 8 hours of supervisory training felt that 3 hours was a bare minimum.

FRA believes that a minimum of 3 hours is sufficient, but now requires training on post-accident testing criteria and collection procedures. Railroads may integrate these required topics into their current training programs, which must be made available for inspection upon request.

§ 219.13 Preemptive effect.

Section 219.13, which states the preemptive effect of safety regulations issued under the FRSA (See 45 U.S.C. 434), remains unchanged. The Act expressly did not provide a new preemption standard; instead, it amended the FRSA to require the Secretary to issue rules, regulations, standards, and orders relating to alcohol and drug use in railroad operations.

§ 219.15 Alcohol concentrations in blood and breath.

This section is deleted since a revised alcohol concentration definition is included in § 219.5.

§ 219.21 Information collection.

As mentioned above, FRA has replaced § 217.13(d)'s reporting requirements with a management information system to collect information on railroad drug misuse programs. (MIS comments were addressed in that rule.) After railroads have implemented alcohol testing, FRA will require reporting of alcohol misuse programs data as well. In § 219.801, FRA adds data elements on alcohol testing to complete the MIS’ information collection on railroad substance abuse programs. FRA will use this data to monitor compliance and enforcement.
Authority and SEPTA suggested mandating eight hours of pre-duty abstinence. The NTSB preferred a longer period, but would also support an eight hours of pre-duty abstinence if uniformly applied.

New Jersey Transit (NJT), however, while recommending that pre-duty drinking should be absolutely prohibited, felt that the proposed abstinence period would be useful both as an enforcement and a public relations tool. NJT also felt that the employee should have the option to take a pre-duty test if either the employee or the employer suspects that the employee may be in violation.

FRA had asked for comment on whether this pre-duty prohibition is workable for "short-call" employees, such as those who operate trains in pool crew service and off extra boards and signal main lines who are subject to call without notice round the clock to handle "trouble calls." In response to this query, the BLE and BRS recommended that FRA mandate bypass provisions (mark-offs), particularly for signal employees subject to short call. The RLEA agreed that employees should be allowed to mark off and stay off-duty when impaired, and suggested that any potential for abuse could be curbed by setting limits; for example, requiring an EAP referral for any employee who marks off three or more times in a year. The TTD commented that pre-duty abstinence would be impracticable for those employees who are always subject to call, and that FRA should allow employees to mark off for any type of impairment.

As discussed in the NPRM, FRA encourages railroads to adopt mark off procedures in the concept of voluntary programs such as Operation Red Block. However, because the successful implementation of such programs requires faithful adherence to mutual undertakings, FRA believes that implementation of such programs should be a bargaining issue rather than a federal mandate. Implementation of mark-off procedures therefore remains voluntary. In contrast, the eight hour pre-duty abstinence period suggested by the NTSB and some carriers would in effect impose total prohibition on short-call employees. After considering the comments, FRA believes that none of these recommended standards is appropriate.

A true .00 standard could not be enforced, as a practical matter. A .02 standard would probably cause SAPs to waste time and effort on employees who do not in fact have alcohol or substance abuse problems, while a .04 standard would actually invite some employees to risk using alcohol, in the hope that their BAC would be below .04 by the time that they could be tested (e.g., employees at remote work sites). This approach would also deprive railroads of information that could be used to enforce Rule G and other, more stringent company policies.

FRA therefore believes that the proposed "bifurcated" or "two-tier" system is necessary to avoid having the full consequences of a violation apply to those situations where an employee's test result indicates an alcohol concentration between .02 percent and .039 percent. The employee will not have to be evaluated by a SAP, or administrably handled after test. However, since use of alcohol indicates that the employee, while at work, may present a safety risk, the employee will not be allowed to perform covered service for a minimum of eight hours after administration of the test.

With the sole exception of pre-employment tests for final applicants for employment (discussed below), FRA does not adopt the proposed retest option. Railroads were unsure as to what to do with an employee while waiting for his or her BAC to drop to below .02; since Rule G prohibits a covered employee who has any alcohol in his or her system from being on company property. Since this option is
Include a minimum of six unannounced tests that would track the basis for the employee's removal; that is, an employee who was removed for misuse of controlled substances or for refusing to provide body fluid samples under a mandatory provision of this part would be follow-up tested only for drugs, while an employee who was removed for misuse of alcohol or for refusing to provide breath samples under a mandatory provision of this part would be follow-up tested only for alcohol. After this first year, additional follow-up testing would be discretionary upon recommendation of the SAP, who is authorized to recommend follow-up testing for up to 48 months.

FRA asked for comment on the issues of recidivism and polydrug abuse. In its compliance reviews, FRA uncovered instances of railroads failing to conduct follow-up tests on employees who had returned to covered service following positive drug tests. In several cases, routine random testing had detected drug use by post-positive employees. Moreover, FRA's study of clinical literature shows some incidence (10-50 percent) of individuals abusing both alcohol and one or more illicit or controlled substances. There is more evidence for individuals who cease drug misuse crossing over from drugs to alcohol; the cross-over from alcohol to drugs (and particularly those drugs contained in the DHHS test panel) is not as well documented.

Comment was divided. The AAR and the ASLRA, among others, felt that follow-up testing should be left completely to the discretion of the SAP. Rail labor agreed. SEPTA and APTA, however, wanted mandatory testing for 60 months, with APTA recommending a minimum of 12 tests the first year and 6 tests each year thereafter. APTA and all rail commenters wanted the authority to follow-up test for both alcohol and drugs, regardless of the substance of the positive. SEPTA offered data from its program, which includes 30 months of follow-up testing. Other than reasonable suspicion testing, SEPTA's highest positive rate (10.17 percent in the last fiscal year) was for post-positive return to service tests. To address concerns about employee relapse, FRA retains its proposed testing minimums while allowing for greater cross-substance testing. Broader monitoring may help detect instances where an employee switches to alternative drugs after being deprived of his or her primary drug of abuse. FRA therefore requires a return to service test and six follow-up tests in the first 12 months for the substance (or class) of the original positive. In addition, a railroad may choose to test for both alcohol and drugs at the return to service test, and at follow-up tests for a total of up to 60 months, if such testing is recommended by the SAP. The SAP may make such additional testing part of a conditional recommendation for the employee's return to service.

This approach allows for flexible case management, recognizing that an employee who misuses either alcohol or a controlled substance could have a more general propensity to abuse psychoactive drugs (i.e., active polydrug abuse or incipient cross-addiction). Its intent is to eliminate any question as to the employer's right and obligation to provide for aftercare monitoring of employees who have violated alcohol or drug rules.

Paragraph (f) (As discussed above, the .02—.039 rule text is now in § 219.101(a)(4)). This paragraph seeks to ensure that the SAP places the interest of safety above other considerations, when recommending treatment or advising the railroad about whether to return an employee to covered service.

Subpart C—Post-Accident Toxicological Testing

The common preamble discussion of post-accident testing does not apply to FRA's program, which unlike those of other modes, requires full toxicological testing following designated accidents and incidents.

As discussed above, existing provisions will remain in effect to allow for a smooth transition. The effective date for the amendments to this subpart is January 1, 1995.
FRA expects the results from breath and blood alcohol testing to almost always vary, since an EBT test will usually be conducted hours before the railroad is able to collect blood and urine samples, allowing the employee's BAC to change in the interim. The breath test result will always stand on its own, however, since by definition an EBT test always meets evidential standards. FRA will use the results from all three types of testing (breath, blood, and urine) for post-accident toxicological analysis, since the purpose of mandatory toxicological testing remains unchanged. Blood and urine samples will continue to be collected as independent aids to accident investigation, not as backups for EBT test results.

§219.205 Sample collection and handling.
FRA will publish an amended Appendix C to part 219 to modify post-accident procedures, toxicology kits, forms, and instructions to accommodate optional breath alcohol testing and mandatory urine split sample procedures. (FRA already splits blood samples into two sealed 10 milliliter tubes.) FRA will announce when the new kits and forms become available. Upon employee request, FRA's post-accident toxicological laboratory will ship the employee's sealed split samples to another DHHS-certified laboratory for testing.

§219.209 Reports of tests and refusals.
Paragraph (b)
With the addition of the breath test option described above, a railroad must report to FRA any refusals to provide breath for testing.

Paragraph (c)
In an earlier Safety Recommendation, the NTSB recommended that FRA require railroads to submit notification, including reasons for the delay, whenever a post-accident test could not be conducted within four hours of the qualifying accident or incident. The NTSB's current recommendation reduces this testing window from four hours to two. Such a requirement would in effect compel railroads to submit a report for each qualifying event, since the average FRA post-accident collection time is 5.5 hours. FRA requires reporting but will minimize the burden by adopting the NTSB's original four hour recommendation, which is a more workable window for post-accident testing. In addition, while reports must be prepared and maintained for inspection upon request, they do not have to be submitted to FRA.

§219.211 Analysis and follow-up.
Paragraph (a)
As part of its amended Appendix C, FRA will publish a summary of its post-accident testing protocols, which have been submitted to the DHHS.

§219.213 Unlawful refusal; consequences.
A refusal to provide breath for optional testing will have the same consequences as a refusal to provide bodily fluid samples for mandatory testing; the employee shall be disqualified from covered service for nine months.

Subpart D—Testing for Cause
As proposed, FRA amends the heading of this subpart to differentiate now-mandatory reasonable suspicion from accident/incident and rule violation testing, which remain discretionary. This new heading also conforms to the classifications used in FRA's drug MIS.

As discussed above, existing provisions will remain in effect to allow for a smooth transition. The effective date for the amendments to this subpart is January 1, 1995.

§219.300 Mandatory reasonable suspicion testing.

Noting that an alcohol test is not needed to confirm possession of alcohol or controlled substances, the AAR considered the proposed language in this paragraph too broad since it would require alcohol testing whenever a supervisor suspected any violation of §219.101(a). FRA agrees, and has amended this paragraph to require testing only when use of alcohol is suspected. (The Act specifies that reasonable suspicion testing must be conducted for use of alcohol or controlled substances.) Therefore, a suspicion of possession alone does not require a reasonable suspicion test. FRA will not add long-time decline in job performance as a factor for the employer to consider when determining whether to conduct a reasonable suspicion test on an employee. Only one commuter line supported this proposal. The AAR thought this additional factor unnecessary, since a supervisor could only consider long-term performance in conjunction with specific contemporaneous observations indicative of substance abuse, and such observations would provide an independent basis for a new mandatory reasonable suspicion test. Rail labor agreed, commenting that employers
have authority to conduct reasonable suspicion testing without this factor, and that long-term decline in job performance would more properly be handled by EAPs, since it is often caused by personal problems other than substance abuse. The NTSB did not comment on this issue.

(For purposes of modal consistency, and to avoid any misimpression that a reasonable suspicion drug test could be required solely based on perceived long-term decline in performance without a contemporaneous manifestation clearly tied to drug use, FRA has deleted the following phrase: "[such observations may include indications of the chronic and withdrawal effects of drugs."]

Deletion of this phrase is not intended to limit a supervisor from taking into consideration any contemporaneous indication of drug use. But FRA cautions that chronic and withdrawal effects alone will seldom yield unambiguous contemporary indications in the case of either alcohol or drugs. Where unambiguous withdrawal effects are encountered, prompt medical attention will normally take precedence over occupational alcohol or drug testing. Where a long-term decline in performance occurs, referral under subpart E of this rule ("Identification of Troubled Employees") is the indicated course of action.

 Paragraph (b)

FRA had proposed a "logic tree" for situations where a supervisor reasonably suspects an employee of substance abuse, but is unable to determine whether the medium of abuse is alcohol or controlled substance(s). FRA continues to recommend, but will not require, the following process: a supervisor should conduct an alcohol test first whenever an employee's symptoms could be consistent with either alcohol or controlled substance use. If the breath test result is below .02, the supervisor should conduct a urine drug test to continue the search for an explanation. If the breath test result is .02 percent or more, drug urinalysis is optional.

Because of polydrug abuse, Metra and SEPTA considered this logic tree unnecessary, suggesting that employers should be allowed to conduct both a breath alcohol test and a urine drug test whenever reasonable suspicion exists to test for alcohol. Although FRA agrees that employers need some latitude to inquire into suspected polydrug abuse, FRA recommends that supervisors decide step by step whether additional testing is needed, instead of automatically proceeding to test for both alcohol and controlled substances.

 Paragraph (c)(1)

Reaction was cleanly split on FRA's proposal to prohibit a supervisor who makes a reasonable suspicion determination from also conducting the breath test for that employee. Railroads uniformly opposed this prohibition as both impractical and unnecessary. Carriers who conduct for cause testing programs under their own authority had experienced no problems with supervisory abuse of discretion. To document their lack of supervisory depth, several AAR member railroads submitted examples of locations where normally only one supervisor would be available. Commenters also noted that testing could only be conducted if a trained supervisor had an articulable basis for his or her suspicion.

Additionally, the employee would observe the entire breath alcohol testing process and the NPRM required all breath testing devices to meet evidential standards.

In contrast, rail labor supported the determining supervisor as BAT prohibition. The BLE and BRS noted that FRA's requirement of two supervisors (one of whom must be trained) to make a reasonable suspicion drug testing determination has been in place for several years. In theory, therefore, the same two supervisors would also be available for reasonable suspicion alcohol testing. More importantly, this requirement makes more likely that each breath alcohol test will have an independent witness.

FRA believes that a compromise may be possible, particularly in light of the Department's decision to allow employers to use PBTS for screening tests. In the above-mentioned NPRM on blood testing procedures, OST proposes to allow the determining supervisor to conduct the screening test on an EBT or a PBT (if an EBT is unavailable), but not the confirmation test, which must still be conducted on an EBT by another individual. This would provide testing flexibility for reasonable suspicion events that occur in remote locations, while still requiring all confirmation tests to be conducted by a person not in the employee's chain of command. Comments on this proposal should be submitted to OST's docket.

 Paragraph (c)(2)

Commenters raised similar pros and cons for FRA's proposal to require two trained supervisors to make a determination to conduct a reasonable suspicion drug test. In response, FRA will instead retain its existing requirement of two supervisors, one of whom must be trained in the signs and symptoms of substance abuse (as provided for in § 219.11(g)), to make a reasonable suspicion drug testing determination.

 Paragraph (d)

Under FRA's original proposal, a major concern for commenters was the possibility that testing situations could frequently occur in remote locations where EBTS are unavailable. Where this occurred, a railroad could still enforce prohibitions against alcohol misuse under its own authority, but would be unable to conduct federally mandated testing.

At a minimum, permitting the use of PBTS should enable railroads to conduct screening tests in most circumstances. As discussed above, FRA proposes to allow confirmation blood alcohol testing. Under current FRA procedures, however, if the screening test result indicates alcohol misuse, the supervisor must determine whether a confirmation test should be conducted on an EBT within eight hours of the screen. If an EBT is unavailable, the unconfirmed screening test will be considered a no test.

However, once a supervisor suspects alcohol misuse, he or she must enforce the prohibitions in Subpart B even if the employee cannot be tested at that time. FRA requires the supervisor to comply with the prohibitions in § 219.101(a)(4) and send the employee home for at least eight hours. As always, a railroad may also take independent enforcement action under its own authority.

§ 219.301 Testing for reasonable cause.

FRA has reformulated its proposal language in response to the ASLRA's comment that the phrase "based on affirmative evidence of unsafe conduct" implied a probable cause standard for testing. Instead, FRA will require a supervisor to have "a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident". This case law-derived language, while clearly a lesser standard than traditional probable cause, stresses that a supervisor must have more than a hunch or a guess upon which to base his or her determination. This restriction applies only to testing under FRA accident/incident authority, however.

§ 219.302 Prompt sample collection; time limitation.

Paragraph (b)(2)

Contrary to the discussion in the common preamble, the eight hour time limit for completion of accident/
Paragraph (f)
A railroad must prepare and maintain a report, similar to the post-accident delay report required in § 219.209(c), whenever a reasonable suspicion test cannot be conducted within two hours of the observations or events that were the basis for the railroad’s reasonable suspicion determination. The report does not have to be submitted, but must be made available upon request.

§ 219.303 Alcohol test procedures and safeguards.
As discussed earlier, FRA will allow PBTs to be used for screening tests in response to commenters’ near unanimous demand for greater flexibility. By allowing the use of PBTs, however, FRA does not excuse railroads from making their best efforts to ensure the availability of EBTs for routine testing situations.

§ 219.303 Breath test procedures and safeguards.
Paragraph (c)
As discussed above, FRA will adopt part 40 blood alcohol testing procedures upon publication of the Department’s final rule. This paragraph is accordingly deleted.

Subpart F-Pre-employment Tests
Existing provisions will remain in effect to allow for a smooth transition. As discussed above, however, the effective date for implementation of pre-employment alcohol testing is January 1, 1995.

§ 219.501 Pre-employment tests.
As mentioned above, FRA adopts the proposed retest option only for final applicants for employment. An applicant whose test result indicates an alcohol concentration between .02 percent and .039 percent will not be allowed to perform safety-sensitive service until he or she has a later test result indicating an alcohol concentration of less than .02. Since rule G applies only to current railroad employees, allowing a retest option for applicants is compatible with traditional industry policy. This option also makes FRA pre-employment policy administratively consistent with the rest of the Department.

Committee expressed no interest in the proposed “grandfathering” provision, which would have allowed railroads to exempt a covered employee from pre-employment testing if a background check indicated that the employee had not had any violations of this part or of the alcohol and drug misuse rules of another DOT agency within the last six months. FRA has decided to delete this option, since the added flexibility it would have provided is unnecessary for the rail industry, which traditionally has a stable employee population and a low turnover rate (unlike trucking, for example).

Subpart G-Random Testing Programs
§ 219.607 Railroad random alcohol testing programs.
Paragraph (a)
All commenters on the issue favored combined alcohol and drug random testing programs. The BLE and BRS recommended this approach as a cost effective means of deterrence, since an employee could not know in advance whether he or she was being tested for alcohol, for drugs, or for both. Transtar felt that a single testing program would reduce both cost and confusion. Metra and APTA supported using the same selection to conduct alcohol and drug testing, while Amtrak wanted the flexibility to conduct alcohol and drug tests simultaneously for some employees, but at different times for others.

FRA agrees that flexibility is important, and will allow railroads to combine plans and/or testing, if desired. A railroad may submit a separate alcohol testing plan or a combined testing plan for approval. The combined testing plan may be a previously approved random drug testing plan that has been modified by adding alcohol testing elements (any modifications should be specified and highlighted, however).

FRA will, for the most part, duplicate the notice requirements and criteria for plan approval that were used to implement random drug testing, including a three-tier submission and implementation schedule that allows smaller carriers additional time to develop and execute random alcohol testing plans. Class I and commuter railroads must submit random alcohol testing plans for FRA approval within 6 months after publication of this rule and must implement random alcohol testing beginning on January 1, 1995; Class II railroads must submit plans within 12 months after publication and must implement testing beginning on July 1, 1995, and Class III railroads must submit plans within 18 months after publication and must implement testing beginning on January 1, 1996. (For the reasons discussed below, there will be no phase-in of the testing rate.)

Paragraph (b)(2)
Commenters (including, among others, the APTA, AAR, ASLRA, BLE, BRS and RLEA) were close to unanimous in supporting a 10 percent testing rate the first year, followed by an annual performance-based rate set according to each railroad’s random alcohol positive rate for the preceding year. In support of this low initial rate, commenters pointed to the existence of an extensive peer prevention and employee assistance system, the addition of new types of mandatory (pre-employment and reasonable suspicion) alcohol testing, and supervisory knowledge of the signs and symptoms of alcohol, making alcohol misuse comparatively easy to detect. Commenters also cited the General Accounting Office’s study and the results of the AAR test project as evidence that lowering testing rates does not affect deterrence. Support was also widespread for railroad-specific performance-based testing (for both alcohol and drugs), both as an incentive for carriers to try alternative methods of deterrence, and as a reward to those carriers who have viable peer referral and bypass programs.

FRA agrees that the initial random rate for alcohol testing should be lower than the current 50 percent random drug testing rate, and that testing rates should then be tied to the preceding year’s positive rate. However, FRA believes that a 10 percent testing rate is the absolute minimum level of effort required to sustain awareness and deterrence. Moreover, FRA is concerned that a railroad-specific performance-based system could create an incentive for some railroads to report and/or keep records dishonestly, thus requiring considerable enforcement effort to guard against such improper manipulation. Such a system would also be difficult to apply to smaller railroads, since even a small variation in the number of positives (e.g., 0 vs. 1) would result in high year-to-year volatility in each railroad’s required testing rate. In other words, the small size of a given railroad’s population and the resulting small number of tests could create variations in positive rates that do not truly reflect that railroad’s incidence of employee misuse.

Therefore, FRA (along with FAA, FHWA and FTA) will instead set a 25 percent initial rate for alcohol testing, with performance-based alcohol testing by industry. Each railroad is expected to achieve the required 25 percent testing rate at the inception of random alcohol
testing. (FRA intends to discuss the random rate for drug testing in a separate NPRM). As discussed in §219.608, the Administrator will publish a minimum random testing rate, which will be determined by the overall violation rate for the rail industry.

**Paragraph (b)(3)**

Because of the short half-life of alcohol in the body, railroads may conduct random alcohol testing at any time the employee reports for work and at any time during the duty tour (except for when the employee is expressly relieved of any responsibility for the performance of safety-sensitive duties).

**Paragraph (b)(6)**

An employee may be tested only when he or she is on duty and either performs covered service or is immediately available to perform covered service. Therefore, the issue of commingled service is critical to plan approval. (Since off-duty consumption of alcohol is not prescribed for as long as the employee does not report for duty with a BAC of .02 or more). Plans must be carefully designed to subject commingled service employees to testing only to the extent that they perform or can reasonably be expected to perform covered service during a given duty tour.

Industry commenters wanted the flexibility to conduct testing at different times during an employee’s “duty tour.” FRA has no objections, so long as the date or time of the test is not predictable to the employee. For instance, a railroad could not cluster its tests exclusively at the beginning or end of the duty tour. (FRA will not adopt its proposal to limit a railroad’s time in which to notify an employee to a period running from 30 minutes before to 30 minutes after the employee performs safety-sensitive functions, plus applicable travel time.)

**§219.608 Administrator’s determination of random alcohol testing rate.**

For at least three calendar years (because of staggered implementation dates, the minimum amount of time needed for all classes of railroads to have one year of alcohol testing data), railroads will conduct random alcohol testing at a 25 percent annualized rate. Subsequently, FRA will use employer data obtained from MIS reports to determine the industry’s violation rate, which will in turn determine the minimum testing rate to be authorized by the Administrator. Any random rate change indicated by industry performance will occur at the beginning of the calendar year. Railroads will remain free to test at higher rates provided they treat all employees alike.

**Subpart H—Procedures and Safeguards for Urine Drug Testing and for Breath Alcohol Testing**

As noted above, the urine drug testing split sample procedures specified in part 40 are mandatory beginning on August 15, 1994 as are the amendments to this subpart concerning urine drug testing.

**§219.708 Employee requests for testing.**

Comments were clearly divided as to how much time should be allowed for an employee to request a test of his or her split sample. Carriers uniformly supported the 72 hour period proposed by OST, while labor wanted to duplicate the 60 day period currently allowed in FRA’s retest option.

Although FRA agrees with labor that the retest option has worked well in the past, FRA will no longer allow retests of primary samples. Instead, to be consistent with the rest of the Department, FRA will allow split sample testing only. An employee will have 72 hours (the minimum contemplated by the Act) within which to request a test of his or her split sample, running from when the employee receives actual notice from the medical review officer (MRO) that the employee’s test result has been verified as positive. As an additional safeguard, the MRO must inform an employee who has a confirmed test result of his or her right to request a split sample test at the time of the MRO’s initial contact with the employee, even though the employee’s 72 hours do not begin to run until after the MRO has completed the verification process. The employee may also present information to the MRO if he or she believes that unusual circumstances (e.g., an intervening holiday, the unavailability of the MRO) prevented him or her from requesting a split sample test within 72 hours.

**§219.715 Alcohol testing procedures.**

As discussed, FRA will permit railroads to use EBTs that qualify for NHTSA’s CPL but do not meet part 40 requirements (lacking sequential numbering and printout capability, for example) as PBTs for screening tests. This allows those railroads that already conduct alcohol testing under their own authority (such as Amtrak and the CNW), to recoup the full useful life of previously purchased EBTs, while allowing other railroads the flexibility to reduce costs. An EBT test is still required for confirmation, however.

Subpart I—Annual Report

**§219.801 Reporting of alcohol misuse prevention program results in a management information system.**

FRA recently published a final rule implementing a management information system to obtain and analyze employer drug misuse program data. Included in this rule are comparable information collection requirements for alcohol misuse program data. Appendices D3 and D4, attached as exhibits to this rule, are respectively the standard and “EZ” forms for reporting of employer alcohol misuse program data. (These forms are similar to Appendices D and D2 in the drug MIS.) FRA will not ask for information on operational tests and inspections or supervisory training, since reporting on these combined programs is already required under the drug MIS.

Like the drug MIS, the alcohol MIS asks for information on for cause alcohol testing (although these data elements appear repetitive, they are not identical since the charts have been modified to reflect the two-tier or bifurcated system). Once alcohol testing has produced a year’s worth of data, FRA will republish a combined MIS form for alcohol and drug program data.

Subpart J—Recordkeeping Requirements

**§§219.901 and 219.903 Retention of breath alcohol testing records and urine drug testing records.**

FRA adopts the retention requirements as proposed. Although several commenters felt that these proposed requirements were too burdensome, these sections conform with the departmental requirements published in part 40 today. In addition, FRA retains §219.713’s current requirement for railroads to maintain for at least five years a summary record of each covered employee’s test results.

**§219.905 Access to facilities and records.**

FRA proposes to replace §219.713’s language on access to records and adopt 49 CFR §40.81, which allows an employer to release an employee’s alcohol and drug test records only with the written consent of the employee, with the exceptions of when access is requested by a DOT agency or the NTSB or when access is requested by a decisionmaker in a legal proceeding relating to a benefit sought by the employee.

Executive Order 12866 and DOT Regulatory Policy and Procedures

This proposal is significant under Executive Order 12866. It is also
significant under the Department of Transportation’s Regulatory Policy and Procedures.

The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 was enacted by Congress to ensure that small entities are not unnecessarily and disproportionately burdened by Government regulations. FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities. Railroads that have fewer than 15 employees in covered service that do not operate on the tracks of another railroad or engage in joint operations are exempt from subparts D, E, F, and G, and are exempted from new subparts I and J as well. Railroads with fewer than 400,000 manhours of employment are also exempt from subpart I.

Federalism Implications

This rule does 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, FRA has determined that this rule does not have sufficient federalism implications to warrant preparation of a Federalism assessment.

Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 95–611) applies to this final rule because it changes several approved collections of information and initiates several new information collection requirements for alcohol misuse prevention programs. As mentioned earlier, FRA recently implemented a Management Information System to collect drug misuse prevention program data. For the drug portion of the MIS only, FRA estimated that information gathering, record maintenance and form preparation would approximate 65 hours each year for the standard form. For the simplified (EZ) form, FRA estimated that information gathering, record maintenance and form preparation would approximate 20 hours each year.

FRA estimates that the addition of alcohol testing data elements will add approximately 8 hours to preparation of the standard form, for a total of 73 hours each year. The simplified form will require an additional 4 hours to prepare, for a total of 24 hours each year. Approximately 40 railroads are expected to submit the standardized form, and 20 railroads are expected to submit the short form.

FRA has requested Office of Management and Budget (OMB) approval of these revised information collection requirements. A Federal Register notice will be published when Paperwork Reduction Act approval is obtained. Current information collection requirements under part 219 were approved under OMB No. 2130–0526.

List of Subjects in 49 CFR Part 219

Alcohol and drug abuse, Railroad safety, Reporting and record keeping requirements.

Accordingly, for the reasons stated in the preamble, FRA amends 49 CFR part 219 as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. Authority for part 219 continues to read as follows:

Authority: 45 U.S.C. 431, 437, and 436, as amended; Pub. L. 100–342; Pub. L. 102–143; and 49 CFR 1.49(m).

Part 219—[Amended]

2. Part 219 is amended by removing the terms “EAP counselor” and “counselor” wherever they appear and by replacing them with “Substance abuse professional” and “professional” respectively; and by removing “$5,700” in 1989 and 1990” and by adding in its place “$8,300 in 1991 and thereafter” wherever this phrase appears in the text.

3. Section 219.3 is amended by revising paragraphs (a), (b) and (c) and by adding a new paragraph (d). As revised, the section reads as follows:

§219.3 Application.

(a) Except as provided in paragraphs (b) and (c), this part applies to—

(b) *(x)

(b)(3) Subpart I does not apply to a railroad that has fewer than 400,000 total manhours.

(c) Subparts E, F and G do not apply to operations of a foreign railroad conducted by covered service employees whose primary place of service (“home terminal”) for rail transportation services is located outside the United States. Such operations and employees are subject to Subparts A, B, C, and D when operating in United States territory.

4. Section 219.5 is amended by adding, in alphabetical order, definitions for alcohol concentration (or content), alcohol use, confirmation test, consortium, DOT agency, screening test, refuse to submit, substance abuse professional and violation rate; by removing the definition for EAP counselor; by revising the definitions for alcohol, covered employee, and the first sentence of independent, as follows:

§219.5 Definitions.

As used in this part—

Alcohol means the intoxicating agent in beverage alcohol, ethanol or other low molecular weight alcohols including methyl or isopropyl alcohol. 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 a breath test under this part) or grams of alcohol per 100 milliliters of whole blood.

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

Confirmation test means a second test, following a screening test with a result of .02 or greater, that provides quantitative data of alcohol concentration.

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol testing as required by this part or other DOT alcohol testing regulation and that acts on behalf of the employers.

Covered employee means a person who has been assigned to perform service subject to the Hours of Service Act (45 U.S.C. 61–64b) during a duty tour, whether or not the person has performed or is currently performing such service, and any person who performs such service. [An employee] is not “covered” within the meaning of this part exclusively by reason of being an employee for purposes of section 2(a)(3) of the Hours of Service Act, as amended (45 U.S.C. 62(a)(3)). For the purposes of pre-employment testing only, the term covered employee includes a person applying to perform covered service.

DOT Agency means an agency (or “operating administration”) of the United States Department of Transportation administering regulations requiring alcohol or controlled substance testing (4 CFR parts 61, 63, 65, 121 and 135; 49 CFR parts 199, 219, 382 and 654) in accordance with part 40 of this title.

Independent with respect to a medical facility, means not under the ownership or control of the railroad and not operated or staffed by a salaried officer or employee of the railroad.

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 the provisions of this part, or engages in conduct that clearly obstructs the testing process.

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

Substance abuse professional means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in the diagnosis and treatment of alcohol and drug related disorders.

Violation rate means the number of covered employees (as reported under §219.801 of this part) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

5. Section 219.9 is amended by revising the first sentence of paragraph (a) and adding a new paragraph (c) as follows:

§219.9 Responsibility for compliance.

(a) Any person (including but not limited to a railroad; any manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $10,000 per violation, except that: Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed $20,000 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved.

(b) Any independent contractor or other entity that performs covered service for a railroad has the same responsibilities as a railroad under this part, with respect to its employees who perform covered service. The entity's responsibility for compliance with this part may be fulfilled either directly by that entity or by the railroad's treating the entity's employees who perform covered service as if they were its own employees for purposes of this part. The responsibility for compliance must be clearly spelled out in the contract between the railroad and the other entity or in another document. In the absence of such a clear delineation of responsibility, FRA will hold the railroad and the other entity jointly and severally liable for compliance.

6. Section 219.11 is amended by revising paragraph (b)(2) by redesignating existing paragraph (g) as paragraph (h); and by adding paragraphs (c)(4) and (g) as follows:

§219.11 General conditions for chemical tests.

(b) * * *

(2) In any case where an employee has sustained a personal injury and is subject to alcohol or drug testing under this part, necessary medical treatment shall be accorded priority over provision of the breath or body fluid sample(s). No employee who is unable to urinate normally (based on the judgment of a medical professional that catheterization would be required) as a result of a personal injury, resulting medical treatment, or renal failure shall be required to provide a urine sample. Nothing in this section shall bar use of a urine sample made available as a result of catheterization undertaken for medical purposes, provided the circumstances of such collection are fully documented and the specimen is otherwise handled in accordance with the applicable requirements of this title.

(c) * * *

(4) The results of any breath tests for alcohol conducted by or for the treating facility.

(g) Each supervisor responsible for covered employees (except a working supervisor within the definition of co-worker under this part) shall be trained in the signs and symptoms of alcohol and drug influence, intoxication and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum provide information concerning the acute behavioral and apparent physiological effects of alcohol and the major drug groups on the controlled substances list. The program shall also provide training on the qualifying criteria for post-accident testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C and appendix C of this part. The duration of such training shall be not less than 3 hours.

§219.15 [Removed]

7. Section 219.15 is removed and reserved.

8. Section 219.23 is amended by revising the section heading; revising paragraphs (a) and (b); and adding paragraphs (d) through (f), to read as follows:

§219.23 Railroad policies.

(a) Whenever a breath or body fluid test is required of an employee under this part, the railroad shall provide clear and unequivocal written notice to the employee that the test is being required under Federal Railroad Administration regulations. Use of the mandated DOT form for urine drug testing or breath analysis satisfies the requirements of this paragraph.

(b) Whenever a breath or body fluid test is required of an employee under this part, the railroad shall provide clear, unequivocal written notice of the basis or bases upon which the test is required (e.g., reasonable suspicion, violation of a specified operating/safety rule enumerated in subpart D of this part, random selection, follow-up, etc.). Completion of the alcohol testing form or urine custody and control form indicating the basis of the test (prior to providing a copy to the employee) satisfies the requirement of this paragraph.

(d) Each railroad shall provide educational materials that explain the requirements of this part, and the railroad's policies and procedures with respect to meeting those requirements.

(1) The railroad shall ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under the railroad's alcohol misuse prevention program and to each person subsequently hired for or transferred to a covered position.

(2) Each railroad shall provide written notice to representatives of employee organizations of the availability of this information.

(e) Required content. The materials to be made available to employees shall
including detailed discussion of at least the following:

(a) Identity of the person designated by the railroad to answer employee questions about the materials.

(b) The classes or crafts of employees who are subject to the provisions of this part.

(c) Information on the safety-sensitive functions performed by those employees to make clear that the period of the workday the covered employee is required to be in compliance with this part is that period when the employee is on duty and is required to perform or is available to perform covered service.

(d) Specific information concerning employee conduct that is prohibited under subpart B of this part.

(e) In the case of a railroad utilizing the accident/incident and rule violation reasonable cause testing authority provided by this part, prior notice which may be combined with the notice required by §§ 219.601(d)(1) and 219.607(d)(1), that covered employees of the circumstances under which they will be subject to testing.

(f) The circumstances under which a covered employee will be tested under this part.

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

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

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

(j) The consequences for covered employees found to have violated subpart B of this part, including the requirement that the employee be removed immediately from covered service, and the procedures under § 219.104.

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

(l) Information concerning the effects of alcohol misuse on an individual's health, work, and personal life; signs and symptoms of an alcohol problem (the employee's or a coworker's); and available methods of evaluating and resolving problems associated with the misuse of alcohol, including utilization of the procedures set forth in subpart E of this part and the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

(m) Optional provisions. The materials supplied to employees may also include information on additional railroad policies with respect to the use or possession of alcohol and drugs, including any consequences for an employee found to have a specific alcohol concentration, that are based on the railroad's authority independent of this part. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

9. Section 219.101 is amended by revising paragraphs (a)(2)(i) and (a)(3) and adding new paragraphs (a)(4) and (a)(5) as follows:

§ 219.101 Alcohol and drug use prohibited.

(a) * * *

(2) * * *

(i) Having .04 or more alcohol concentration in the breath or blood; or

(3) No employee may use alcohol for whichever is the lesser of the following periods:

(i) within four hours of reporting for covered service; or

(ii) after receiving notice to report for covered service.

(4) No employee tested under the provisions of this part whose test result indicates an alcohol concentration of .02 or greater but less than .04 shall perform or continue to perform covered service functions for a railroad, nor shall a railroad permit the employee to perform or continue to perform covered service, until the start of the employee's next regularly scheduled duty period, but not less than two hours following administration of the test.

10. Section 219.104 is amended by revising paragraphs (a), (d), and (e); and adding paragraphs (f) and (g) as follows:

§ 219.104 Responsive action.

(a) Removal from covered service.

(1) If the railroad determines that an employee has violated § 219.101 or § 219.102, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad shall immediately remove the employee from covered service and the procedures described in paragraphs (b) through (e) of this section shall apply.

(2) If an employee refuses to provide breath or a body fluid sample or samples when required to by the railroad under a mandatory provision of this part, the railroad shall immediately remove the employee from covered service, and the procedures described in paragraphs (b) through (e) of this section shall apply.

(d) Return to covered service. An employee who has been determined to have violated § 219.101 or § 219.102 or who refused to cooperate in a breath or body fluid test under this part shall not be returned to covered service unless the employee has:

(1) Been evaluated by a substance abuse professional to determine if the employee is affected by a psychological or physical dependence on alcohol or one or more controlled substances or by another identifiable and treatable mental or physical disorder involving misuse of alcohol or drugs as a primary manifestation;

(2) Been evaluated by a substance abuse professional to determine that the employee has properly followed the prescribed rehabilitation program; and

(3) (i) Presented a urine sample for testing under Subpart H of this part that tested negative for controlled substances assayed (in the case of an employee who has been determined to have violated a prohibition of § 219.101 or § 219.102 regarding possession or misuse of controlled substances or who refused to provide a body fluid sample or samples when required to by the railroad under a mandatory provision of this part); or

(ii) Presented breath for testing under Subpart H of this part that indicated an alcohol concentration of less than .02. (in the case of an employee who has been determined to have violated a prohibition of § 219.101 regarding possession or misuse of alcohol or who refused to provide breath when required to by the railroad under a mandatory provision of this part).

(4) An employee shall be required to present both a urine sample and breath for testing, as specified in this section and Subpart H of this part, if the substance abuse professional determines that such testing is necessary as a
condition for returning the particular employee to covered service.

(e) Follow-up testing. An employee returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the substance abuse professional and shall be subject to unannounced follow-up tests administered by the railroad 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. Any such testing shall be performed in accordance with the requirements of 49 CFR part 40. 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.

(1) If the employee has been determined to have violated a prohibition of §219.101 or §219.102 regarding possession or misuse of controlled substances, or if the employee refused to provide a body fluid sample or samples when required by the railroad under a mandatory provision of this part, the employee shall be subject to follow-up testing as specified in this section. Such testing shall be for controlled substances, but may include testing for alcohol as well, if the substance abuse professional determines that alcohol testing is necessary for the particular employee.

(2) If the employee has been determined to have violated a prohibition of §219.101 regarding possession or misuse of alcohol, or if the employee refused to provide breath or body fluid sample or samples when required by the railroad under a mandatory provision of this part, the employee shall be subject to follow-up testing as specified in this section. Such testing shall be for controlled substances, but may include testing for alcohol as well, if the substance abuse professional determines that drug testing is necessary for the particular employee.

(f) The railroad shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol or controlled substances misuse does not refer the employee to the substance abuse professional's private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(1) a public agency, such as a state, county, or municipality;
(2) the railroad or a person under contract to provide treatment for alcohol problems on behalf of the railroad;
(3) the sole source of therapeutically appropriate treatment under the employee's health insurance program; or
(4) the sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(g) Railroad compliance with the provisions of paragraphs (a), (d), and (e) of this section is mandatory beginning on January 1, 1995.

11. Part 219 is amended by adding §219.107 to subpart B as follows:

§219.107 Consequences of unlawful refusal.

(a) An employee who refuses to provide breath or a body fluid sample or samples when required by the railroad under a mandatory provision of this part shall be deemed disqualified for a period of nine (9) months.

(b) Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action, and the procedures described in §219.104(c) shall apply.

(c) The disqualification required by this section shall apply with respect to employment in covered service by any railroad with notice of such disqualification.

(d) The requirement of disqualification for nine (9) months does not limit any discretion on the part of the railroad to impose additional sanctions for the same or related conduct.

(e) Upon the expiration of the 9-month period described in this section, a railroad may permit the employee to return to covered service only under the same conditions specified in §219.104(d), and the employee shall be subject to follow-up tests, as provided by that section.

12. Section 219.201 is amended by revising paragraphs (a)(1)(iii), (a)(2)(ii), and (b) as follows:

§219.201 Events for which testing is required.

(a) * * *

(1) * * *

(iii) Damage to railroad property of $1,000,000 or more.

(b) * * *

(ii) Damage to railroad property of $150,000 or more.

* * *

(h) Exceptions. No test shall be required in the case of a collision between railroad rolling stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. No test shall be required in the case of an accident/incident the cause and severity of which are wholly attributable to a natural cause (e.g., flood, tornado or other natural disaster) or to vandalism, as determined on the basis of objective and documented facts by the railroad representative responding to the scene.

13. Section 219.203 is amended by revising paragraph (a)(1); and revising the first sentence of paragraph (d)(2), as follows:

§219.203 Responsibilities of railroads and employees.

(a) Employees tested.

(1) * * *

(d) * * *

(2) If an injured employee is unconscious or otherwise unable to evidence consent to the procedure and the treating medical facility declines to obtain blood samples after having been acquainted with the requirements of this part, the railroad may require employees to provide breath for testing in accordance with the procedures set forth in 49 CFR Part 40 and this part, if such testing does not interfere with timely collection of required samples.

* * *

14. Section 219.205 is amended by revising paragraph (a) as follows:

§219.205 Sample collection and handling.

(a) General. Urine and blood samples shall be obtained, marked, preserved.
15. Part 219 is amended by adding § 219.206 as follows:

§ 219.206 FRA access to breath test results.

Documentation of breath test results shall be made available to FRA consistent with the requirements of this subpart, and the technical specifications set forth in Appendix C to this part.

16. Section 219.209 is amended by adding a new last sentence to paragraph (a)(1); and by adding a new paragraph (c), as follows:

§ 219.209 Reports of tests and refusals.

(a)(1) * * * Notification shall be provided to the Office of Safety, FRA, at (202) 366-0501; an answering machine will record any notification calls made to this number outside of the Federal work week (8:30 a.m. to 5 p.m. EST or EDT).

(c) If a test required by this section is not administered within four hours following the accident or incident, the railroad shall prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the Federal Railroad Administration upon request of the Associate Administrator for Safety.

17. Section 219.211 is amended by revising the second sentence of paragraph (a); by revising the last sentence of paragraph (c) and the last sentence of paragraph (d); and by revising paragraphs (e) and (f), as follows:

§ 219.211 Analysis and follow-up.

(a) * * * Samples are analyzed for alcohol and controlled substances specified by FRA under protocols prescribed by FRA, summarized in Appendix C, which have been submitted to the Department of Health and Human Services for acceptance.

(c) * * * The Federal Railroad Administration shall not be bound by the railroad Medical Review Officer’s determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

(d) * * * (However, as further provided in this section, FRA may provide results of testing under this subpart and supporting documentation to the National Transportation Safety Board.)

(e) An employee may respond in writing to the results of the test prior to the preparation of any final investigation report concerning the accident or incident. An employee wishing to respond shall do so by letter addressed to the Alcohol/Drug Program Manager, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 within 45 days of receipt of the test results. Any such submission shall refer to the accident date, railroad and location, shall state the position occupied by the employee on the date of the accident/incident, and shall identify any information contained therein that the employee requests be withheld from public disclosure on grounds of personal privacy (but the decision whether to honor such request shall be made by the FRA on the basis of controlling law).

(h) Except as provided in § 219.201 (with respect to non-qualifying events), each sample (including each split sample) provided under this subpart is retained for not less than three months following the date of the accident or incident (two years from the date of the accident or incident in the case of a sample testing positive for alcohol or a controlled substance). Post-mortem specimens may be made available to the National Transportation Safety Board (on request).

18. Section 219.213 is amended by revising paragraphs (a) and (b) as follows:

§ 219.213 Unlawful refusals; consequences.

(a) Disqualification.

An employee who refuses to cooperate in providing breath, blood or urine samples following an accident or incident specified in this subpart shall be withdrawn from covered service and shall be deemed disqualified for covered service for a period of nine (9) months in accordance with the conditions specified in § 219.107.

(b) Procedures. Prior to or upon withdrawing the employee from covered service under this section, the railroad shall provide notice of the reason for this action and an opportunity for hearing before a presiding officer other than the charging official. The employee shall be entitled to the procedural protection set out in § 219.104(d).

19. Subpart D is amended by revising the heading of the subpart and adding § 219.300 as follows:

Subpart D—Testing For Cause

§ 219.300 Mandatory reasonable suspicion testing.

(a) Requirements.

(1) Beginning on January 1, 1995, a railroad shall require a covered employee to submit to an alcohol test when the railroad has reasonable suspicion to believe that the employee has violated any prohibition of Subpart B of this part concerning use of alcohol. The railroad’s determination that reasonable suspicion exists to require the covered employee to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee.

(2) A railroad shall require a covered employee to submit to a urine drug test when the railroad has reasonable suspicion to believe that the employee has violated the prohibitions of Subpart B of this part concerning use of controlled substances. The railroad’s determination that reasonable suspicion exists to require the covered employee to undergo a drug test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the employee. Such observations may include indications of the chronic and withdrawal effects of drugs.

(b) (1) With respect to an alcohol test, the required observations shall be made by a supervisor trained in accordance with § 219.11(g). The supervisor who makes the determination that reasonable suspicion exists may not conduct testing on that employee.

(2) With respect to a urine drug test, the required observations shall be made by two supervisors, at least one of whom is trained in accordance with § 219.11(g).

(c) Nothing in this section shall be construed to require the conduct of breath alcohol testing or urine drug testing when the employee is apparently in need of immediate medical attention.

20. Section 219.301 is amended by removing and reserving paragraph (b)(1); revising the introductory text to paragraphs (b), (b)(2) and (c); and removing paragraphs (f) and (g), as follows:

§ 219.301 Testing for cause.

(a) * * *

(b) For cause breath testing. In addition to reasonable suspicion as described in § 219.300, the following circumstances constitute cause for the administration of breath alcohol tests under this section:

(1) [Reserved].
(2) Accident/incident. The employee has been involved in an accident or incident reportable under part 225 of this title, and a supervisory employee of the railroad has a reasonable belief, based on specific, articulable facts, that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or

(3) For cause urine testing. In addition to reasonable suspicion as described in §219.300, each of the conditions set forth in paragraphs (b)(2) ("accident/incident") and (b)(3) ("rule violation") of this section as constituting cause for breath alcohol testing also constitutes cause with respect to urine drug testing.

21. Part 219 is amended by adding a new §219.302 as follows:

§219.302 Prompt sample collection; time limitation.

(a) Testing under this subpart may only be conducted promptly following the observations or events upon which the testing decision is based, consistent with the need to protect life and property.

(b) No employee shall be required to participate in breath alcohol or urine drug testing under this section after the expiration of an eight hour period from—

(1) The time of the observations or other events described in this section; or

(2) In the case of an accident/incident, the time a responsible railroad supervisor receives notice of the event providing reasonable cause for conduct of the test.

(c) An employee may not be tested under this subpart if that employee has been released from duty under the normal procedures of the railroad. An employee who has been transported to receive medical care is not released from duty for purposes of this section. Nothing in this section prohibits the subsequent testing of an employee who has failed to remain available for testing as required (i.e., who is absent without leave).

(d) As used in this subpart a "responsible railroad supervisor" means any responsible line supervisor (e.g., a trainmaster or road foreman of engines) or superior official in authority over the employee to be tested.

(e) In the case of a urine drug test, the eight-hour requirement is satisfied if the employee has been delivered to the collection site (where the collector is present) and the request has been made to commence collection of the urine specimens within that period.

(f) If a test required by this section is not administered within two hours following the determination under §219.306, the railroad shall prepare and file a record stating the reasons the test was not properly administered. If a test required by this section is not administered within eight hours following the determination under §219.306, the railroad shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test. Records shall be submitted to FRA upon request of the Administrator.

(g) Section 219.23 prescribes the notice to an employee that is required to provide breath or a body fluid sample under this part.

22. Part 219 is amended by revising §219.303 to read as follows:

§219.303 Alcohol test procedures and safeguards.

The conduct of alcohol testing under this subpart is governed by Subpart H of this part and Part 40 of Subtitle A of this title.


24. Subpart F is amended by revising the subpart heading to read as follows:

Subpart F—Pre-employment Tests

25. Section 219.507 is revised to read as follows:

§219.507 Pre-employment tests.

(a) Beginning on January 1, 1995, prior to the first time a covered employee performs covered service for a railroad, the employee shall undergo testing for alcohol and drugs. No railroad shall allow a covered employee to perform covered service, unless the employee has been administered an alcohol test with a result indicating an alcohol concentration less than .04 and has been administered a test for drugs with a result that did not indicate the misuse of controlled substances. This requirement shall apply to final applicants for employment and to employees seeking to transfer for the first time from non-covered service to duties involving covered service. If the test result of a final applicant for pre-employment indicates an alcohol content of .02 or greater, the provisions of paragraph (b) of this section shall apply.

(b) No final applicant for employment tested under the provisions of this part who is found to have an alcohol concentration of .02 or greater but less than .04 shall perform safety-sensitive functions for a railroad, nor shall a railroad permit the applicant to perform safety-sensitive functions, until the applicant’s alcohol concentration measures less than .02.

(c) Tests shall be accomplished through breath analysis and analysis of urine samples. The conduct of breath alcohol testing and urine drug testing under this subpart is governed by Subpart H of this part and part 40 of subtitle A of this title.

(d) As used in subpart H with respect to a test required under this subpart, the term covered employee includes an applicant for pre-employment testing only. In the case of an applicant who declines to be tested and withdraws the application for employment, no record shall be maintained of the declination.

(e) Railroad compliance with the provisions of paragraphs (a) through (c) of this section is mandatory beginning on January 1, 1995.

26. Part 219 is amended by revising §219.503 to read as follows:

§219.503 Notification; records.

The railroad shall provide for medical review of the urine drug test results as provided in subpart H of this part. The railroad shall notify the applicant of the results of the urine and breath tests in the same manner as provided for employees in subpart H. Records shall be maintained confidentially and shall be retained in the same manner as required under subpart F for employee test records, except that such records need not reflect the identity of an applicant whose application for employment in covered service was denied.

§219.505 [Amended]

27. Section 219.505 is amended by revising the section heading to read "Refusals," removing the designation from paragraph (a) and removing paragraph (b).

28. Part 219 is amended by revising the heading of subpart G as follows:

Subpart G—Random Alcohol and Drug Testing Programs

PART 219—[AMENDED]

29. Section 219.601 is amended by revising the heading, the undesignated paragraph following (b)(2)(iii), paragraph (b)(7), and the first two sentences of paragraph (c) as follows:

§219.601 Railroad random drug testing programs.

(a) The railroad shall ensure that a random drug testing program will equal at least 50 percent of the...
number of covered employees. Annualized percentage rates shall be determined by reference to the total number of covered employees employed by the railroad at the beginning of the particular twelve-month period or by an alternate method specified in the plan approved by the Associate Administrator for Safety. If the railroad 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.

(7) Each time an employee is notified for random drug testing the employee will be informed that selection was made on a random basis.

(c) Approval. The Associate Administrator for Safety will notify the railroad in writing whether the program is approved as consistent with the criteria set forth in this part. If the Associate Administrator for Safety determines that the program does not conform to those criteria, the Associate Administrator for Safety will inform the railroad of any matters preventing approval of the program, with specific explanation as to necessary revisions.

§219.603 [Amended]
30. Section 219.603 is amended by revising the section heading to read “Participation in drug testing”, and by removing the designation “(a) Participation” from paragraph (a); and removing paragraphs (b) and (c).
31. Section 219.605 is amended by revising the heading and adding a new final sentence to paragraph (b) as follows:

§219.605 Positive drug test results; procedures.

(b) * * * The responsive action required in §219.104 is not stayed pending the result of a retest or split sample test.

32. Part 219 is amended by adding a new §219.607 to subpart G as follows:

§219.607 Railroad random alcohol testing programs.

(a) Each railroad shall submit for FRA approval a random alcohol testing program meeting the requirements of this subpart. A Class I railroad (including the National Railroad Passenger Corporation) or a railroad providing commuter passenger service shall submit such a program not later than February 15, 1995. A Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall submit such a program not later than August 15, 1995. A railroad commencing operations after the pertinent date specified in this paragraph shall submit a random alcohol testing program not later than 30 days prior to such commencement. The program shall be submitted to the Associate Administrator for Safety, FRA, for review and approval. If, after approval, a railroad desires to amend the random alcohol testing program implemented under this subpart, the railroad shall file with FRA a notice of such amendment at least 30 days prior to the intended effective date of such action. A program responsive to the requirements of this section or any amendment to the program shall not be implemented prior to approval.

(b) Form of programs. Random alcohol testing programs submitted by or on behalf of each railroad under this subpart shall meet the following criteria, and the railroad and its managers, supervisors, officials and other employees and agents shall conform to such criteria in implementing the program:

(1) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as the result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process, and any records necessary to document random selection shall be retained for not less than 24 months from the date upon which the particular samples were collected.

(2) The program shall include testing procedures and safeguards, and, consistent with this part, procedures for action based on tests where the employee is found to have violated §219.101.

(3) The program shall ensure that random alcohol tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

(4) The program shall ensure to the maximum extent practicable that each covered employee shall perceive the possibility that a random alcohol test may be required at any time the employee reports for work and at any time during the duty tour (except any period when the employee is expressly relieved of any responsibility for performance of covered service).

(5) An employee shall be subject to testing only when on duty. Only employees who perform covered service for the railroad shall be subject to testing under this part. In the case of employees who during some duty tours perform covered service and during others do not, the railroad program shall specify the extent to which, and the circumstances under which they shall be subject to testing. To the extent practical within the limitations of this part and in the context of the railroad’s operations, the railroad program shall provide that employees shall be subject to the possibility of random testing on any day they actually perform covered service.

(6) Testing shall be conducted promptly, as provided in §219.715(a).

(7) Each time an employee is notified for random alcohol testing the employee will be informed that selection was made on a random basis.

(c) Implementation. (1) No later than 45 days prior to commencement of random alcohol testing, the railroad shall publish to each of its covered employees, individually, a written notice that they will be subject to random alcohol testing under this part. Such notice shall state the date for commencement of the program, shall state that the selection of employees for testing will be on a strictly random basis, shall describe the consequences of a determination that the employee has violated §219.101 or any applicable railroad rule, and shall inform the employee of the employee’s rights under subpart E of this part. A copy of the notice shall be provided to each new covered employee on or before the employee’s initial date of service. Since knowledge of Federal law is presumed, nothing in this paragraph creates a defense to a violation of §219.101. This notice may be combined with the notice or policy statement required by §219.23.

(2) Each Class I railroad (including the National Railroad Passenger Corporation) and each railroad providing commuter passenger service
shall implement its approved random alcohol testing program beginning on January 1, 1995. Each Class II railroad shall implement its approved random testing program beginning on July 1, 1995. Each Class III railroad (including a switching and terminal or other railroad not otherwise classified) shall implement its approved random testing program beginning on January 1, 1996. In lieu of a calendar percentage rate commencing operations after the pertinent date set forth in paragraph (a) of this section for filing of a program, the railroad shall implement its approved random testing program not later than the expiration of 60 days from approval by the Administrator or by the pertinent date set forth in this paragraph, whichever is later.

33. Part 219 is amended by adding a new §219.608 to Subpart G as follows:

§219.608 Administrator's determination of random alcohol testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of covered employees.

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

(c)(1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §219.801 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §219.801 for two consecutive calendar years indicate that the violation rate is less than 1.0 percent but equal to or greater than 0.5 percent.

(d)(1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §219.801 for the calendar year that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent or less, and the data received under the reporting requirements of §219.801 for any calendar year indicate that the violation rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees.

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

(f) If a railroad is required to conduct random alcohol testing under the alcohol testing rules of more than one DOT agency, the railroad may—

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

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

34. Part 219 is amended by adding a new §219.609 to Subpart G as follows:

§219.609 Participation in alcohol testing.

A railroad shall, under the conditions specified in this subpart and Subpart H of this part, require a covered employee selected through the random testing program to cooperate in breath testing to determine compliance with §219.101, and the employee shall provide the required breath and complete the required paperwork and certifications. Compliance by the employee shall be excused only in the case of a documented medical or family emergency.

35. Part 219 is amended by adding a new §219.611 to Subpart G as follows:

§219.611 Test result indicating prohibited alcohol concentration; procedures.

Procedures for administrative handling by the railroad in the event an employee's confirmation test indicates an alcohol concentration of 0.04 or greater are set forth in §219.104.

PART 219—[AMENDED]

36. Part 219 is amended by revising the heading of Subpart H as follows:

Subpart H—Procedures and Safeguards for Urine Drug Testing and for Alcohol Testing

37. Part 219 is amended by revising the heading of §219.703 as follows:

§219.703 Drug testing procedures.

38. Section 219.707 is amended by revising the section heading and the first sentence of paragraph (a) as follows:

§219.707 Review by MRO of Urine Drug Testing Results.

(a) Urine drug test results reported positive by the laboratory as provided in part 40 of this title shall not be deemed positive or disseminated to any person (other than to the employee tested in a medical interview, if conducted) until they are reviewed by a Medical Review Officer (MRO) of the railroad as required by part 40 of this title and this section.

* * * * *

39. Part 219 is amended by adding a new §219.708 as follows:

§219.708 Employee requests for testing.

(a) If the test result of the primary sample is positive, an employee may request that his or her split sample(s) be tested in accordance with the procedures specified in 49 CFR part 40.
The test result information shall be provided by the railroad to FRA and the employee. The employee will be notified of the test result immediately. Each railroad shall ensure that an employee who is performing covered service at the time of notification shall cease to perform covered service and proceed to the testing site. A non-random alcohol test shall be conducted as soon as possible without affecting safety. If the test result indicates an alcohol concentration of 0.02 or greater, the employee will be removed from service at the time of notification and proceed to the testing site. The results of any alcohol misuse provisions shall be reported annually to the FRA.

Subpart J—Annual Report

§219.801 Reporting alcohol misuse prevention program results in a management information system.

(a) Each railroad that has 400,000 or more employee manhours shall submit to FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse prevention program.

(b) Each railroad that is subject to more than one DOT agency alcohol regulation 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 functions. Prior to conducting any alcohol test on a covered employee subject to the regulations of more than one DOT agency, the railroad shall determine which DOT agency regulation or rule authorizes or requires the test.

The test result information shall be directed to the appropriate DOT agency or agencies.

(c) Each railroad shall ensure the accuracy and timeliness of each report submitted. The report shall be submitted on one of the two forms specified by the FRA.

(d) Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of Subpart B of this part shall include the following elements (the “Alcohol Testing Management Information System Data Collection Form,” Appendix D3 to this part):

1. Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).
2. Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.
3. Number of screening tests by type of test (i.e., pre-employment and post-employment, random, post-positive return to service, and follow-up) and employee category.
4. Number of confirmation tests, by type of test and employee category.
5. Number of confirmation alcohol tests indicating an alcohol concentration equal to 0.02 or greater but less than 0.04, by type of test and employee category.
6. Number of confirmation alcohol tests indicating an alcohol concentration of 0.04 or greater, by type of test and employee category.
7. Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in §219.104(d)).
8. For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of 0.02 or greater but less than 0.04, and the number of confirmation test results of 0.04 or greater.
9. For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted, the number of confirmation tests conducted, the number of confirmation tests of 0.02 or greater but less than 0.04, and the number of confirmation test results of 0.04 or greater.
10. Number of covered employees who refused to submit to a random alcohol test required under this part.
11. Number of covered employees who refused to submit to a random alcohol test required under this part.
12. Number of covered employees who refused to submit to a random alcohol test required under this part.
13. Number of covered employees who refused to submit to a random alcohol test required under this part.
14. Number of supervisory personnel who have received the required initial training on the specific alcohol content.
15. Performance indicators of probable alcohol use during the reporting period.
16. Each report that contains no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of Subpart B of this part shall include the following informational elements (the “Alcohol Testing Management Information System Data Collection Form,” Appendix D4 to this part). This report may only be submitted if the program results meet this criteria.

1. Number of covered employees by employee category (i.e., train service, engine service, dispatcher/operator, signal, other).
2. Number of covered employees in each category subject to alcohol testing under the alcohol misuse regulation of another DOT agency, identified by each agency.
3. Number of screening tests by type of test (i.e., pre-employment and post-employment, random, post-positive return to service, and follow-up) and employee category.
4. Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater, or who have violations of other alcohol misuse provisions, who were returned to service in covered positions (having complied with the recommendations of a substance abuse professional as described in §219.104(d)).
5. For cause breath alcohol testing under railroad authority, by reason for test (accident/injury or rules violation), the number of screening tests conducted.
6. For cause breath alcohol testing under FRA authority, by reason for test (reasonable suspicion, accident/injury or rules violation), the number of screening tests conducted.
7. Number of covered employees who refused to submit to a random alcohol test required under this part.
8. Number of covered employees who refused to submit to a random alcohol test required under this part.
9. Number of supervisory personnel who have received the required initial training on the specific alcohol content.
10. Performance indicators of probable alcohol use during the reporting period.
11. Annual reporting for calendar year 1993 and prior years shall be governed by the provisions of §217.13 of this chapter in effect during the subject calendar period.

43. Part 219 is amended by adding a new Subpart J as follows:
Subpart J—Record Keeping Requirements

§ 219.901 Retention of breath alcohol testing records.

(a) General requirement. Each railroad 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.

(b) Period of retention. Each railroad shall maintain the records in accordance with the following schedule:

(1) Five years. The following shall be maintained for a minimum of five years:

(i) Records of alcohol test results with results indicating an alcohol concentration of .02 or greater, documentation of refusal to take required alcohol tests, calibration documentation, and employee evaluation and referrals;

(ii) A summary record of each covered employee’s test results; and

(iii) A copy of the annual report summarizing the results of its alcohol misuse prevention programs (if required to submit under §219.801(a)).

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

(3) One year. Records of all test results below .02 shall be maintained for a minimum of one year.

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

(1) Records related to the collection process:

(i) Collection logbooks, if used.

(ii) Documents relating to the random selection process.

(iii) Calibration documentation for evidential breath testing devices.

(iv) Documentation of breath alcohol technician training.

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.

(vi) Documents generated in connection with decisions on post-accident testing.

(vii) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a urine sample.

(2) Records related to test results:

(i) The railroad’s copy of the alcohol test form, including the results of the test.

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

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

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee’s need for assistance.

(ii) Records concerning a covered employee’s compliance with the recommendations of the substance abuse professional.

(5) Records related to evaluation and training:

(i) Materials on drug misuse awareness, including a copy of the railroad’s policy on drug misuse.

(ii) Documentation of compliance with the requirements of §219.23.

(iii) 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.

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

§ 219.903 Retention of urine drug testing records.

(a) General requirement. Each railroad shall maintain records of its drug misuse prevention program as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of retention. Each railroad shall maintain the records in accordance with the following schedule:

(1) Five years. The following shall be maintained for a minimum of five years:

(i) Records of employee positive drug test results, documentation of refusal to take required drug tests, and employee evaluation and referral;

(ii) A summary record of each covered employee’s test results; and

(iii) A copy of the annual report summarizing the results of its drug misuse prevention program (if required to submit under §219.803(a)).

(2) Two years. Records related to the collection process and training shall be maintained for a minimum of two years.

(3) One year. Records of negative test results (as defined in Part 40 of this title) shall be maintained for a minimum of one year.

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

(1) Records related to the collection process:

(i) Documents relating to the random selection process.

(ii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.

(iii) Documents generated in connection with decisions on post-accident testing.

(iv) Documents verifying the existence of a medical explanation of the inability of a covered employee to provide a urine sample.

(2) Records related to test results:

(i) The railroad’s copy of the drug test custody and control form, including the results of the test.

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

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

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee’s need for assistance.

(ii) Records concerning a covered employee’s compliance with the recommendations of the substance abuse professional.

(5) Records related to evaluation and training:

(i) Materials on alcohol misuse awareness, including a copy of the railroad’s policy on alcohol misuse.

(ii) Documentation of compliance with the requirements of §219.23.

(iii) 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.

(iv) Certification that any training conducted under this part complies with the requirements for such training.
§ 219.905 Access to facilities and records.

(a) Release of covered employee information contained in records required to be maintained under §§ 219.901 and 219.903 shall be in accordance with 49 CFR Part 40 and this section. (For purposes of this section only, urine drug testing records shall be considered equivalent to breath alcohol testing records.)

(b) Each railroad shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or any of its covered employees.

(c) Each railroad shall make available copies of all results for railroad alcohol and drug testing programs conducted under this part and any other information pertaining to the railroad’s alcohol and drug misuse prevention program, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the railroad or covered employee.

44. Part 219 is amended by adding Appendices D3 and D4 as follows:

BILLING CODE 4910-06-P
INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Railroad Administration (FRA) Alcohol Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes five sections. Collectively, these sections address the data elements required in the FRA and the U.S. Department of Transportation (DOT) alcohol testing regulations. The five sections, the page number for the instructions, and the page location on the reporting form are:

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions Page</th>
<th>Reporting Form Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. RAILROAD EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i</td>
<td>2</td>
</tr>
<tr>
<td>C. ALCOHOL TESTING INFORMATION</td>
<td>ii-iv</td>
<td>3-4</td>
</tr>
<tr>
<td>D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION</td>
<td>iv</td>
<td>5</td>
</tr>
<tr>
<td>E. ALCOHOL TRAINING/EDUCATION</td>
<td>iv</td>
<td>5</td>
</tr>
</tbody>
</table>

Page 1  RAILROAD EMPLOYER INFORMATION (Section A) requires the company name for which the report is done and a current address. Below this, a signature, date, and current telephone (including the area code) are required certifying the correctness and completeness of the form.

Page 2  COVERED EMPLOYEES (Section B) requires a count for each Hours of Service Act employee category that must be tested under FRA regulations. The categories are: "Engine Service", "Train Service", "Dispatcher/Operator", "Signal Service", and "Other." The OTHER category is a count of employees performing covered service that are not included in specific preceding categories. Examples include yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, etc. These counts should be based on the company records as of January 1 of the reported year. The TOTAL is a count of all covered employees for all categories combined, i.e., the sum of the column.

Additional information must be completed if your company employs personnel who perform duties covered by the 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).
ALCOHOL TESTING INFORMATION (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment (and transfer to covered service) section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for company employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random testing, (2) return to duty testing, (3) follow-up testing, (4) for cause testing due to accidents/injuries, (5) for cause testing due to rule violations, and (6) reasonable suspicion testing. These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first blank column with the heading “NUMBER OF SCREENING TESTS” requires a count of all screening alcohol tests performed for each employee category. It should not include refusals to test. The second blank column with the heading “NUMBER OF CONFIRMATION TESTS” requires a count of all confirmation alcohol tests performed for each employee category.

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

The fourth blank column with the heading “NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04" requires a count for each employee category. Note: For return to duty testing, a confirmation result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

Each column in the table should be added and the answer entered in the row marked “TOTAL”.

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

At the bottom of the page containing pre-employment testing information is a box with the heading “Number of applicants/transfers denied employment/transfer following an alcohol test indicating an alcohol concentration of 0.04 or greater”. Enter the appropriate number in the box provided.

Next, you must provide a count of the “Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations)”. This information should be available from the personnel office and/or the drug and alcohol program manager.

FOR CAUSE TESTING data are provided in three separate parts of the table -- one for accidents/injuries, one for rules violations, and one for reasonable suspicion. In the top portion of the parts for accidents/injuries and rules violations you must indicate whether the testing was conducted under FRA authority or under railroad authority.
SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories for testing in Section C which require you to summarize testing results for employees. This example will use the categories “Engine Service” and “Train Service” to illustrate the procedures for completing the form.

Screening tests were performed on 157 job applicants for engine service positions during the reporting year. This information is entered in the first blank column of the table in the row marked “Engine Service”.

Confirmation tests were necessary for 6 of the 157 applicants for engine service positions. Enter this information in the second blank column of the table in the row marked “Engine Service”. The confirmation test results for these 6 applicants were the following:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.06</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

The confirmation test results for 2 of the applicants for engine service positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the third blank column of the table in the row marked “Engine Service”.

The confirmation test results for 3 of the applicants for engine service positions were equal to or greater than 0.04. Enter this information in the fourth blank column of the table in the row marked “Engine Service”.

The last row, marked “TOTAL”, requires you to add the numbers in each of the columns. With this example, 157 applicants for engine service positions and 107 applicants for service positions were subjected to screening 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).

Please note that our sample data collection form also has information for train service workers on line two. The same procedures outlined for engine service should be followed for entering the data on train service workers. With applicants for train service positions, 107 screening tests were conducted resulting in 3 confirmation tests. No results were equal to or greater than 0.02, but less than 0.04; the confirmation test result for 1 of the train service applicants was equal to or greater than 0.04. This information is entered in the row marked “Train Service”.

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 CONFIRMATION TESTS”. These numbers may differ since some confirmation test results may be less than 0.02.
Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.

Page 5 OTHER ALCOHOL TESTING/PROGRAM INFORMATION (Section D) requests information on employees tested for drugs and alcohol at the same time and that you complete tables dealing with violations of other alcohol provisions/prohibitions of the regulation and refusals for testing.

Page 5 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 5 VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these FRA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.

Page 5 EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FRA regulation.

Page 5 ALCOHOL TRAINING/EDUCATION (Section E) requires information on the number of supervisory personnel who have received the required alcohol training during the current reporting period.
FRA ALCOHOL TESTING MIS DATA COLLECTION FORM  OMB No. 2130-0526

YEAR COVERED BY THIS REPORT: 19

A. RAILROAD EMPLOYER INFORMATION

Company

Address


I, the undersigned, certify the information provided on the attached Federal Railroad Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete 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. The willful falsification of any information in this report may also subject the submitter to civil or criminal prosecution under Title 45, U.S.C. Section 438(e).

The Federal Railroad Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety, Federal Railroad Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2130-0526); Washington, D.C. 20503.

FRA Form No. FRAF6180.95A
### B. COVERED EMPLOYEES

#### COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FRA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>FAA</td>
</tr>
<tr>
<td>Engine Service</td>
<td></td>
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<tr>
<td>Train Service</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dispatcher/Operator</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Signal Service</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other*</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Includes yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, and other miscellaneous employees performing covered service as defined in 49 CFR 228.5 (c).

#### READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).

2. This report is only for testing REQUIRED BY THE FEDERAL RAILROAD ADMINISTRATION (FRA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):
   - Results should be reported only for employees in COVERED POSITIONS as defined by the FRA 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 D ["OTHER ALCOHOL TESTING/PROGRAM INFORMATION"]. Do not include refusals for testing in other sections of this 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.
### C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
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<tr>
<td>Engine Service</td>
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<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<td>Other</td>
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<td>RANDOM</td>
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<td>Engine Service</td>
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<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<td>RETURN TO DUTY</td>
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<td>Engine Service</td>
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<td>Dispatcher/Operator</td>
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<tr>
<td>FOLLOW-UP</td>
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<td>Engine Service</td>
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<td>Train Service</td>
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<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<tr>
<td>Total</td>
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</tr>
</tbody>
</table>

**Number of applicants/transfers denied employment/transfer following an alcohol test indicating an alcohol concentration of 0.04 or greater:**

**Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations):**

FRA Form No. FRAF6180.95A
C. ALCOHOL TESTING INFORMATION (continued)

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engine Service</td>
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<tr>
<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<td>Other</td>
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<tr>
<td><strong>TOTAL</strong></td>
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</tr>
</tbody>
</table>

**FOR CAUSE ALCOHOL TESTING DUE TO ACCIDENT* INJURY**
*(Accidents NOT qualifying under 49 CFR Part 219 Subpart C)*
*(Testing Conducted Under: FRA Rule Railroad Rule)*

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engine Service</td>
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<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<tr>
<td>Other</td>
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<tr>
<td><strong>TOTAL</strong></td>
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</tr>
</tbody>
</table>

**DUE TO RULES VIOLATION**
*(Testing Conducted Under: FRA Rule Railroad Rule)*

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engine Service</td>
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<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<tr>
<td>Other</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

**REASONABLE SUSPICION**

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Engine Service</td>
<td></td>
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<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<td>Other</td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
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<td></td>
<td></td>
</tr>
</tbody>
</table>
### D. OTHER ALCOHOL 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:

<table>
<thead>
<tr>
<th>ACTION TAKEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covered employee used alcohol while performing safety-sensitive function</td>
</tr>
<tr>
<td>Covered employee used alcohol within 4 hours of performing safety-sensitive function</td>
</tr>
<tr>
<td>Covered employee used alcohol before taking a required post-accident alcohol test</td>
</tr>
</tbody>
</table>

### VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION

<table>
<thead>
<tr>
<th>NUMBER OF COVERED EMPLOYEES</th>
<th>VIOLATION</th>
<th>ACTION TAKEN</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covered employee used alcohol while performing safety-sensitive function</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Covered employee used alcohol within 4 hours of performing safety-sensitive function</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Covered employee used alcohol before taking a required post-accident alcohol test</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST

<table>
<thead>
<tr>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Covered employees who refused to submit to a random alcohol test required under the FRA regulation:</td>
</tr>
<tr>
<td>Covered employees who refused to submit to a non-random alcohol test required under the FRA regulation:</td>
</tr>
</tbody>
</table>

### E. ALCOHOL TRAINING/EDUCATION

<table>
<thead>
<tr>
<th>NUMBER</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FRA alcohol testing regulations:</td>
</tr>
</tbody>
</table>
APPENDIX D 4 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) "EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Railroad Administration (FRA) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there is no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes three sections. These sections address the data elements required in the FRA and the U.S. Department of Transportation (DOT) alcohol testing regulations.

SECTION A - RAILROAD EMPLOYER INFORMATION requires the company name for which the report is done and a current address. Below this, a signature, date, and current telephone (including the area code) are required certifying the correctness and completeness of the form.

SECTION B - COVERED EMPLOYEES requires a count for each Hours of Service Act employee category that must be tested under FRA regulations. The categories are: "Engine Service", "Train Service", "Dispatcher/Operator", "Signal Service", and "Other." The OTHER category is a count of employees performing covered service that are not included in specific preceding categories. Examples include yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, etc. These counts should be based on the company records as of January 1 of the reported year. The TOTAL is a count of all covered employees for all categories combined, i.e., the sum of the column.

Additional information must be completed if your company employs personnel who perform duties covered by the 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).

SECTION C - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED in each category for testing. All numbers entered into the pre-employment (and transfer to covered service) section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. Testing categories include: (1) random, (2) for cause testing due to accidents/injuries, (3) for cause testing due to rule violations, (4) reasonable suspicion, (5) return to duty, and (6) follow-up. Each column in the table should be added and the answer entered in the row marked "TOTAL".

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations). This information should be available from the personnel office and/or alcohol program manager.
EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, reasonable suspicion, return to duty, follow-up, or for cause testing) alcohol test required under the FRA regulation.

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.
FRA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM OMB No. 2130-0526
(No Alcohol Misuse)

YEAR COVERED BY THIS REPORT: 19

1. RAILROAD EMPLOYER INFORMATION

Company ____________________________________________

Address ........................................................................

........................................................................

I, the undersigned, certify the information provided on the attached Federal Railroad Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete 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. The willful falsification of any information in this report may also subject the submitter to civil or criminal prosecution under Title 45, U.S.C. Section 438(e).

The Federal Railroad Administration estimates that the average burden for this report form is 4 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety; Federal Railroad Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2130-0526); Washington, D.C. 20503.
### B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FRA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY MORE THAN ONE DOT OPERATING ADMINISTRATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>FAA</td>
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<tr>
<td>Engine Service</td>
<td></td>
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<tr>
<td>Train Service</td>
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<tr>
<td>Dispatcher/Operator</td>
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<tr>
<td>Signal Service</td>
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<tr>
<td>Other</td>
<td></td>
<td></td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*Includes yardmasters, hostlers (non-engineer craft), bridge tenders, switch tenders, and other miscellaneous employees performing covered service as defined in 49 CFR 228.5 (c).*

### C. ALCOHOL TESTING INFORMATION

**NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED**

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>PRE-EMPLOYMENT</th>
<th>RANDOM</th>
<th>FOR CAUSE</th>
<th>FOR CAUSE</th>
<th>REASONABLE</th>
<th>RETURN TO</th>
<th>FOLLOW-UP</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Accident/Injury Testing Conducted Under Rule FRA Railroad</td>
<td>Rule Violation Testing Conducted Under Rule FRA Railroad</td>
<td>SUSPICION</td>
<td>DUTY</td>
<td></td>
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<tr>
<td>Engine Service</td>
<td></td>
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<td>Train Service</td>
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<td>Dispatcher/Operator</td>
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<td>Signal Service</td>
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<td>Other</td>
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<td><strong>TOTAL</strong></td>
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</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FRA regulations).

**EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST**

| Covered employees who refused to submit to a random alcohol test required under the FRA regulation: |
| Covered employees who refused to submit to a non-random alcohol test required under the FRA regulation: |

**ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD**

| Supervisory personnel who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FRA alcohol testing regulations: |

FRA Form No. FRAF6180.95B 2
DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration
49 CFR Part 219
[Docket No. RSOR-6; Notice No. 36]
RIN 2130-AA82
International Application: Alcohol/Drug Regulations

AGENCY: Federal Railroad Administration (FRA), DOT.
ACTION: Termination of rulemaking proceedings.

SUMMARY: The Federal Railroad Administration has determined that a separate rulemaking on international application of the Omnibus Transportation Employee Testing Act of 1991 (Act) is unnecessary. Accordingly, this notice withdraws FRA’s December 15, 1992 advance notice of proposed rulemaking (ANPRM), which asked for comment on issues arising from the application of the Omnibus Transportation Employee Testing Act of 1991 (Act) to foreign railroads operating within the United States [57 FR 59605].

DATES: This proposed rule is withdrawn on February 15, 1994.

FOR FURTHER INFORMATION CONTACT: Walter C. Rockey, Executive Assistant to the Associate Administrator for Safety (RRS-3), Office of Safety, FRA, Washington, DC 20590 (Telephone: (202) 366-0897) or Patricia V. Sun, Trial Attorney (RCC-30), Office of Chief Counsel, FRA, Washington, DC 20590 (Telephone: (202) 366-4002).

SUPPLEMENTARY INFORMATION: Foreign railroads have been subject to portions of FRA’s regulations on the control of alcohol and drug use (49 CFR part 219) since February 10, 1986. In the above-mentioned ANPRM, FRA asked for comment on practical considerations arising from international application of the new requirements of the Act, and received none. Foreign railroads generally enter into United States territory only for limited distances and these railroads already comply with existing FRA rules on post-accident and for cause testing. In light of this, and FRA’s successful compliance record with foreign railroads, FRA will not proceed with a separate rulemaking on international application of the Act. Interested parties should instead look to FRA’s final rule on alcohol testing (published elsewhere in today’s Federal Register), which continues FRA’s current level of application while conforming part 219 to the requirements of the Act. The departmental common preamble published in today’s Federal Register also contains a discussion of this issue.


Federico Peña,
Secretary of Transportation.

Jolene M. Molitoris,
Administrator, Federal Railroad Administration.

[FR Doc. 94–2036 Filed 2–3–94; 1:00 pm]
BILLING CODE 4910–06–P
Part VII

Department of Transportation

Federal Highway Administration

49 CFR Parts 382, et. al.
Controlled Substances and Alcohol Use and Testing; Rule and Proposed Rule
In addition, a Department of Transportation-wide preamble precedes this document in today’s Federal Register. It is entitled Limitation on Alcohol Use by Transportation Workers. This common preamble discusses comments to the notices of proposed rulemakings (NPRM) published by six operating administrations on December 15, 1992, including the FHWA, and the parts of the final rules common to the six operating administrations. It should be read in conjunction with this document to ensure a complete understanding of the FHWA’s final rule. There is no common rule associated with the common preamble. The rule contained in this document contains the requirements for motor carriers.

A third document, consisting of regulatory amendments and a preamble, contains the technical testing procedures designed for use when testing is required by part 382, this rule. Procedures for Transportation Workplace Drug and Alcohol Testing Programs, also published elsewhere in today’s Federal Register, specifies how the testing is to be conducted. It adds alcohol testing procedures and drug testing amendments to 49 CFR part 40, the current Department-wide drug testing procedures regulation.

B. Notices of Proposed Rulemakings

In addition to the final rules mentioned above, the FHWA is also publishing in today’s Federal Register three proposals to change certain provisions of the final rules. For more information than provided below, please refer to each NPRM.

The first NPRM contains a proposal to amend the part 382 final rule you are now reading to include foreign-based employers and their drivers who operate commercial motor vehicles in and through the United States. Included is a discussion of the comments received in response to an advanced notice of proposed rulemaking (ANPRM) published by the FHWA on December 15, 1992, in which various issues related to foreign coverage were raised. The second NPRM proposes to amend part 40 to allow confirmatory blood testing for alcohol during reasonable suspicion and post-accident tests when an evidential breath testing device is not readily available. The Department-wide proposal asks comment on how blood testing for alcohol should be conducted and what laboratories should be used.

The third NPRM proposes a Department-wide procedure for each operating administration’s Administrator to adjust the random drug testing rate. Paralleling the provisions for adjusting the alcohol testing rate appearing in this rulemaking, the proposal would allow a reduction in the drug testing rate based upon reliable statistics of positive rates for each operating administration’s program.

C. Use of Terms That Might Be Confusing to the Reader

In this document and the others published by the FHWA and the Department in today’s Federal Register, the terms “drugs” and “controlled substances” are interchangeable and have the same meaning. Unless otherwise provided, drugs and controlled substances refer to marijuana (THC), cocaine, opiates, phencyclidine (PCP), and amphetamines (including methamphetamines).

II. Background

A. Statutory Authority

The Omnibus Transportation Employee Testing Act of 1991 (the Omnibus Act) was signed by President Bush on October 28, 1991, as part of the 1992 Department of Transportation and Related Agencies Appropriations Act. Public Law 102-143, Title V, 105 Stat. 917, 952 (1991). The Omnibus Act requires the Secretary of Transportation to promulgate regulations for alcohol and controlled substances testing for persons in safety-sensitive positions in four modes of transportation—motor carrier, airline, railroad, and mass transit. The general requirements of the Omnibus Act are addressed in the Office of the Secretary of Transportation’s (OST) final rule amending 49 CFR part 40 and in the common preamble applicable to all of the U.S. Department of Transportation (DOT) modal agency rules on alcohol testing programs. These documents appear elsewhere in today’s issue of the Federal Register.

Section 5 of the Omnibus Act addresses requirements specific to employers who own or lease commercial motor vehicles (CMVs) or assign persons to operate such vehicles. 49 U.S.C. 2717. This section amends the Commercial Motor Vehicle Safety Act of 1986 (CMVSA). Public Law 99-570, 100 Stat. 3207-3217 (codified at 49 U.S.C. app. 2701-2718). The CMVSA established the requirements for the Commercial Drivers License (CDL). The FHWA has implemented the CDL provisions of the CMVSA through the publication of several final rules. The Omnibus Act requires the Secretary to issue regulations requiring employers to conduct pre-employment, reasonable suspicion, random and post-accident testing of drivers for the use, in violation of law or Federal regulation, of alcohol or controlled substances.
Congress recognized current FHWA regulations for controlled substances testing and the scientific and technical guidelines established by the Department of Health and Human Services incorporated therein. In addition, this rule is issued under the general safety regulatory authority of the FHWA. See 49 U.S.C. 3102 and app. 2505.

B. Regulatory History

1. Current Regulations

The FHWA published a final rule on November 21, 1988, setting forth regulations to require employers who operate CMVs in interstate commerce to have an anti-controlled substances program, including the testing of interstate CMV drivers. See 53 FR 47134. That rule required employers to conduct five types of controlled substances tests: Pre-employment/use; periodic; reasonable cause; post-accident; and random. 49 CFR part 391, subpart H.

Though there is no corresponding alcohol testing program currently applicable to motor carriers, a number of other regulations prohibit the misuse of alcohol and drugs when operating a CMV. Prohibitions on use before and during driving appear in 49 CFR 392.4 and 392.5. A driver who is convicted of being under the influence of drugs or alcohol while driving a CMV is subject to CDL suspension. 49 CFR 383.51. A driver who uses Schedule I drugs, though there is no corresponding alcohol testing program currently applicable to motor carriers, a number of other regulations prohibit the misuse of alcohol and drugs when operating a CMV. Prohibitions on use before and during driving appear in 49 CFR 392.4 and 392.5. A driver who is convicted of being under the influence of drugs or alcohol while driving a CMV is subject to CDL suspension. 49 CFR 383.51. A driver who uses Schedule I drugs, is subject to CDL suspension. 49 CFR 383.51. A driver who uses Schedule I drugs, alcohol could readily be implemented. Some comments recommended a partial exemption for foreign drivers and a total exemption for electrical contractors.

Other commenters, including the Owner-Operator Independent Drivers Association (OOIDA), disagreed with the FHWA's proposed alcohol and controlled substances testing program. The FHWA has included transcripts of comments made at the hearings are discussed below along with written comments submitted directly to the dockets.

4. Comments to the Dockets

A. Alcohol Testing [Docket MC-92-19]. Comments to docket MC-92-19 that relate to rule provisions common to all operating administrations are discussed in the comment preamble. Limitation on Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register. Discussion in this rulemaking document will focus on aspects or applications of the rule which are unique to FHWA. Where a discussion is included in this document, the corresponding section in the common preamble should also be consulted for a complete understanding of this final rule.

The FHWA received 323 comments to docket MC-92-19, the alcohol NPRM, by the close of business on April 14, 1993. The commenters included employers, drivers, trade associations, unions, medical review officers (MROs), substance abuse professionals (SAPs), and governmental agencies, including law enforcement agencies, and school districts.

Applicability

Comments: Many custom harvesters stated that their industry should retain the current exemption from drug testing in 49 CFR part 391, Qualification of Drivers, and also be exempt from alcohol testing. Some commenters, including The Kansas Electric Cooper, stated that rural electric cooperatives should be exempt from testing because job responsibilities are different from those of over-the-road truck drivers. They stated that their employees spend minimal time on high speed thoroughfares in close proximity to small passenger cars. A local government agency stated that mechanics should not be subject to alcohol and controlled substances testing because they could not afford such a program.

The Virginia State Police, among others, stated that only employers subject to 49 CFR part 391 should be tested. They stated that the controlled substances testing program is in place and working. The additional testing for alcohol could readily be implemented. Some comments recommended a partial exemption for foreign drivers and a total exemption for electrical contractors.

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Special Programs Administration (RSPA) jurisdiction.
The Tennessee Valley Authority (TVA) and other commenters stated that employers subject to the Nuclear Regulatory Commission (NRC) should be tested under NRC regulations. The TVA stated that there is needless, costly duplication which significantly compounds the opportunity for human error in the testing program. The U.S. Postal Workers Union stated that the U.S. Postal Office has a credible, controlled substances testing program and should be given credit for their program. Pinnacle Transport Services, Inc. stated that drivers of CMVs should only be subject to FHWA regulations.

Other commenters, including the Washington State Patrol (WSP), stated that government employers should be totally exempted from the alcohol testing requirements. The WSP stated that requiring governmental agencies, including school bus drivers and highway road crews, to implement random alcohol testing would further reduce limited budgets for these agencies. The WSP also stated that their state currently has a strong and effective school bus inspection program.

FHWA Response: The Omnibus Act, as stated above, amended the CMVSA, subjecting all drivers of CMVs who are required to obtain CDLs to testing for the illegal use of alcohol and controlled substances. The Omnibus Act does not provide specific waiver authority apart from the CMVSA. The CMVSA gives the Secretary the discretion to waive classes of drivers and vehicles from all or part of the statute’s requirements. The FHWA does not believe that this waiver authority is broad enough to waive all drivers from requirements of the Omnibus Act. See H.R. Rep. No. 901, 99th Cong., 2d Sess. 4 (1986). Moreover, the FHWA does not believe it is in the public interest to grant industry-wide exemptions from testing requirements beyond those permitted in the CDL program as a whole. Therefore, only those few categories of drivers that have received full waivers from CDL requirements are similarly waived from drug and alcohol testing requirements. Employers not subject to this rule will be those employers who exclusively employ drivers that are not subject to commercial driver’s license requirements. Such employers may be Department of Defense (DoD) agencies who only employ active duty military personnel. Those DoD agencies that employ civilian and non-active duty drivers will be subject to these rules and must implement FHWA required testing programs for those civilian and non-active duty drivers. Other employers not subject to this rule include farmers, emergency response and firefighting companies, when they employ drivers that have been waived from the CDL requirements by their State of licensure. Employers who are subject to the Federal Transit Administration’s (FTA) alcohol and controlled substances testing regulations are not subject to the FHWA’s regulations. The FTA generally requires its grantees to be subject to its rules. The FTA, however, will not require recipients receiving Federal funding under section 16(b)(2) of the Federal Transit Act to follow the FTA substance testing rule. The Federal Transit Act, under section 16(b)(2), provides capital assistance through a State to organizations that provide specialized transportation services to elderly persons and persons with disabilities. The funds may go to nonprofit organizations, and under certain circumstances, to public bodies. Though commenters suggested to the FHWA and the FTA that the FTA cover section 16(b)(2) recipients in the FTA rule, the Omnibus Act does not provide such coverage. Therefore, the CMV drivers of section 16(b)(2) recipients will be covered under this FHWA rule. See the FTA final rule published elsewhere in today’s Federal Register for further information.

As for employers and drivers subject to other Federal agencies’ testing programs, the FHWA, along with the other operating administrations in the Department and the OST, have worked with the NRC, the Departments of Energy (DOE) and Health and Human Services (DHHS) and other Federal agencies to establish similar requirements for testing of both the agencies’ Federal employees and regulated entities. The FHWA has attempted to have substantially compatible regulations with all Federal agencies that require testing of Federal and non-Federal employees. However, operators of CMVs and their employers must comply with the requirements of the Omnibus Act regardless of whether an employer has an existing drug and/or alcohol testing program. This section also specifies that persons who are both an employer and a driver, that is, the person who owns a business and also drives a commercial motor vehicle for that business (generally called an owner-operator), must comply with both the driver and the employer requirements contained in part 382. This section also stipulates that an employer with only one driver may not have an employer’s random testing program. Such employers must join a group of other DOT regulated employers, generally known as a consortium, to conduct random testing for alcohol and drug testing. This requirement is necessary to ensure a truly random selection, since it is impossible to randomly select from a pool that contains only one person.

Definitions

Comments: The Council of Special Transportation and the County of Somerset, New Jersey stated that the term “safety-sensitive position” should be defined in the regulations. The Council of Special Transportation added that the FHWA and FTA should minimize inconsistencies in their respective regulations and definitions. Other commenters stated that the definition of the term “accident” should be consistent with current rules.

FHWA Response: The term “safety-sensitive function” was defined in the proposal and is defined in this final rule. A safety-sensitive function or position in the mass transit industry encompasses more functions than the FHWA’s exclusive definition of a CMV driver and thus, the FHWA and FTA cannot have identical definitions for this term. Testing is restricted to CMV operators in Section 5 of the Omnibus Act. Section 6, in contrast, allows the FTA to determine what mass transportation employees are responsible for safety-sensitive functions. See the FTA final rule published elsewhere in today’s Federal Register for a complete discussion of FTA covered safety-sensitive functions.

The FHWA proposed a definition of “accident” to be consistent with the Omnibus Act, which requires that drivers involved in an accident where there is loss of human life, regardless of fault be tested. The Secretary is also given the discretion to determine what other serious accidents, involving bodily injury or significant property damage, trigger post-accident testing. The FHWA is maintaining the definition as proposed in the NPRM, which adopted the definition of accident appearing in 49 CFR 390.5.

Requirement for Notice

Comments: Numerous commenters opposed any requirement to provide written notification, stating that because the proposed regulations prohibit an employer from representing a non-DOT test as a test conducted under the regulations of the Department, no written notice is necessary. Other commenters stated that written notice should be provided.

The Amalgamated Transit Union (ATU) stated that a written notice requirement would establish uniformity and confirm that notice has been properly given.
Recommendations regarding the time frame for written notice ranged from immediately prior to the test to the day of the test.

**FHWA Response:** This requirement is necessary to address the concerns of drivers who have complained that their employers purported to require a test under the current drug testing program when, in fact, the test was not required by FHWA regulations. In order to provide employers with flexibility, the form of the notification is not prescribed. It may be oral or written. The breath alcohol testing form and the drug testing custody and control form may be used to meet the requirement for notice. The final rule requires only that notification be given prior to the administration of the test.

**Medication Exception.**

**Comments:** Several commenters, including the American Trucking Associations (ATA), stated that an exception should not be made for the consumption of prescription medication containing alcohol. However, the ATA also stated that employers should be allowed to possess prescription medicine containing alcohol.

Other comments, including those from the OOIDA, stated that an exception should be allowed for the consumption of prescription medicine containing alcohol. STA United Inc. recommended removing the stipulation that an employer must have actual knowledge that an employee possesses alcohol, arguing that actual knowledge implies the existence of a witness and the presence of a witness justifies the performance of a reasonable suspicion test.

**FHWA Response:** The FHWA received no comments regarding whether a driver is as safe on the highway using medications as a driver who does not use them. We believe that the public interest is better served if we continue our long-standing prohibition on the possession and consumption of substances containing any amount of alcohol. Highway safety is of paramount importance, and there are alternative medications which do not contain alcohol. The FHWA continues to believe that CMV drivers must use non-imparing medications while driving CMVs.

Finally, it should be noted that mere possession of alcohol, standing alone, does not give rise to a reasonable suspicion test under this part, which must be based on observations concerning the appearance, behavior, speech, or body odors of a driver.

**Pre-duty Alcohol Use**

**Comments:** Several commenters stated that drivers should abstain from consuming alcohol prior to duty, but there was no consensus on the length of the required abstinence. The US DOE recommended 5 hours. The Texas Pupil Transportation Drug Testing Advisory Committee recommended 6 hours.

Other commenters, including the American Bus Association (ABA) and U.S. West Communications, recommended 8 hours. The ABA believed that an 8 hour abstinence is necessary in order to prevent an otherwise lawful use of alcohol from invalidating a post-accident test. The Council on Special Transportation opposed the pre-duty prohibition on the use of alcohol because it is unfair to "on call" drivers and the employer can not enforce such a regulation.

**FHWA Response:** Current regulations applicable to persons who operate CMVs in interstate commerce prohibit a person from consuming an intoxicating beverage regardless of its alcohol content within 4 hours before going on duty, operating or having physical control of a motor vehicle. See 49 CFR 392.5. The FHWA believes that the public's interest in safety is better served if the current pre-duty alcohol prohibition is extended to all CMV operators subject to alcohol and controlled substances testing. All commenters who were in favor of prohibiting pre-duty alcohol use supported abstinence periods of 4 or more hours. The FHWA underpins the concern of the ABA that the pre-duty use of alcohol may register during a post-accident test. The 4 hour abstinence period, however, is a minimum requirement, regardless of a driver's alcohol concentration. A driver may in fact need to abstain for a longer period in order to be below 0.02 BAC while operating a CMV.

**Pre-employment/Pre-duty Testing**

**Comments:** The ATA stated that pre-employment testing is unnecessary and that the FHWA should waive such testing under section 12013 of the CMVSA. Once a driver is hired, they state, the person is subject to random and probable cause testing, which is sufficient to deter misuse.

**FHWA Response:** Even accepting, for the sake of the argument, the comment's presumption that pre-employment testing is inherently useless, the FHWA does not believe it has the authority to waive all drivers from a major provision of the legislation. Eliminating all pre-employment tests would greatly diminish the number of required tests, and would, in effect, rewrite the statute.

**Post-accident Testing**

**Comments:** There were numerous comments to this section dealing with such issues as whether an accident should be required or permitted to perform the post-accident testing and how long after an accident occurs should a driver be required to be tested. Commenters, including the California Trucking Association (CTA), supported the position that law enforcement officials either be required or permitted to perform post-accident testing. The CTA stated that the police should perform post-accident testing because they have the necessary equipment and training to perform the tests. One commenter stated that the test should be performed if the accident is reportable, regardless of whether a citation is issued. Other commenters supported post-accident testing only if the driver receives a citation. The NEA opposed the requirement to test all CMV drivers involved in fatal accidents because the tested driver may not have caused the accident. The National Education Association (NEA) stated that there should be some showing of fault or culpability before a driver is required to be tested. A few commenters opposed post-accident testing.

There was no consensus on the maximum time limit after the accident an employer should be required to test the driver. The US DOE recommended one hour while others recommended either four or eight hours as the maximum limit. A few commenters did not like the eight hour time limit but did not recommend an alternative.

The National Solid Waste Management Association (NSWMA) stated that a post-accident test should not be voided if the testing official fails to give notice that the test is required by regulation. Other commenters stated that either police or employers should be permitted to conduct the test at the employer's option.

**FHWA Response:** The Omnibus Act expressly requires that every CMV driver involved in an accident that involves a fatality must be tested for alcohol and controlled substances, regardless of whether the driver was culpable or at fault.

The statute does allow, however, the FHWA to determine what other types of "serious accidents involving bodily injury or significant property damage" should lead to a driver being tested for alcohol and controlled substances. In order to be consistent with current standards, accidents as defined in 49 CFR 390.5 (loway and medical...
Certain tests conducted by law enforcement officials with independent authority may be substituted by the employer for a post-accident test if the employer obtains the results. Since such tests would be conducted independent of this part, a law enforcement official would not give the notification required in this part. Post-accident testing must be done as soon as possible after an accident.

However, the FHWA realizes that there are times when, because of unforeseen problems, a test is not obtainable in the first couple of hours after the accident. The FHWA believes that the eight hour time frame for alcohol testing is therefore necessary to allow for testing under such circumstances. A driver who was over 0.10 BAC at the time of the accident may continue to test above 0.02 BAC at the time of the test. It is generally accepted that alcohol dissipates from the body in a very short time. However, the FHWA believes that a driver, who continues to have a prohibited alcohol concentration up to 8 hours after an accident that requires an alcohol/controlled substances test, should be subject to evaluation by a substance abuse professional.

Random Testing

See Limitation on Alcohol Use by Transportation Workers for discussion of random alcohol testing comments, including the random roadside testing option proposed in the NPRM but not included in the final rule.

Reasonable Suspicion Testing

Comments: A few commenters, including the IBT, were opposed to lowering the number of supervisors needed to make a reasonable suspicion observation, from the current rule's two to the proposal's one. The union stated that it weakens protection for workers. Other commenters supported the single supervisor requirement.

FHWA Response: The FHWA believes that requiring only one supervisor or company official to make a reasonable suspicion determination responds to the operational realities of motor carrier operations. The FHWA received many comments and much oral testimony stating that there are often not two supervisors available to make such determinations on those relatively infrequent occasions when some drivers return to terminals. Only one supervisor or company official might be present and available to observe the driver.

The current drug testing rule, moreover, requires observation by two supervisors or company officials only where feasible. It is the FHWA's experience in administering the rule that motor carriers often, due to the operational characteristics noted above, have not found it feasible to obtain observations from two supervisors. After the fact evaluation by the FHWA of feasibility has proven difficult. In effect, therefore, this rule may not be diminishing significantly the overall numbers of supervisors and company officials making reasonable suspicion determinations.

In order to counteract any perceived increase in the potential for abuse by company officials caused by eliminating the two supervisor requirement, the one supervisor who makes the reasonable suspicion determination is prohibited from conducting the alcohol test. Thus, it remains that at least two company officials must become involved before any driver is determined to have violated this rule such that the driver is referred to a SAP. Drivers are further protected by the requirement for all persons making reasonable suspicion determinations to receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of alcohol misuse.

Exceptions for Testing Performed by Consortiums

Comments: Pinnacle Transport Services, Inc. stated that the reference in the title of this topic to consortiums should be removed because it did not accurately and completely reference the applicable sections.

FHWA Response: The FHWA agrees, and has removed this as a separate exception. The only exceptions available in the final rule are placed under the pre-employment testing sections. The random testing exception has been removed entirely.

Retention of Records

Comments: Numerous commenters, including the ATA, recommended reducing the record retention period from the proposed 5-year period to a 3-year period. Roadway Express, Inc. stated that a maximum record retention period of three years would be consistent with other FHWA recordkeeping requirements for medical records. The US DOE recommended that equipment records be retained for 2 years since they are similar in nature to collection process records. Pinnacle Transport Services, Inc. recommended that the threshold for alcohol test results which are required to be kept for 5 years should be changed from 0.02 BAC to 0.04 BAC. The NSWMA recommended that the annual report of test results be kept for no more than 5 years.

The Arlington, Virginia Public Schools recommended that employers not be required to keep equipment calibration records because the police department does the alcohol testing for the school system.

FHWA Response: The proposed regulations were designed to be consistent among all modes of the Department to permit compliance for employers that are subject to the regulations of two or more DOT agencies. The FHWA does not believe that sufficient justification was presented to warrant a change to the record retention requirements. With regard to maintenance of records by a party other than the employer, the FHWA currently allows agents of the employer to maintain certain records, provided the employer obtains such records for auditing within two business days after the request of an authorized representative of the FHWA. This language is included in § 382.401(d).

Access to Facilities and Records

See Limitation on Alcohol Use by Transportation Workers for discussion of this section.

Required Evaluation and Testing

See Limitation on Alcohol Use by Transportation Workers for discussion of comments on this section.

Other Alcohol-Related Conduct

See Limitation on Alcohol Use by Transportation Workers for discussion of comments on this section.

Disqualifications and Consequences

Comments: The OOIDA and the NEA both recommended that a driver not be disqualified without the benefit of a hearing. The Idaho Department of Law Enforcement recommended that a driver only be disqualified upon conviction of an alcohol violation, not a positive test.

FHWA Response: Because the FHWA has not included the MCSAP random roadside testing option in the final rule, the associated CDL suspension penalties, and the corresponding driving prohibition periods in the employer-based testing option, are also not included in the final rule. The only consequence under this rule for violation of the alcohol prohibitions is referral to a substance abuse professional, who may require the driver to undergo treatment before
returning to perform safety-sensitive functions, and a return-to-duty test with a result below 0.02. The purpose is to ensure that drivers are evaluated for alcohol problems, and that they get the treatment they need before returning to duty. Therefore, the time period a driver is actually prohibited from driving will vary, depending on the speed with which a SAP is consulted and the results of the SAP’s evaluation.

Of course, the driver disqualifications and 24 hour out-of-service period provided for discovery and conviction of certain alcohol offenses by law enforcement officials remain. See 49 CFR 383.51 and 392.5.

The 24 hours out-of-service period is required by the CMVSA to be imposed on drivers discovered by law enforcement officials to have violated the proscriptions in § 392.5, including any measured concentration of alcohol. It is designed to ensure that the employee is provided enough time to become alcohol free prior to driving a CMV again. See discussion below of Section 382.505 in Section-by-Section Analysis.

**On-Duty Time**

**Comments:** Several commenters, including the ATA, oppose recording time spent submitting to an alcohol or controlled substances test as on-duty time. The ATA stated that time spent acquiring or renewing a CDL or taking a physical examination is not logged as on-duty time. The recording of on-duty time while performing a mandatory test would have a significant impact on the industry in terms of lost productivity and other costs. Testing is a fitness for duty issue, they believe, not the performing of work for an employer. OOIDA stated that return-to-duty testing should always be on-duty time. STA United Inc. stated that return-to-duty testing should be on-duty time if the driver continues to work for the same employer in a job not related to safety during rehabilitation.

**FHWA Response:** Testing under these requirements is done to deter CMV drivers from using alcohol and controlled substances. The FHWA continues to believe that all time spent travelling to and participating in either a drug or alcohol test is to be logged as on-duty time when a random, reasonable suspicion, post-accident, or follow-up test is directed by or on behalf of a motor carrier.

**B. Controlled Substances Docket MC-92-23**

The comments to docket MC-92-23 which are similar to those considered in the discussion of the comments to the alcohol testing docket MC-92-19 are not discussed again below. The following discussion involves only comments that are different from those submitted to docket no. MC-92-19 and the common preamble, Limitation on Alcohol Use by Transportation Workers.

The FHWA received 107 comments to this NPRM. The commenters included: Employers; drivers; driver’s associations; unions; MROs; SAPs; and Federal, State and local governments. Commenters from government agencies included law enforcement agencies and school districts.

**Applicability**

**Comments:** The American Postal Workers Union (APWU) stated that postal workers should be exempt from controlled substances testing. The Truck Stop Operators Association stated that mechanics should be subject to the FHWA rules.

**FHWA Response:** As stated above, only drivers waived from CDL requirements are similarly waived from the alcohol and controlled substances testing regulations. Mechanics who hold CDLs to operate CMVs for truck stop operators will be required by this rule to submit to alcohol and drug testing if they operate CMVs on public highways.

**Definitions**

**Comments:** One commenter stated that the definition of MRO should include health care professionals because the FHWA allows these professionals to perform medical examinations. One commenter at the San Francisco, California, hearing recommended that a definition of “verified negative test” be included in this section. Commenters to the docket and at the Washington, D.C. hearing that the definition of SAP should include a “certified employee assistance professional”, “occupational health nurse” and “certified addiction counselor”. The Employee Assistance Professionals Association recommended that only their members be allowed to serve as SAPs.

The IBT said that “canceled test” should be defined in part 40, if at all. The IBT believed that the use of the word “adulteration” in the definition of “canceled test” was confusing. In addition, the IBT recommended that MROs be required to take MRO courses and pass a qualifying examination. The IBT also believed that SAPs should be certified, be in current practice and have appropriate training.

**FHWA Response:** The FHWA agrees with the IBT that the definition of the term “canceled test” was confusing and has concluded that the FHWA’s restatement of part 40 issues is unwarranted. The FHWA has decided to remove this section, making part 40 procedures for canceled tests to be the FHWA standard.

The definitions of a SAP, verified negative test, and the qualifications of MROs and SAPs also involve Department-wide issues and thus will be controlled by regulations issued the Office of the Secretary 49 CFR Part 40. See the Office of the Secretary’s responses to these comments in the final rule amending part 40, Docket No. 48153, Procedures for Transportation
Workplace Drug and Alcohol Testing Programs, published elsewhere in today's Federal Register.

Starting Date for Controlled Substances Testing Programs

Comments: One commenter was concerned about the proposed §382.115(c) regarding when to begin business after the second year after implementation of the rule. One commenter stated that the implementation dates should be the same for all employers. Other commenters believed that the alcohol and controlled substances testing programs should be implemented within 6 months of the effective date of the regulations. The Montana Office of Public Instruction suggested that implementation be delayed until July 1, 1995, to allow Montana school districts to minimize negative fiscal consequences to existing programs.  

FHWA Response: Given its experience administering the drug testing program under part 391, subpart H, the FHWA believes that small employers will require more time to implement changes mandated by the Omnibus Act than large employers. Small entities may have difficulty implementing all of the requirements within one year. Larger employers, however, should be able to implement the programs within approximately one year. Accordingly, large employers (fifty or more drivers) will be required to implement a complete, fully operational program that complies with this rule and part 40 on January 1, 1996. Small employers (fewer than fifty drivers) must implement the requirements of this part and part 40 on January 1, 1996.

Furthermore, the Department has decided that all employers subject to the current drug testing regulations at part 391, subpart H, must begin split sample collections and provide CMV drivers the opportunity for split sample reconfirmation of a verified positive drug test result within 6 months from today, in accordance with the amended part 40. Since this only affects those persons subject to current drug testing under subpart H, amendatory language has been inserted in subpart H requiring this Department-wide procedure.

Controlled Substances Testing—General

Comments: The IBT recommended removing the reference to "prescription drug", because such a reference was not in the present rule.  

FHWA Response: The FHWA agrees that the reference to prescription controlled substance use should be deleted. The FHWA has used the term "therapeutic drug use" in §391.97(d) and has placed that phrase into this rule.

Pre-Employment/Pre-Duty Testing

Comments: The International Brotherhood of Teamsters recommended retaining the 12-month participation option which is currently part of the exception criteria in subpart H. Two commenters recommended that employers be permitted to obtain and use an applicant's prior testing information during the hiring process as a condition of employment. The OOIDA was opposed to requiring a driver to sign an authorization for the release of test results as a condition of employment.  

FHWA Response: The subpart H, "12 month participation in a random drug testing program" allow kept in will be retained. 49 CFR 391.103(e)(1)(ii)(B). See the discussion of § 382.413 below for a discussion of release of previous employers' testing information.

Post-Accident Testing

Comments: The OOIDA opposed post-accident testing without probable cause. Other commenters believed that the term "safety sensitive function" should be defined. The Edison Electric Institute suggested that paragraph (a)(1) be revised to read "** * * performing a safety sensitive function with regard to driving, loading or securing loads on vehicles that are driven on a public highway." In addition, commenters asked if continuous procedural instructions about post-accident testing would include ensuring that post-accident testing kits are kept in each vehicle and that reminders are posted on bulletin boards.

The ATA believed that post-accident testing should apply only to those drivers involved in a fatal accident for which they were issued a citation for a moving violation. One commenter was opposed to the provision that a citation had to be issued. A few commenters stated that there should be no acceptable reason for leaving the scene of an accident.

One commenter believed that the "tow-away" requirement in accidents should be replaced with minimum dollar amounts. For example, $2,500 for "vans" and $5,000 for "buses and trucks" could be used. Another commenter suggested that the FHWA either require that a blood test be performed on a driver who is incapacitated for at least 24 hours or require a law enforcement official to perform the test.  

FHWA Response: The Omnibus Act requires that testing be conducted after all fatal accidents, regardless of whether or not a citation is issued. Safety-sensitive functions are defined in § 382.107 of the rule. The regulations require that the employer provide employees with necessary post-accident information, procedures, and instructions so that the employees may be able to comply with the requirements of this section. The FHWA believes that the employer should be given maximum flexibility in implementing the post-accident drug testing requirements. "Post-accident testing kits" and bulletin board notices might be possible options for complying with the regulations, but there is no requirement to produce either such kits or notices. There is also no requirement, or authorization, to take specimens of any kind from an incapacitated driver unable to consent to testing.

The FHWA believes that the "tow-away" criteria appearing in the definition, adopted from 49 CFR 390.5, is better criteria for an accident because property damage estimates sometimes change. Finally, it is reasonable to allow drivers subject to post-accident testing to leave the scene of the accident for medical and other emergencies.

Random Testing

Comments: One commenter was opposed to any random testing for controlled substances. A few commenters opposed testing by employers. Though not proposed, other commenters recommended that the drug testing be done at the roadside by government officials.

Although the FHWA did not provide any options for a random testing rate in the drug testing NPRM, many commenters recommended rates differing from 50%.

One commenter suggested that a statement should be added to this section regarding the legality of requiring an employee to submit to testing on off-duty time. Another commenter questioned the requirement to perform random selections at least quarterly.

FHWA Response: For a discussion of adjusting the random drug testing rate in a manner similar to the alcohol testing rate adjustment provided in this rule, see the NPRM published elsewhere in today's Federal Register. 

To preserve randomness and the deterrent value of the program, drivers must have an equal chance of being randomly tested throughout the year. Due to the varying sizes of employers, however, nowhere in the rule is it required that random selection be made at least on a quarterly basis for all employers. The rule merely requires
that testing be spread reasonably throughout the year. As stated above, the time spent performing most tests must be logged as on duty. Compensation arrangements between drivers and their employers is beyond the scope of FHWA regulatory authority.

Reasonable Suspicion Testing

Comments: One commenter suggested that the supervisor's observations leading to a reasonable suspicion test be documented within two hours of the observation. Another suggested that the time requirement for documentation be reduced to within two to six hours from the 24 hours provided in the proposal. One commenter stated that documentation should not be attached to the results, but should be available upon request.

FHWA Response: The FHWA currently requires in 49 CFR §391.99(d) that documentation of reasonable suspicion determinations for drug tests be completed within 24 hours of the observed behavior or before the results of the tests are received, whichever is earlier. There is no requirement that the written documentation for a reasonable suspicion test be attached to the test result itself.

This requirement is being carried over for drug testing only in this rule. An employer may need more than two or six hours to document a reasonable suspicion test. The 24 hour period should allow documentation to occur by the next day's shift at the latest because, in most situations, test results will not be available within 24 hours. Written documentation is required for reasonable suspicion drug testing, but not alcohol testing, because of the greater difficulty in recognizing indications of drug use. Unlike alcohol use, drug use, largely because of its general illegality, is not something with which most people are widely familiar. The physical effects may also be more subtle, even to those exposed to drug use and to professional Drug Recognition Experts (DRE). While 60 minutes of training in the indicators of drug use is required by the rule, it is not expected to transform employers into DRE's.

Documentation will allow employers to review reasonable suspicion determinations made by its officials. By comparing the observations recorded before both positive and negative test results, employers may be able to evaluate patterns or procedures which are affecting the efficacy of reasonable suspicion testing, and make changes accordingly. In this way, documentation should also serve to reduce the potential for the use of reasonable suspicion testing as a method of harassing drivers.

Exceptions for Testing Performed by Consortiums

Comments: One commenter stated that this section omits certifications from other employers for trip lease, interchange, or contract drivers.

FHWA Response: Because the exception is being moved to the pre-employment/pre-duty testing section, certifications for trip lease, interchange, or contract drivers are still acceptable.

Split Sample Testing

Comments: A number of commenters were in favor of the section as proposed. One of them stated that it provides further protection of privacy and due process rights.

The ATA stated that split sample testing should only be required for reasonable suspicion testing. One commenter, the Food Marketing Institute (FMI), stated that there has been no demonstrated need for split samples and suggested that split samples be allowed as an option. The FMI recommended that an employer be allowed to choose the testing lab and require the employee to pay for testing. One commenter believed that the employer should not have to pay for the split sample test. Another commenter suggested that the FHWA allow the same laboratory to test the split sample so that employers could avoid both the additional cost of blind sample testing and the necessity of a contract with another laboratory.

STA United believed that part 40 and part 382 should explain which sample is primary and which is secondary by milliliter example. STA United stated that split sample testing is costly. The California Department of Personnel Administration was opposed to split sample testing.

FHWA Response: Because split sample testing involves the issue of testing methodology, the regulations on split sample testing are being written by the Office of the Secretary. The FHWA has decided to remove this section and defer to the requirements in part 40. See the part 40 rulemaking published elsewhere in today's Federal Register, Procedures for Transportation Workplace Drug and Alcohol Testing Program.

Canceled Tests

Comments: Several commenters to this section agreed with it as written and cited the deterrent effect. One commenter recommended that a retest should be performed if the employer requests it. Other commenters recommended adding canceled, follow-up, random, and reasonable suspicion tests to those that require a driver to resubmit a sample. One commenter stated that the requirements of this section were burdensome and costly and should be the responsibility of the testing laboratories and MRO.

FHWA Response: Because canceled tests involve testing procedures applicable to all modes of DOT, the FHWA has decided to remove this section and defer to the requirements in part 40. See the part 40 rulemaking published elsewhere in today's Federal Register, Procedures for Transportation Workplace Drug and Alcohol Testing Program.

Laboratory Notifications

Comments: The California Department of Personnel Administration suggested that laboratory reports be sent directly to the employer.

FHWA Response: The FHWA has decided to remove this section and defer to the requirements in part 40. See the part 40 rulemaking published elsewhere in today's Federal Register, Procedures for Transportation Workplace Drug and Alcohol Testing Program.

Medical Review Officer Notifications to the Tested Individual

Comments: One commenter stated that the prescription medication affirmative defense to allegations of driving while using a controlled substance should be removed. STA United stated that if a MRO does not make contact with the employee, the MRO must include complete documentation with the hard copy test result. The California Department of Personnel Administration believed that the time limit allowed for a MRO review should be restricted. The Department also believed that the employer should instruct the employee to be available for a MRO contact; the MRO to contact the employer within three days if unable to contact the employee; and the employee to contact the MRO within three days. One commenter supported the requirement for the employer to contact the employee promptly if the MRO is unable to reach the employee.

FHWA Response: Because MRO notification to the tested individual involves a multi-modal procedural issue, the FHWA has decided to remove this section and defer to the requirements in part 40. See the part 40 rulemaking published elsewhere in today's Federal Register, Procedures for Transportation Workplace Drug and Alcohol Testing Program.
Medical Review Officer Notification to the Employer

Comments: One commenter believed that the MRO was unable to contact them, unless they requested the results of the tests. One commenter stated that it is unrealistic to require an employer to contact applicants who tested positive for a controlled substance because they probably no longer want the job.

The Carolina Power & Light believed that there should be no requirement that employees be notified after every test. Employers should be allowed to communicate the test results in their own way.

FHWA Response: Notifying the driver of positive test results is essential to fairness. The procedures contained in subpart H and included in this rule are adequate to ensure notification. Yet, it is desirable that review of applicant's tests be conducted in some way. In the current drug testing program, tests are conducted and MROs hold results indefinitely until a driver is contacted. It is only at the point that a driver is contacted that the five day period begins to run to verify a confirmed positive test result. To employ that situation, under this final rule, an employer is required to make a reasonable effort to contact the applicant and inform the applicant that he/she must contact the MRO immediately. If the applicant does not contact the MRO after 5 days, the MRO will verify the test as positive and close the donor's file rather than leave it open indefinitely.

Laboratory Recordkeeping and Record Retention

Comments: The IBT believed that because the requirements of this section are adequately addressed in part 40, the section should be removed. The OOIDA was in support of this section.

FHWA Response: The FHWA agrees. This section is removed.

Medical Review Officer Recordkeeping and Record Retention

Comments: Some commenters stated that they saw no compelling reason for this requirement and recommended that employers be permitted to be the custodians of test results.

FHWA Response: The FHWA does not agree that employers should be the sole custodians of test results. Because the MRO makes controlled substances test determinations, the MRO must also retain copies of test results as a back-up and for use in compliance enforcement and in resolving potential disputes involving test results.

Employer Record Retention

Comments: The OOIDA was in favor of the regulations as proposed. Mobile Laboratory Services recommended that employers be allowed to retain any copy of the custody and control form because employers often do not get the copy that shows the controlled substances test results from the MRO.

Roadway Express Inc. and ATA recommended that the record retention period should be reduced to three years, consistent with other FHWA record retention requirements. The Baltimore Gas & Electric Company believed that a retention period should be assigned to each record to eliminate errors in their maintenance.

FHWA Response: The FHWA disagrees with the commenter who stated that the employer be allowed to retain any copy of the custody and control form because employers do not always receive the employer copy of the form. The employer is required to retain the employer's copy of the custody and control form, and not, for instance, the copy of the form which the testing laboratory sends to the MRO. The MRO might change a laboratory confirmed positive test result to a verified negative test result after affording the donor an opportunity to present an affirmative defense.

The FHWA believes it must remain consistent with the other operating Administrations who all have a five year recordkeeping requirement for positive test results.

Reporting of Results in a Management Information System

Comments: One commenter stated that the amount of information submitted in response to the annual reporting requirement should be dependent on the number of persons subject to the rule. The DOT should provide the annual reporting form and alcohol testing form free of charge. One commenter suggested that the reporting year should be July 1 through June 30 with the due date in August of each year. Conoco Inc. objected to the proposed annual reporting requirement and suggested continuation of the current system.

FHWA Response: Annual reporting of results will assist the FHWA in determining the need for future action on the programs. Without such information, the FHWA has no way of discovering whether the use of drugs and/or alcohol is decreasing or increasing. This information is needed to reassess such things as the efficacy of the program, the random testing rate, the need for various types of testing programs, and whether additional countermeasures are necessary. Though the FHWA wishes to simplify recordkeeping, it must maintain similar recordkeeping requirements as other DOT modes, especially for those employers subject to the jurisdiction of...
two or more Administrations. The calendar year is used as the reporting year. The model forms provided with this rule may be used to compile the annual report.

Access to Individual Records

Comments: Many commenters expressed their frustration with the lack of a system of drug testing information under the current drug testing rule. Many respondents favorably to the question in the NPRM’s preamble about making release of such information a condition of employment as a driver. Some went so far as to say that the program was meaningless without some system, because drivers who test positive merely go to work for another employer without ever being recertified as medically qualified or taking a return-to-duty test. Other commenters strongly opposed requiring information sharing as a violation of privacy rights.

FHWA Response: The FHWA agrees that the lack of shared information has left the current drug testing program with a large hole through which drivers can avoid the purpose of the program—to deter drug use by drivers. Some drivers are continuing to use drugs, and when caught, merely change employers. Section 362.413 of this final rule has been designed to ensure that drivers complete the required rehabilitation and return-to-duty tests. By making the information releasable only pursuant to the driver’s consent, privacy concerns are obviated.

Required Evaluation and Testing

Comments: NSWMA recommended that drivers who have tested positive for controlled substances only be allowed to perform safety-sensitive functions necessary to respond to an emergency under a motor carrier or government escort.

FHWA Response: Though not stated expressly in the rule, it is reasonable to allow a driver to temporarily continue to perform safety-sensitive functions after a violation of the rule’s prohibitions in an emergency situation. In such a situation, an employer or government official may not always be available to oversee the driver’s action. For example, a driver who has violated the rules may move a truck carrying hazardous materials off of a bridge or a railroad track crossing. These types of instances will be rare. If the driver is the only available person at the scene capable of eliminating the imminent danger to public safety, the driver should be allowed to perform the safety-sensitive function only until the danger has ceased.

Disqualifications and Penalties

Comments: The IBT stated that a one year loss of driving privileges for a refusal to submit to a required test is unduly harsh. A refusal to test should be the same penalty as a positive controlled substances test. The union stated that often it is unclear whether or not the driver’s words or behavior constituted a refusal to be tested.

FHWA Response: The FHWA believes that the motor carrier is not unduly restricted in educational material development. The final rule contains the minimum required educational material content. The FHWA allows the employer considerable latitude regarding additional materials and the form of dissemination. A live presentation is not required. The regulations require that the educational materials must be provided to the employee and that the employee and employer sign the employer’s notice of the availability of the materials.

Controlled Substance Training for Supervisors and Company Officials

See Limitations on Alcohol Use by Transportation Workers for discussion of this section.

Referral, Evaluation and Treatment

See Limitations on Alcohol Use by Transportation Workers for discussion of this section.

PART 395—HOURS OF SERVICE OF DRIVERS

Definitions

Comments: Several commenters supported requiring time spent in the controlled substances testing process as on-duty time. The IBT recommended, including time spent travelling to and from the collection site as on-duty time. Other commenters stated that the definition of on-duty time should include return-to-duty testing.

The Western Company believed that including testing as on-duty time would cause a significant burden on the industry.

FHWA Response: See the response to comments under Docket MC—92–19 above.

D. Docket No. MC—116—Other

Comments Regarding Controlled Substances Testing

Comments: The ATA stated that physicians who perform biennial medical examinations and prospective employers should have access to prior controlled substances test results without the need for an employee’s authorization.

The regulations require a CMV driver who receives a citation in an accident to be tested, yet the employee may not receive the citation until days after the accident, when any controlled

Conducted by an instructor who is able to answer questions from the
considered in the part of the common preamble entitled, "Overview of the Operating Administration's Final Rules."

The drug and alcohol testing requirements are, to the extent possible, identical. For example, the presumptive effects of the Omnibus Act are the same for both the alcohol and drug elements of the program, and is discussed as a whole. In contrast, there is a difference between the exception criteria to a pre-employment alcohol test and a pre-employment drug test, and both provisions are discussed.

Subpart A—General

Section 382.101 Purpose

The purpose of this rule is to establish employer-based alcohol and controlled substances testing programs to help prevent accidents and injuries resulting from the misuse of alcohol and controlled substances by drivers of commercial motor vehicles. This rule prohibits any alcohol misuse that could affect performance of driving a CMV, including: (1) Use on the job; (2) use during the four hours before driving a CMV; (3) having prohibited concentrations of alcohol in the system while driving CMVs; (4) use during 8 hours following an accident; and (5) refusal to take a required test. This rule prohibits any controlled substances use, without a licensed doctor of medicine or osteopathy's written prescription.

This rule requires pre-employment, reasonable suspicion, random, post-accident, return-to-duty and follow-up testing using procedures specified in 49 CFR part 40. These procedures use an evidential breath testing device for alcohol testing. For controlled substances testing, urine specimens are collected and testing by a laboratory certified by the Department of Health and Human Services is required. Additional testing under the authority of this rule for drugs other than those specified in part 40, without the permission of the Department, is strictly prohibited. The primary purpose of the testing provisions is to deter misuse of alcohol and controlled substances.

Following a determination that an employee has misused alcohol, this rule requires the employee's removal from safety-sensitive functions until, at a minimum, (a) The employee undergoes evaluation, and where necessary, rehabilitation,

(b) A substance abuse professional determines that the employee has successfully complied with any required rehabilitation, and

(c) The employee undergoes a return-to-duty test with a verified negative test result.

This rule mandates reporting and record keeping requirements and provide for alcohol and controlled substances misuse information for employees, supervisor training, and referral of employees to substance abuse professionals (SAP).

Section 382.103 Applicability

The FHWA's rule focuses on function rather than a defined job or position. An individual's job may encompass several different functions, some of which are not safety-sensitive. Since alcohol is a legal substance, alcohol use is relevant.
only to the extent its use coincides with performance of a safety-related function. As a safety regulatory matter, for example, the rule does not prohibit a school bus driver from having a drink before or while performing functions that are not safety-sensitive (as long as no other regulation is violated). For example, if the school bus driver is receiving all-day training on retirement planning along with non-safety employees and the other employees can have a drink at lunch, the school bus driver may also, provided the driver will not be operating a school bus within 4 hours.

Testing only applies to drivers operating in the United States. Consistent with CDL requirements, this rule does not apply to drivers operating outside the 50 States and the District of Columbia. Drivers operating in territories of the United States, such as Guam or Puerto Rico, therefore, are not covered by this rule.

At this time, testing also does not apply to those drivers who operate in the United States, but normally report for duty in a foreign country, whether or not the employer is foreign-owned or the employee is a foreigner. An NPRM, published elsewhere in today's Federal Register, proposes, however, to add foreign-based drivers operating in the United States to the program. In the meantime, only foreign and American citizens who report for duty at an employer's terminal in the United States are subject to these requirements.

Section 382.105 Testing Procedures

The final rule requires that employers ensure that all alcohol and controlled substances testing conducted under these rules complies with the procedures in the amended 49 CFR part 40. See Procedures for Transportation Workplace Drug and Alcohol Testing published by the Department elsewhere in today's Federal Register. The FHWA incorporates by reference the amended 49 CFR part 40.

Section 382.107 Definitions

See Limitations on Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.109 Preemption of State and Local Laws

See Limitations on Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.111 Other Requirements Imposed by Employers

See Limitations on Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.113 Requirement for Notice

Before performing an alcohol or controlled substances test under these rules, the employer must notify the driver being tested that the alcohol or controlled substances test being administered is required by the rule. The notice can be oral or written. Use of the U.S. Department of Transportation Breath Alcohol Testing Form or the controlled substances custody and control form, whichever is appropriate, may serve as the required notice. An employer shall not falsely represent that a test administered under their own or other authority independent of FHWA's authority is being administered under FHWA requirements.

Section 382.115 Starting Date for Testing Programs

Interstate motor carriers subject to 49 CFR part 391, subpart H prior to the effective date of this rule must implement the split sample urine collection procedure within six months of the publication date of this final rule. The split sample urine collection procedures for controlled substances testing have been codified in the regulations since the original FHWA controlled substances testing regulations went into effect on December 21, 1988, though, until now, it was merely an option and not required. See 49 CFR 40.25(f)(10). Therefore, employers currently subject to part 391 controlled substances testing should not be overly burdened in changing their programs to incorporate the split sample requirement. The Department is changing the procedures slightly with respect to the laboratory that will perform the analysis of the split sample. Those changes are contained in the part 40 amendments published elsewhere in today's Federal Register.

Except for the split sample urine collection implementation date for interstate motor carriers subject to part 391, subpart H, all large employers must implement the requirements of the rule beginning on January 1, 1995. Small employers must implement the rule beginning on January 1, 1996. The size of the employer is determined by the number of drivers it employs. Interstate motor carriers currently subject to 49 CFR part 391, subpart H must switch to implementation of part 382 on the appropriate date. An employer beginning operations before the applicable implementation date of part 382 is required to implement part 391 drug testing only, and then will be required to implement part 382 alcohol testing and change to part 382 drug testing on the appropriate implementation date.

The staggered timetable should allow smaller employers to join alcohol and controlled substances testing programs already established by larger employers or preexisting consortia, which may reduce their costs. The implementation schedules also take into account the time needed by manufacturers to produce the required breath test devices. All employers must have an alcohol and controlled substances testing program in compliance with this final rule in place two years after the effective date of this rule.

Subpart B—Prohibitions

This rule prohibits certain drug and alcohol usage by CMV drivers. A driver is prohibited from performing, and an employer is prohibited from using a driver to perform, safety-sensitive functions after a positive drug test result or an alcohol test result indicating a 0.02 BAC, regardless of when the drug or alcohol was ingested and regardless of whether or not the driver is under the influence of alcohol or drugs, as defined in Federal, State, or local law.

Section 382.201 Alcohol Concentration

See Limitations of Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.203 Alcohol Possession

This section prohibits a driver from possessing unmanifested alcohol products while driving a CMV. The FHWA has had a long-standing requirement that no driver shall drive a CMV while possessing any product containing alcohol, regardless of its alcohol content. The FHWA will extend this requirement to all CMV drivers subject to this rule. A driver may not possess medication, food, or other alcohol-containing products that are not specifically manifested to be on the truck or bus. A manifested alcohol product is any product that is being transported on the CMV as a part of the shipment of freight.

Section 382.205 On-Duty Use

See Limitations of Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.207 Pre-Duty Use

See Limitations of Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.
Section 382.209 Alcohol Use
Following an Accident

See Limitations of Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.211 Refusal to Submit to a Required Test

The FHWA will disqualify drivers for one year, under the procedures in 49 CFR part 386, if a driver refuses to submit to a post-accident test after a fatal accident. See § 382.507.

An applicant's or driver's refusal to submit to a pre-employment test or a return-to-duty test will not trigger the need for evaluation by a SAP. In those cases, the applicant or driver is not performing a safety-sensitive position from which to be removed. Since those tests are a condition precedent to starting or returning to perform safety-sensitive functions, the applicant or driver simply could not be hired or returned to duty.

Section 382.213 Controlled Substances Use

The FHWA currently prohibits the use of controlled substances by drivers (49 CFR § 392.4). Drivers who use drugs are rendered medically unqualified to drive in interstate commerce (49 CFR § 391.103(d)). Similarly, this section prohibits drivers from using controlled substances, except pursuant to a doctor's prescription. The doctor must also advise the driver that the substance does not adversely affect the driver's ability to safely operate a commercial motor vehicle. Employers are prohibited from permitting a driver to perform safety-sensitive functions while using drugs. The employer may require a driver to inform it of any therapeutic drug use otherwise prohibited by this section.

Section 382.215 Controlled Substances Testing

Similar to the current drug testing program, drivers are prohibited from driving, and employers are prohibited from using a driver, who tests positive for drugs or with a 0.04 or greater BAC. The prohibition remains in effect until the driver complies with the requirements of section 382.605, including evaluation by a SAP.

A driver who is prohibited from performing safety-sensitive functions may be assigned to non-safety-sensitive functions until such time as the driver complies with the requirements for returning to duty in this part.

Subpart C—Tests Required

The FHWA's current drug testing regulations require pre-employment, periodic, reasonable cause/suspicion, post-accident and random tests (testing also is required for drivers who seek to return to work following a positive test or refusal to submit to a test). The Omnibus Act requires all these forms of testing except periodic tests, which generally are performed as part of required physical examinations for some drivers operating in interstate commerce, and may be suspended if certain conditions are met. Although periodic testing is discretionary under the Omnibus Act, the FHWA will not to require or authorize periodic testing for alcohol or controlled substances. Of course, employers that wish to continue to perform periodic testing under their own authority may do so.

Section 382.301 Pre-employment/Pre-Duty Testing

In order to give employers flexibility, this section allows an employer to forgo administration of a pre-employment test if the driver has had an alcohol test conducted under any DOT agency's alcohol misuse rule following part 40 procedures with a result less than 0.04 within the previous six months and the employer ensures that no prior employer of whom the employer has knowledge has records showing a violation of these rules within the previous six months. Generally, this means that when checking prior employers to obtain test results within the past six months, the new employer must also determine that the prior employers have no records of a violation of an OA alcohol misuse rule within 6 months. The new employer wishing to do so, must check all known prior employers within the last six months.

The exception for pre-employment drug testing is narrower. In addition to the above criteria, there are participation requirements, which are carried over from the current rule, § 391.103(d).

In order to avail itself of either exception, an employer must obtain the information listed in paragraph (d).

The FHWA expects employers to conduct pre-employment testing of drivers each time a driver returns to work after a layoff period when the driver does not continue to be subject to random drug testing or has been employed by another entity. However, if a driver is laid off, but continues to be subject to random drug testing and is not employed by another entity, a pre-employment test is not required under this section.

The following examples describe situations in which an employer must perform pre-employment tests.

1. A new employer just started operating CMVs in commerce. All drivers that would be hired to drive CMVs subject to this rule will fall under the pre-employment testing requirements.

2. Employer A purchases Employer B. The pre-employment testing requirements would not be applicable to Employer A, because the individual's employment status has not been interrupted.

3. All scenarios in which an employer name changes occur, the pre-employment requirements would not apply.

4. An employer is organized in divisions and subsidiaries. In any case where a driver would be transferred from one division to another, the pre-employment requirements would not apply. Under this scenario the employer is one corporate entity. The situation where a driver transfers from one wholly owned subsidiary to another, a pre-employment test would be needed, because each subsidiary is considered a separate corporate entity.

5. A driver usually drives vehicles for which a CDL is not required to operate, but then is required to obtain a CDL and drive CMVs for the same employer. A pre-employment test would be required because the driver will be subject to part 382.

6. Any time a driver is hired and has not been part of a drug program that complies with the FHWA regulations for the previous 30 days, a pre-employment drug test is required.

When any pre-employment test is required, an employer must actually test the individual or meet all of the respective requirements for pre-employment exceptions for alcohol or controlled substances.

Section 382.303 Post-Accident Testing

The definition of accidents that trigger a post-accident test is contained in 49 CFR § 390.5. As soon as practicable following an accident, an employer shall test a surviving driver for alcohol and controlled substances, when any person involved in the accident has been fatally injured or if the driver received a citation for a moving traffic violation arising from performance of a safety-sensitive function with respect to the accident. The need for testing is presumed. Any decision not to administer a test must be based on the employer's determination, using the best information available at the time,
that a human being did not die or that the employer's CMV driver was not cited for a moving traffic violation arising from the accident within such time that a test could be conducted within 32 hours after the time of the accident.

Employers are also obligated to provide information to their drivers to allow them to arrive at an accident site in a timely manner. This is especially important for employers whose operations occur in remote areas. Drivers are then obligated to follow the instructions and see that the tests are conducted. Any driver subject to post-accident testing who leaves the scene of an accident before a test is administered or fails to remain readily available for testing may be deemed by the employer to have left the scene of an accident. In such circumstances, the employer is obligated to follow the instructions and ensure that the driver is available for a post-accident test. This, of course, does not mean that necessary medical treatment for injured people should be delayed or that a driver cannot leave the scene of an accident for the period necessary to obtain assistance in responding to the accident or to obtain necessary emergency medical care.

Testing of drivers for drugs must be initiated prior to the 32nd hour after the accident. As in alcohol testing, if the citation is not issued by the key hour or testing is not initiated by that hour, there is less likelihood of obtaining a meaningful result. The employer then will have to cause attempts to administer the test and must explain why the employer was unable to administer a drug test. Under no circumstances is an employer authorized by this rule to conduct alcohol or drug testing on dead CMV drivers. In lieu of administering a post-accident test, employers may substitute a breath or blood test for the use of alcohol and a urine test for the use of drugs administered by on-site police or public safety officials under separate authority. This may be particularly useful if that test can be administered before the employer can get to the scene. These local authorities often are first to arrive at an accident site, particularly if the accident occurs in a remote area, and sometimes are equipped to conduct

field alcohol breath and controlled substances tests. The employer is allowed to substitute a blood or breath alcohol test and a urine drug test performed by such local officials, using procedures required by their jurisdictions, if the employer obtains the test results from the local jurisdiction or the driver.

An employer substituting a law enforcement-based post-accident test must take the actions appropriate to the result—not using the driver for 24 hours for an alcohol test result between 0.02 and 0.09 BAC, and referral to a SAP for an alcohol test result of 0.04 BAC or greater or a positive drug test result. For example, a rental car company's airport shuttle bus driver is involved in an accident on an airport access road with a non-CMV driver and the non-CMV driver is killed instantly. The CMV driver must be tested under this rule for both alcohol and controlled substances.

An airport police officer at the scene determines, under authority independent of this rule, that the CMV driver should be tested for alcohol use. The police officer requires the CMV driver to submit to a blood test at the airport health clinic using procedures developed by the airport police department for such alcohol use testing. When the rental car company obtains the blood test result from either the driver or the airport police department, such a test will be allowed to substitute for the alcohol test. However, the rental car company will have to require its CMV driver to also submit to a controlled substances test under this rule, since both tests are required after a human being is killed.

Another example could involve an air freight delivery truck driver who falls asleep at the wheel, her truck runs into a median barrier causing the front axle to be bent and inoperable and requiring the vehicle to be towed from the scene. The investigating State patrol officer, based upon observations and material found at the scene, has cause to believe the driver was using an illegal substance and was speeding excessively. The officer cites the CMV driver for excessive speed and requires the CMV driver to submit to urine testing at a local hospital. The urine is sent, as required by that State's laws, to the State's forensic crime laboratory for drug testing. When the employer receives the test result from the driver or State patrol, the employer may use the result, regardless of whether the laboratory used Department of Health and Human Services or part 40 procedures for testing the specimen, rather than requiring the driver to submit to another drug test.

Section 382.305 Random Testing

See Limitations of Alcohol Use by Transportation Workers for a discussion of adjusting the random alcohol testing rate based on the industry positive rate. The alcohol testing rate is set initially at 25%. See also the NPRM on adjusting the random drug testing rate, published elsewhere in today's Federal Register.

This section requires random alcohol testing that is limited to the time period surrounding the performance of safety-related functions. A driver may only be tested while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions. Obviously, the best time to test is before the driver begins to perform the safety-sensitive function. Detection at that point will prevent the driver from actually performing the function while he or she has alcohol in his or her system. However, if the driver understands that a random test will only be administered before he or she begins work and there is an opportunity to drink during work, deterrence is limited. The ability to test just before, during or just after performance increases the deterrent effect and may enable detection of drivers who use alcohol on the job. The purpose of the concept of “just before” and “just after” is to avoid the problem that some safety-sensitive functions could not be interrupted for the performance of a test (e.g., driving a school bus). It is intended to be close enough to the actual performance of the safety-sensitive function, however, that the test results will clearly indicate that the driver has engaged in the misuse of alcohol when performing or about to perform those functions.

This rule, however, will not place such a requirement on controlled substances testing. Controlled substances testing may be performed at anytime while the driver is at work for the employer. The driver may be doing clerical or mechanical repair duties at the time of notification by the employer. This rule will provide that employers require that each driver selected for random testing prove the testing site immediately. In the event the driver is performing a safety-sensitive function when notified, the employer must ensure that the driver ceases the function, consistent with safety, and proceeds to the site as soon as possible.

An employer may not delay a test based upon a consignor's, consignee's, or employer's demand to move freight or passengers. Employers should plan their notifications to reduce conflict
with such demands affecting their random alcohol and drug testing programs. However, employers are expected to notify and conduct tests on drivers as soon as possible after a selection of drivers is made. This means that when a selection of drivers has been made, the employer shall require all drivers selected to submit to testing at their first available time in the terminal or other appropriate location. Employers shall not delay testing for drivers until just before the next selection of drivers names. Although the FHWA has allowed this practice in the past, the FHWA believes that some employers may use such an interpretation to perform quasi-reasonable suspicion tests of drivers by manipulating the timing of such tests, rather than conducting random testing that is not based on individualized suspicion. In addition, employers may have been delaying testing to move freight or allow a driver with a problem to "clean up" prior to taking the test. Under normal circumstances, employers shall not dispatch selected driver on a new trip, from a work reporting location where other drivers are or have been tested, until to only test drivers once every few years. Rather, it will have to test at least once a year and establish a program that will ensure that there is no period of time during which employees know testing "is done for the year." For example, if an employer is required to conduct only two tests and that number of tests are completed by mid-summer, the employer's program must ensure that more tests could be conducted before the following calendar year. Such an employer could conduct random testing every quarter or could randomly select the month, within the next 12 months, for conducting the next test(s). Depending on the month selected, the employer may in fact test more than once in a calendar year.

Using a revolving calendar, the first selection and test is made in May 1995 for the calendar year 1995; the next selection must be for the 12 months from May 1995 to April 1996. In addition, if a consortium sets up a testing pool where this scenario would be applicable, the consortium must also follow this procedure.

Another alternative is for employers to join a consortium with testing pools large enough so that their drivers are always subject to random testing. Although the FHWA has eased the burden on small employers in a number of ways, these restrictions that may raise the effective annual random testing rate are necessary to achieve deterrence in alcohol and controlled substances use. A small employer, of course, can achieve the benefits of a lower random rate without the higher costs of meeting the deterrence requirements if it joins a consortium.

Random testing pools may be formed in a variety of ways. To promote efficiency and reduce costs, particularly for smaller employers and those employers subject to more than one DOT agency rule, the FHWA permits the combination of geographically-proximate drivers covered by different DOT agency rules into one pool. To maintain fairness and the equal chance of each driver to be selected and tested, certain conditions must be met. For example, drivers in any industry who travel most of the time should constitute one pool; others who remain in the vicinity of the testing site should be in another, as long as the selection and testing rates are the same. However, if testing is required of drivers immediately upon selection or whenever they first return to the testing location after their selection (but still unannounced), there would be no need for separate pools. Any acceptable method must ensure that each driver has an equal chance of actually being tested. Although multi-modal pools will be permitted, other specific DOT agency requirements will have to be met, such as the FAA requirement for prior approval of consortium-operated random testing pools.

If the employer joins a consortium, this rule will permit the calculation of the annual rate on either the total number of drivers for each individual employer or the total number of covered employees subject to random testing by the consortium's pool covering the employer. This will mean that a consortium member could have less than its required number of random tests conducted if the overall consortium rate equals the required rate. Thus, if Employer A has ten drivers and the consortium has 500 drivers in the pool covering Employer A, and a 50 percent rate applies, if Employer A chooses to have the rate based on the consortium, the rate is calculated based on the consortium rate rather than the individual rate. Therefore, the consortium must conduct at least 250 tests even if only four or fewer drivers of Employer A are tested. So long as each driver has an equal chance of being tested each time the consortium conducts random tests, the requisite deterrence factor remains. Membership in a consortium, as noted earlier, should improve deterrence for small companies because their drivers will continue to perceive an equal chance of being selected and tested throughout the year.

The FHWA has had many inquiries regarding compliance by owner-operators with the random testing requirements in Part 391. It has been the FHWA's view and will continue to be the view that owner-operators cannot conduct their own random testing program. Owner-operators must meet the conditions of random testing, which include that the random selection process must provide for testing to be unannounced and the timing of a test unpredictable. The FHWA believes that the requirement of unannounced testing requires that an owner-operator must join a consortium or testing pool that includes at least two or more drivers. Owner-operators are expected to join consortiums that have at least two or more covered employees. The other covered employees may be subject to aviation, railroad, mass transit, maritime or pipeline industries, provided that the applicable regulations for those other industries allow inclusion of CMV drivers in their testing pools.

Upon each of the implementation dates for this rule, the FHWA will remove, for the employers subject to the applicable implementation dates, the current prohibition that intrastate commercial motor vehicle drivers shall not be included in random testing selection pools with interstate commercial drivers. As this new rule applies to all inter- and intrastate drivers with CDLs, there will be no need for the separation. However, the FHWA will prohibit the inclusion in the random selection pools of any employees not subject to any of the DOT agency testing rules. When a representative of the FHWA or any DOT agency is investigating an employer subject to these rules, the representative of FHWA must determine whether the required testing rate has been met. Prohibiting non-drivers and other non-DOT covered employees from participating in the same random selection pools will assist the employer in complying with these rules, especially in ensuring that drivers are tested at the required minimum annual percentage rate.

If a driver works for two or more employers subject to FHWA or DOT agency regulations, the driver must be in all of the employers' random testing programs. When drivers are off work due to long-term lay-offs, illnesses, injuries or vacations, the employer has three options. First, the driver's name could be skipped and the next driver's name on the selection list could be selected and tested. If this occurs, the employer must keep documentation that the driver was ill, injured, laid off, or on vacation and that the driver was in the
random selection pool for that cycle. Second, the employer could remove the
driver's name from the selection pool for that cycle. If this is done for drug
testing and the driver is out of the
program for more than 30 days, the pre-
employment testing provisions of this
rule will apply. Finally, the employer
could set the driver's name aside until
the driver comes back from the
extended leave and the employer would conduct the test at that time. The
employer shall not, however, notify any
driver to submit to a test while the
driver is off work due to these extended
leave periods. Employers with seasonal
fluctuations in the number of drivers
actually driving should adjust each
random selection episode to reflect the
fluctuation, thereby ensuring an equal
chance of all drivers being selected.

A consortium that performs selection
and/or testing services as agents for the
employer must prepare and provide to
the employer complete and
comprehensive descriptions of the
procedures used by the consortium. An
employer must have this information
readily available for inspection. The
consortium, and an employer who does
not use a consortium, must include in
these descriptions: how the random
selection pool is assembled; the method
of selection and notification of drivers;
the location of collection sites (at
terminals, clinics, "on the road", etc.);
methods of reporting the test results on
each driver; and summary reports of the
consortium's program. Also,
documentation must be provided that
the consortium is testing at the
prescribed minimum annual percentage
rate for alcohol and/or controlled
substances. Each employer is at no time
relieved of the duty to comply with each
requirement of this rule.

Section 382.307 Reasonable Suspicion
Testing

See Limitations of Alcohol Use by
Transportation Workers for discussion of
the majority of the elements of this
section.

In the FHWA rule, only one
supervisor is required to make the
reasonable suspicion determination.
That supervisor may not, however,
conduct the alcohol test on the driver.
Documentation of the grounds for
reasonable suspicion to require a
controlled substances test must be made
and signed by the supervisor within 24
hours of the observed behavior or before
the results of the test are released,
whichever is later.

Section 382.309 Return-to-Duty
Testing

See Limitations of Alcohol Use by
Transportation Workers for discussion of
this section.

Section 382.311 Follow-Up Testing

See Limitations of Alcohol Use by
Transportation Workers for discussion of
this section.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

Section 382.401 Retention of Records

To provide for FHWA oversight of the
alcohol and controlled substances
testing programs and to protect driver
confidentiality, an employer is required to
maintain, for a specified period, in a
secure location with controlled access,
certain records of its alcohol and
controlled substance use prevention
program. This section itself does not
require any records to be generated.
Other sections of the rule does that.
This section merely sets forth the retention
periods for records generated pursuant to
other sections of the rule.

The records may be included in
personal records that have controlled
and secure access only by authorized
personnel. The FHWA is requiring all
documents be maintained in accordance
with § 390.31, which sets forth
requirements for copies and long-term
storage of documents, including
computer storage systems. Though the
records may be maintained anywhere,
the employer must make them available
to an FHWA representative, upon two
days notice, at the employer's principal
place of business.

Section 382.403 Reporting of Results
in a Management Information System

For oversight purposes, each
employer will be required to generate
and retain, at a minimum, an annual
calendar year summary of the results of
its alcohol and controlled substances
prevention program for each calendar
year. The FHWA will randomly select a
sample of employers from all employers
subject to part 382. The sample of
employers will be large enough so that
the sample statistics will have a
acceptable error of plus or minus one
percentage point in a 99 percent
confidence interval. For example, this
means the FHWA will be 99 percent
confident that the actual industry
positive rate is within plus or minus one
percentage point of the sample statistics.

Employers selected to submit data
will be notified by mail during the
month of January of the year in which
the data is due. For example, an
employer who is selected and notified
in January 1996 must report data for
The notice to submit data will specify
the name and address where the data are
to be submitted and enclose copies of
both a long and a short "EZ" form.
Employers will have the option to
submit either form by electronic
transmission and will receive
information on how to submit the forms
electronically.

Previous versions of the forms were
included in the NPRMs [57 FR 58409]
as appendix B to 49 CFR part 40. The
FHWA foresees that the forms or to
instructions may be changed in the
future to make them more
understandable based on future
comments. Therefore, the most current
versions of the long and short "EZ"
forms are contained in this document
for informational purposes only as
Illustrations I and II in the Appendix to
this document respectively. This
appendix will not appear in the Code of
Federal Regulations. The FHWA is not
soliciting employers to submit data by
including the forms in this document.
The FHWA will not enter information
into the MIS from unsolicited
respondents because the sample is
random in nature. The acceptance of
unsolicited responses would bias the
sample. The aggregation of information
collected from solicited reports will be
utilized for program analysis and
to respond to requests for information from
Federal agencies, members of Congress,
and the general public.

Employers whose drivers had any
verified positive controlled substances
test results or any alcohol test results
of 0.02 or greater in the preceding calendar
year must utilize the long form.
Employers whose drivers had no
verified positive controlled substances
test results and no alcohol test results
indicating alcohol concentrations of less
than 0.02 in the preceding calendar
year will be allowed to utilize the short form.
Employers whose drivers had refused to
test in the preceding calendar year will
be allowed to utilize the short form if no
drivers had verified positive controlled
substances test results or alcohol test
results indicating concentrations 0.02 or
greater in the preceding year. Controlled
substances test results must be reported
for the calendar year in which the MRO
made the final determination of the test
result regardless of the date the
specimen was collected. For example, a
final determination of a controlled
substances test result made by a MRO
on January 2, 1996, for a specimen
collected on December 30, 1995, must
be included in the data for calendar year
1996.
Within Section B (Covered Employees) of both the long and short “EZ” forms, employers must submit the number of covered employees in each category subject to testing under the alcohol and controlled substances testing regulations of more than one DOT operating administration (OA), identified by OA. As formulated by the Department, employers who are subject to the alcohol and/or controlled substances testing regulations of two or more OAs must submit data to each regulating OA for those employees covered by that OA’s rule. Employees who perform functions covered by more than one OA should be identified by their employer under the covered position that they will be reported. Data on dual covered employees should be reported to the appropriate OA.

The issue of multi-modal coverage affects railroads, aviation, maritime, and pipeline safety operations. Although many commentators suggested that all CDL holders in the various industries should report to their primary OA, the OAs believe that reportability should be determined by employee function. Therefore, drivers who are subject to the alcohol and/or controlled substances testing regulations of more than one OA must be reported as follows:

For pre-employment and random testing, a driver should be reported to whichever OA covers more than 50% of that driver’s function. If the driver is subject to three or more OA rules, the employer must determine which function the driver performs the greatest percentage of the time and report the pre-employment and random testing results to the OA covering the greatest percentage of the driver’s duties, e.g., driving CMVs 45 percent of the time, flying airplanes 35 percent of the time, and operating railroad equipment 30 percent of the time. For post-accident and reasonable suspicion testing, however, reportability should be determined by the function the driver was performing at the time of the accident or incident. Finally, for return to duty and follow-up testing, the employee should be reported to the same OA to whom the initial positive controlled substances test or alcohol test indicating a concentration of 0.04 or greater was reported. The FHWA must stress here that, although the driver has been tested and is reported to other DOT agencies under their regulations, the driver is prohibited from operating any CMV as required by Subpart E of this rule.

Section 382.405 Access to Facilities and Records

See Limitations of Alcohol Use by Transportation Workers for discussion of this section.

Section 382.413 Release of Alcohol and Controlled Substances Test Information by Previous Employers

Paragraph (a) restates § 382.405(b) in terms of the employer. An employer may obtain any of the information retained by other employers under part 382, pursuant to a driver’s consent.

Paragraph (b), by contrast, provides that an employer shall obtain certain elements of that information, also pursuant to the driver’s consent. This merely makes mandatory that which employers have had the option to do under the current drug testing program—make release of previous testing information a condition of employment as a driver. Information on alcohol and controlled substances testing results from the driver’s previous employers must be obtained generally before offering the driver an employment. An employee is, of course, free to make release of any information a condition of employment, though this section only requires certain information.

Since the information is releasable by the previous employer only pursuant to a driver’s written authorization, an employer must make obtaining such authorization a condition of the driver performing safety-sensitive functions for the employer. Requiring the driver’s consent will ensure that the information remains confidential and is released only to the extent authorized by the driver. The protections of § 382.405 remain in full effect, including allowance of the re-release of information also only pursuant to the driver’s consent.

The information to be released under this section is limited to positive controlled substances test results, alcohol test results of 0.04 or greater, and refusals to be tested, for the two years preceding the date of inquiry. None of the other information required to be maintained by the employer in this rule is required to be released under paragraph (b). Restricting the content of the mandatory inquiries, by not requiring negative drug test results and alcohol tests with results less than 0.04 to be obtained, should minimize the burden of compliance on employers.

This section is necessary to effectuate the referral, evaluation, and treatment requirements of the rule. Whereas the NPRM proposed a system of information and penalty suspensions tied to the driver’s CDL, this final rule includes no CDL consequences because the law enforcement based testing option has not been chosen. Licensing agencies would be understandably reluctant to issue suspensions based solely on the results of employer-based tests, without affording the driver a review process.

Comments to the dockets and experience in administering the current drug testing program make it clear that some system of information is necessary to give effect to the requirements of the rule. One of the major problems with the current drug testing rule is that drivers who test positive merely apply to work with a different employer without taking the required retest or becoming medically recertified to drive. The new employer has no clear way and, unfortunately, too often, no incentive to determine if the driver-applicant is avoiding the requirements. With the rehabilitation requirements in the rule over and above those in the current drug testing program, the incentive to avoid them will only be increased.

The problem is particularly acute in the motor carrier industry, due to its size and turnover rate. Of the approximately 270,000 known interstate carriers, about 10% enter and leave business each year. Adding intrastate carriers, also covered by this rule, only serves to increase the number of drivers in flux. Similarly, of the approximately 6.6 million drivers covered by the rule, it is conservatively estimated that 20% work for a different employer from one year to the next. Given these numbers, it is not difficult to see the potential for getting lost and avoiding the rule’s requirements, especially where there is no tracking system, also covered by this rule, such as the CDL Information System.

Sharing information on recent positive tests, and the requirement in paragraph (g) that employers obtain proof of completion of rehabilitation and return-to-duty test requirements after positive tests, is not such a tracking system. It will help keep drivers, and employers, from avoiding evaluation and possible treatment following a violation, however. Again, it must be emphasized that this section requires nothing that could not be willingly accomplished by employers under the current rule. An employer could make release of prior results a condition of employment as a driver, and should require drivers with positive tests to prove they have been retested and medically recertified as qualified. Employers choose at all, prohibited from using a driver it knows has tested positive but has not been recertified and tested negative. By making such inquiries and conditions mandatory,
An employer that learns that a driver-applicant is prohibited from driving need not refer the driver to a SAP for evaluation and treatment. The employer must, however, obtain proof of a SAP evaluation and return-to-duty test before using the driver-applicant. Therefore, drivers with positive drug test results, alcohol test results of 0.04 or greater, or refusals to test should either maintain copies of subsequent SAP evaluations and return-to-duty tests, or should also consent to release of them along with the required information, in order to show compliance with the rule. Alternatively, a pre-employment test directed by the hiring employer may serve as a return-to-duty test under such circumstances.

In no case should any test result for alcohol or drugs under this part be used to infer that a person is an alcoholic or drug addict. Testing under this part determines whether a driver may need to be removed from safety-sensitive functions and must be referred to a substances abuse professional only. The tests under this part are conduct test only, and do not determine the status of any person. Prospective employers should refer to the requirements of the Americans with Disabilities Act, and implementing regulations, 42 CFR 1630, before taking any employment actions based on SAP evaluations released by drivers to the prospective employer.

This section is consistent with 49 CFR 391.21 and 391.23, which requires a driver-applicant to list the names, addresses, and dates of employment for all employers in the preceding three years (10 years for CDL drivers), and requires employers to investigate the driver’s record by contacting all of the driver’s previous employers within the three preceding years. The information on testing could be easily added to the inquiry. This inquiry requirement has been included in part 382, and not part 391, because part 391 does not cover all employers in the preceding three years. The information required to list and investigate prior employers for purposes of test result information, will be enforced in the same manner that part 391 is currently enforced.

The maximum (14 calendar days) period granted to the employer to obtain the testing information is shorter than the period allowed to investigate the driver’s employment record, as required in 49 CFR 391.23. Since the period of investigation is also shorter, three years rather than two, the burden of compliance is lessened. Fourteen days also makes it more difficult to abuse the section’s intent by discharging drivers before the information is absolutely required to be obtained. As an additional incentive to promptly obtain the required information, and to facilitate future inquiries, paragraph (d) requires the employer to obtain the information even if the driver stops driving before the information is obtained or before the 14 day period had expired.

In this rule, also differing from §391.23, an employer is required in the first instance to obtain the information prior to using the driver. Only if such promptness is not feasible, and only for as long as it remains infeasible, may an employer delay obtaining the information. Obviously, the utility of this provision is diminished the longer an employer waits to make the inquiries. The potential is there, however, for a prudent employer, especially those many commenters who have requested a provision allowing the exchange of information, to obtain meaningful information and to aid drivers who misuse alcohol and drugs by ensuring completion of rehabilitation.

An employer is prohibited in paragraph (c) from using a driver for longer than 14 days without obtaining the prior testing information. The new employer must make a good faith effort to obtain the information. An employer who makes a good faith effort, but through no fault of its own is unable to obtain the information, may continue to use the driver if it makes a note under paragraph (f) of the attempt. For instance, if a previous employer refuses, in violation of §382.405, to make the information available pursuant to the driver’s request, the new employer should note the attempt to obtain the information and place the note with the driver’s other testing information.

Finally, paragraph (f) leaves the form of the release of information to the discretion of the employer. The employer must, however, ensure confidentiality of the information in the same manner as provided in §382.405.

Subpart E—Consequences for Drivers Engaging in Substance Abuse—Related Conduct

Section 382.501 Removal From Safety-Sensitive Function

Paragraph (c) extends all of the driving consequences of violating the rule, provided in subpart E, to commercial motor vehicles in interstate commerce as defined in part 390, as well as CMVs in commerce as defined in §382.107. For example, a driver removed from performing safety sensitive functions because of a rule violation occurring in a 26,001 pound or greater vehicle in inter- or intrastate commerce, also is prohibited from driving a 10,001 pound or greater vehicle in interstate commerce, until complying with §382.605. This provision extends consequences of violations incurred in transportation under CDL jurisdiction to transportation covered by the Federal Motor Carrier Safety Regulations.
Section 382.503 Required Evaluation and Testing

See Limitations of Alcohol Use by Transportation Workers, published elsewhere in today's Federal Register.

Section 382.505 Other Alcohol-Related Conduct

Though the minimum alcohol concentration to incur referral to a SAP and a return-to-duty test is 0.04, alcohol tests with result below 0.04 are also serious and represent a threat to the safety of the motoring public. An alcohol concentration of 0.039 does not warrant evaluation and rehabilitation under the rule, but it may have an adverse effect on the driver's ability. In addition, the driver's blood alcohol curve may be rising. In other words, the individual may have just consumed enough alcohol to eventually produce an alcohol concentration of 0.04 or greater, but the alcohol is just entering the bloodstream and, at the time of testing, the alcohol concentration is below 0.04, but rising. It is, rather, a matter of testing foresight.

Part 382 establishes a program of employer-based testing. Section 382.505 requires a driving prohibition of 24 hours for a test result of 0.02 or greater but less than 0.04. (In most instances, the rehabilitation referral requirements of §382.605 will also take at least 24 hours.)

Section 392.5 (c) and (d), on the other hand, requires law enforcement officials to issue a 24 hour out-of-service order to a driver with any measured alcohol concentration or detected presence of alcohol. There is no 24 hour driving prohibition period in §392.5 required directly of the driver and employer without the involvement of a law enforcement official. Section 392.5(a) and (b) merely prohibit driving after a measured alcohol concentration or detected presence of alcohol, without placing any time limit. Moreover, because tests conducted under part 382 with results below 0.02 are deemed to be “negative” or zero, there can be no measured alcohol concentration for which to prohibit driving under §392.5 when the result is less than 0.02.

Still, an employer must comply with the driving prohibition in §392.5, regardless of a test result below 0.02 or not, if it discovers violation of any of the other proscriptions provided in the section, such as pre-duty use, possession, and detected presence of alcohol. In most circumstances, a driver would also be removed from safety-sensitive functions and referred to a SAP under part 382 for committing such violations, in effect imposing the driving prohibition in §392.5 anyway. If a driver subject to §392.5 is given a test, however, which results in a concentration below 0.04, but the employer detects the presence of alcohol in the driver through other means, the employer is prohibited from using the driver until there is no longer the presence of alcohol.

Post-accident tests administered by a law enforcement official under independent authority may result in a 24 hour out-of-service order issued by the official for concentrations below 0.02 because the test is not administered under part 382.

Section 382.507 Penalties

Section 5(f) of the Act allows the Secretary to determine appropriate sanctions for drivers who are determined through testing developed under this Act to have used alcohol or controlled substances in violation of law or Federal regulation, but are not under the influence of alcohol or controlled substances as provided in the CMVSA. Regulations issued pursuant to the CMVSA impose disqualifications and other penalties for “conviction” by Federal, State, or local law enforcement officials of driving under the influence of alcohol or controlled substances (§383.51). This section provides that employers and drivers who violate these rules, which do not provide for “convictions” or CDL disqualifications, are subject to 49 U.S.C. 521(b), which allow civil forfeiture penalties of up to $10,000.

Subpart F—Alcohol and Controlled Substances Misuse Information, Training, and Referral

Section 382.601 Motor Carrier Obligation To Promulgate a Policy on the Misuse of Alcohol and Controlled Substances

Materials explaining how the employer implements the requirements of this part and the employer’s policies must be provided to each driver. Written notice of the availability of these materials must be provided to representatives of employee labor organizations. In addition to educational information, the materials may also include the description of any self-identification program or procedure under which a driver may decline to perform or continue to perform safety-sensitive functions without penalty when he or she may be in violation of these rules, including any limits on the program. The employer also may include information on additional employer policies with respect to the use or possession of alcohol, including any consequences for a driver found to have a specified alcohol concentration, that are based on the employer’s authority independent of these rules. These additional policies must be clearly identified as based on the employer’s independent authority.

Motivating drivers about safety in the workplace and good health is important to making an alcohol and controlled substances use prevention program work. Because the primary objective of this alcohol and controlled substances misuse program is deterrence rather than detection, it is especially important that, before any testing is begun, employers make their drivers fully aware of the dangers of alcohol and controlled substances misuse in their jobs, advise them where help can be obtained if they have a problem with alcohol or controlled substances use, and the potential consequences for people who violate this rule. An effective company policy and educational effort can more than pay for itself with the benefits it can achieve.

Section 382.603 Training for Supervisors

See Limitations of Alcohol Use by Transportation Workers for discussion of this section.

Section 382.605 Referral, Evaluation, and Treatment

The Omnibus Act requires that an opportunity for treatment be made available to drivers. This does not require employers to provide or pay for rehabilitation or to hold a job open for a driver with or without salary. In the current drug testing rules, the Department decided that it was inappropriate to establish a Federal role in mandating that employers provide for rehabilitation and that it should be left to management/driver negotiation. The same logic will apply here. The FHWA has decided not to mandate employer-provided rehabilitation in this rule. We encourage those employers who can afford to provide rehabilitation to do so through established health insurance programs, since it helps their drivers, benefits morale, is often cost-effective and ultimately contributes to the success of both their business and their testing programs.

This section requires an employer to advise a driver who engages in conduct prohibited under these rules of the available resources for evaluation and treatment of alcohol and controlled substances problems. The employer will have no similar obligation to applicants who refuse to submit to or fail a pre-employment test.
A SAP will evaluate each driver who violates these rules to determine whether the driver needs assistance resolving problems associated with alcohol misuse and refer the driver for any necessary treatment. Before returning to duty after a violation, each driver must undergo an applicable alcohol or controlled substances test with a result of less than 0.02 alcohol concentration and/or a verified negative controlled substances test result. In addition, each driver identified as needing assistance must (1) be evaluated again by a SAP to determine whether the driver needs assistance with a result of less than 0.02 alcohol concentration, (2) be subject to a minimum of six (6) unannounced, follow-up tests over the following twelve (12) months. Compliance with the prescribed treatment and passing the test(s) will not guarantee a right of reemployment. They will be preconditions the driver must meet in order to perform safety-sensitive functions.

For a CMV driver to return to duty following a controlled substances test that results in a verified positive test result, the CMV driver must stop using drugs, be evaluated by a substance abuse professional, and take a return-to-duty controlled substances test with a negative result. The SAP evaluation takes the place of the requirement in 49 CFR 391.43(c) that drivers who test positive for drugs, and are thereby rendered medically unqualified to drive under § 391.41(b)(12), must be recertified as medically qualified to drive. Drivers identified as needing assistance must also complete any rehabilitation required by the substance abuse professional, be re-evaluated by a substance abuse professional to determine whether rehabilitation requirements were followed, and be subject to follow-up tests.

Follow-up and return-to-duty tests need not be confined to the substance involved in the violation. If the SAP determines that a driver needs assistance with a poly-substance abuse problem, the SAP may, for instance, require alcohol tests to be performed along with the required drug follow-up and/or return-to-duty tests, after a driver has violated the drug testing prohibition.

The rule will provide that the evaluation and the rehabilitation may be provided by the employer, by a SAP under contract with the employer or by a SAP not affiliated with the employer. The choice of SAP and assignment of costs will be made in accordance with employer/driver agreements and employer policies.

Other Issues

As in the current drug testing rules, the FHWA wants to provide program flexibility to allow employers to carry out their programs in a more efficient, cost-effective manner and to ease the compliance burden on small businesses. Testing, for example, may be conducted by the employer, an outside contractor, a consortium, a union, or any other party or agent of the employer. The employer remains responsible for compliance with the requirements of this part.

The use of consortia has worked well in the drug testing area. In fact, it is the predominant method of compliance in some industries, particularly among smaller employers. One reason to delay implementation of this rule for smaller employers is to enable them to form or join consortia or large employer testing programs, rather than have to establish their own programs.

Employers may find it more cost-effective and convenient to conduct alcohol testing at the same time they conduct drug testing. Because we are requiring alcohol testing at or near the time of performance, drug testing also would have to occur at such times. For random testing, employers could easily accomplish this by randomly choosing the driver’s number and then testing the driver the next time he or she performs safety-sensitive functions.

Multi-Agency Coverage

In some industries, a significant percentage of drivers are subject to the testing rules of more than one DOT OA; some are subject to the testing rules of more than one federal agency (e.g., drivers covered by the Department of Energy may also be covered by FHWA). Where it will not compromise the effectiveness of the testing program or other requirements, one DOT agency will defer to another or recognize the validity of the other’s requirements.

There are different situations in which multi-agency coverage can occur:

1. A driver may perform different modal functions for the same employer. For example, a driver may act as both a railroad repair person and a truck driver for a single employer, activities regulated by the FRA and the FHWA, respectively. Such a driver could be in a single random pool under these rules, but will have to have an equal chance of being selected for random testing while performing either track repair or driving functions.

2. A driver may have two employers. For example, a driver may fly for one employer and drive for another. That driver will be subject to two random testing requirements and will generally be in two different pools. As discussed above, however, the driver could be covered by one random testing pool, e.g., one run by a consortium; in both situations, the driver will be subject to random testing in either job.

This rule will require that drivers cease safety-sensitive functions in every mode of transportation, once determined to be in violation of any one of the OA rules. We also have been consulting with other federal agencies during this rulemaking proceeding in an attempt to make Federal government rules as consistent as possible. The Department of Energy (DOE) already has issued a similar rule on alcohol misuse for drivers in nuclear facilities. To avoid any potential conflict, DOE officials have indicated that they plan to defer to the DOT rules where there are entities covered by both programs.

Self-Identification/Peer-Referral Programs

Since the FHWA’s primary purpose is to deter drivers from having alcohol and controlled substances in their systems while performing safety-sensitive functions, drivers should be able to identify themselves as unfit to work. The FHWA encourages employers to establish self-identification or peer-referral programs and encourage drivers to use them. These programs, which already exist in some segments of the highway transportation industries, generally allow a driver to decline, without penalty, to perform or continue to perform her job if the driver knows that she is or may be impaired by alcohol or controlled substances. The FHWA will not require self-identification programs, because we believe that they are a matter more appropriate for labor-management negotiations. The successful implementation of such programs depends upon joint labor-management commitment to an alcohol/drug-free work environment.

Any such program, however, could not interfere with the tests required by these rules. For example, a driver could not identify himself as unfit to drive after having been notified of a random or reasonable suspicion test and expect to avoid the consequences for a positive test or a refusal to test. Such a program could, however, permit a driver to initiate a voluntary alcohol test to determine whether the driver is in violation of these rules, without fear of consequences required by this rule, regardless of the test results.
Public information and education programs, in the absence of enforcement activities or sanctions, have never been shown to have an impact on alcohol-related traffic fatalities. Conversely, scores of studies have found that programs involving enhanced education, roadside sobriety checkpoints, and the use of sanctions such as license suspensions frequently have resulted in significant reductions of alcohol-related fatalities. Although there is disagreement on the effectiveness of education alone, it appears that using education as an adjunct to deterrent measures will make both more effective.

**Removal of Part 391, Subpart H**

The present regulations for controlled substances testing are contained as a subpart to the FHWA's driver qualification regulations in part 391, and are applicable only to drivers subject to part 391. Generally, parts 390 through 399 of title 49 subchapter B are applicable to motor carriers and drivers who operate in interstate commerce. The Omnibus Act requires the FHWA to expand the scope of persons required to be tested beyond those subject to part 391. This rule will completely replace 49 CFR part 391, subpart H controlled substances testing on January 1, 1996.

The Omnibus Act requires all operators of CMVs to be tested for controlled substances and alcohol. This encompasses far more drivers than have been subject to parts 390 through 399. It applies to all drivers required to obtain a CDL. Drivers to which Federal drug testing requirements are newly applicable include, but are not limited to drivers and their employers operating wholly in intrastate commerce, employed directly by Federal, State and local governments, including school districts, and drivers with restricted-use CDLs or drivers in a State that does not recognize State option waiver CDLs (farm vehicle operators, firefighters and operators of emergency equipment).

The FHWA will make part 391, subpart H ineffective on the two implementation dates of part 382 to enable motor carriers to continue to use the existing regulations until all requirements of part 382 are to be complied with fully. Table I shows the existing regulations at 49 CFR part 391, subpart H and the section where the FHWA has moved the existing regulation into this rule.

### Table I

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Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866. This rule has been reviewed under this order. It is significant within the meaning of Department of Transportation regulatory policies and procedures, too. It is anticipated that the economic impact of this rulemaking will be substantial; therefore, a full regulatory evaluation is required and has been prepared. The regulatory evaluation is included in the docket.

Executive Order 12875 (Enlarging the Intergovernmental Partnership)

The FHWA has determined that this action's NPRM published on December 15, 1992 (57 FR 59516) contained a requirement that must be analyzed in accordance with Executive Order 12875. The FHWA has reviewed the final rule under this order. The FHWA has determined that the proposed requirement for random roadside alcohol testing by State and local law enforcement officials would mandate States to perform roadside alcohol testing on commercial motor vehicle drivers. The requirement would not completely reimburse States for the cost of such a mandated program. The FHWA has decided not to mandate roadside alcohol testing as proposed, because of many factors including this Executive Order. See the section "Other Issues—Motor Carrier Safety Assistance Program (MCSAP)" in Limitations of Alcohol Use by Transportation Workers elsewhere in today's Federal Register for further discussion of the FHWA's and the DOT's analysis of this Executive Order as it relates to this final rule.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this rule on small entities. This final rule will require employers to test drivers for the use of alcohol and controlled substances. It will have a significant economic impact on small entities. The FHWA has lessened the economic impact on small entities by allowing them an additional year to comply with the rule over and above the time given to large employers.

Executive Order 12612 (Federalism Assessment)

This action adds part 382 to the FMCSRs pertaining to testing for alcohol and controlled substances by drivers of commercial motor vehicles operating in commerce on public roads and highways. These requirements directly affect employers and their drivers, including State and local employers and their drivers. The rule also will regulate employers and drivers who have historically been regulated only by their State of residence or where the employer's business is located. These requirements preempt State and local laws, regulations, rules, and orders that are inconsistent with the requirements of this rule. The preemption authority for this document was specifically provided for under 49 U.S.C. app. 2717, Section 12020(f)(1) of the Omnibus Transportation Employee Testing Act of 1991.

Under the Motor Carrier Safety Assistance Program, States will not be required to adopt compatible part 382 regulations for drug or alcohol testing as a condition for receiving grant monies under the program. For the reasons set forth above, the agency is not required to prepare a Federalism Assessment for this proposal.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities applies to this program.

Paperwork Reduction Act

The information collection requirements in part 382 of this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

National Environmental Policy Act

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action will not have any effect on the quality of the environment.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Parts 382, 391, 392 and 395

Alcohol testing, Controlled substances testing, Highways and roads, Highway safety, Motor carriers, Motor vehicle safety.


Federico Peña,
Secretary of Transportation.

Rodney E. Slater,
Federal Highway Administrator.

In consideration of the foregoing, the FHWA proposes to amend title 49, CFR subtitle B, chapter III, parts 391, 392, and 395, and add part 382 as set forth below:

1. Chapter III is amended by adding part 382 as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

Subpart A—General

Sec. 382.1 Purpose.
382.2 Applicability.
382.3 Testing procedures.
382.4 Definitions.
382.5 Other requirements imposed by employers.
382.6 Requirement for notice.
382.7 Starting date for testing programs.

Subpart B—Prohibitions

382.8 Alcohol concentration.
382.9 Alcohol possession.
382.10 On-duty use.
382.11 Refusal to submit to a required alcohol or controlled substances test.
382.12 Refusal to submit to a required alcohol or controlled substances test.
382.13 Controlled substances use.
382.14 Controlled substances testing.

Subpart C—Tests Required

382.15 Pre-employment testing.
382.16 Post-employment testing.
382.17 Random testing.
382.18 Reasonable suspicion testing.
382.19 Return-to-duty testing.
382.20 Follow-up testing.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

382.21 Refusal to submit a required alcohol or controlled substances test.
382.22 Controlled substances use.
382.23 Controlled substances testing.

Sec. 382.301 Pre-employment testing.
382.302 Post-employment testing.
382.303 Random testing.
382.304 Reasonable suspicion testing.
382.305 Return-to-duty testing.
382.306 Follow-up testing.

Subpart D—Handling of Test Results, Record Retention, and Confidentiality

382.301 Pre-employment testing.
382.302 Post-employment testing.
382.303 Random testing.
382.304 Reasonable suspicion testing.
382.305 Return-to-duty testing.
382.306 Follow-up testing.
Subpart E—Consequences for Drivers Engaging in Substance Use-Related Conduct

§382.501 Removal from safety-sensitive function.

§382.503 Required evaluation and testing.

§382.505 Other alcohol-related conduct.

§382.507 Penalties.

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§382.601 Motor carrier obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

§382.603 Training for supervisors.


Subpart A—General

§382.101 Purpose.

The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol or use of controlled substances by drivers of commercial motor vehicles.

§382.103 Applicability.

(a) This part applies to every person who operates a commercial motor vehicle in interstate or intrastate commerce, and is subject to the commercial driver’s license requirements of part 383 of this subchapter.

(b) An employer who employs himself/herself as a driver must comply with both the requirements in this part that apply to employers and the requirements in this part that apply to drivers. An employer who employs only himself/herself as a driver shall implement an alcohol and controlled substances testing program that includes more persons than himself/herself as covered employees in the random testing pool.

(c) This part shall not apply to employers and their drivers:

1. Required to comply with the alcohol and/or controlled substances testing requirements of parts 653 and 654 of this title; or

2. Granted a full waiver from the requirements of the commercial driver’s license program; or

3. Granted an optional State waiver from the requirements of part 383 of this subchapter; or

4. Of foreign domiciled operations, with respect to any driver whose place of reporting for duty (home terminal) for commercial motor vehicle transportation services is located outside the territory of the United States.

§382.105 Testing procedures.

Each employer shall ensure that all alcohol or controlled substances testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 of this title that address alcohol or controlled substances testing are made applicable to employers by this part.

§382.107 Definitions.

Words or phrases used in this part are defined in §§ 386.2 and 390.5 of this subchapter, and § 40.3 or § 40.73 of this title, except as provided herein—

Alcohol means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols including methyl and isopropyl alcohol.

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 under this part.

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

Commerce means (1) Any trade, traffic or transportation within the jurisdiction of the United States between a place in a State and a place outside of such State, including a place outside of the United States and (2) any trade, traffic, and transportation in the United States which affects any trade, traffic, and transportation described in paragraph (1) of this definition.

Commercial motor vehicle means a motor vehicle or combination of motor vehicles used in commerce to transport passengers or property if the motor vehicle—

1. Has a gross combination weight rating of 26,001 or more pounds; or

2. Has a gross vehicle weight rating of 26,001 or more pounds; or

3. Is designed to transport 16 or more passengers, including the driver; or

4. Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the motor vehicle to be placarded under the Hazardous Materials Regulations (49 CFR part 172, subpart F).

Confirmation test For alcohol testing means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration. For controlled substances testing means a second analytical procedure to identify the presence of a specific drug or metabolite which is independent of the screen test and which uses a different technique and chemical principle from that of the screen test in order to ensure reliability and accuracy. (Gas chromatography/mass spectrometry (GC/MS) is the only authorized confirmation method for cocaine, marijuana, opiates, amphetamines, and phencyclidine.)

Consortium means an entity, including a group or association of employers or contractors, that provides alcohol or controlled substances testing as required by this part, or other DOT alcohol or controlled substances testing rules, and that acts on behalf of the employers.

DOT Agency means an agency (or “operating administration”) of the United States Department of Transportation administering regulations requiring alcohol and/or drug testing (41 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 199, 219, 382, 653 and 654), in accordance with part 40 of this title.

Driver means any person who operates a commercial motor vehicle.

This includes, but is not limited to: full time, regularly employed drivers; casual, intermittent or occasional drivers; leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to an employer or who operate a commercial motor vehicle at the direction of or with the consent of an employer. For the purposes of pre-employment/pre-duty testing only, the term driver includes a person applying to an employer to drive a commercial motor vehicle.

Employer means any person (including the United States, a State, District of Columbia or a political subdivision of a State) who owns or leases a commercial motor vehicle or assigns persons to operate such a vehicle. The term employer includes an employer’s agents, officers and representatives.

Performing (a safety-sensitive function) means a driver 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 any safety-sensitive functions.

Refuse to submit (to an alcohol or controlled substances test) means that a driver (1) Fails to provide adequate breath for testing without a valid medical explanation after he or she has received notice of the requirement for breath testing in accordance with the provisions of this part, (2) Fails to provide adequate urine for controlled substances testing without a valid medical explanation after he or she has received notice of the requirement for
§ 395.2 Analytical procedure to determine alcohol concentration.

§ 382.109 Preemption of State and local laws.

§ 382.201 Alcohol concentration.

§ 382.204 Alcohol possession.

§ 382.205 On-duty use.

Subpart B—Prohibitions

§ 382.201 Alcohol concentration.

§ 382.204 Alcohol possession.

§ 382.205 On-duty use.

Subpart C—Procedures

§ 382.301 Pre-duty use.

§ 382.302 Use following an accident.

§ 382.303 Alcohol possession.

§ 382.304 Alcohol concentration.

§ 382.305 On-duty use.

§ 382.306 Use following an accident.

§ 382.307 Contraband substances.

§ 382.308 Opioid use.

§ 382.309 Substance abuse professional.

§ 382.310 Subpart B—Prohibitions.
Subpart C—Tests Required

§ 382.301 Pre-employment testing.
(a) Prior to the first time a driver performs safety-sensitive functions for an employer, the driver shall undergo testing for alcohol and controlled substances. No employer shall allow a driver to perform safety-sensitive functions unless the driver has been administered an alcohol test with a result indicating an alcohol concentration less than 0.04, and has received a controlled substances test result from the medical review officer indicating a verified negative test result. If a pre-employment alcohol test result under this section indicates an alcohol content of 0.02 or greater but less than 0.04, the provisions of § 382.505 shall apply.
(b) Exception for pre-employment alcohol testing. An employer is not required to administer an alcohol test required by paragraph (a) of this section if:
1. The driver has undergone an alcohol test required by this section or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and
2. The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the alcohol misuse rule of another DOT agency within the previous six months.
(c) Exception for pre-employment controlled substances testing. An employer is not required to administer a controlled substances test required by paragraph (a) of this section if:
1. The driver has participated in a drug testing program that meets the requirements of this section, and
2. While participating in that program, either
   (i) Was tested for controlled substances within the past 6 months (from the date of application with the employer) or
   (ii) Participated in a random controlled substances testing program for the previous 12 months (from the date of application with the employer); and
3. The employer ensures that no prior employer of the driver of whom the employer has knowledge has records of a violation of this part or the controlled substance use rule of another DOT agency within the previous six months.
(d) (1) An employer who exercises either paragraph (b) or (c) of this section shall contact the alcohol and/or controlled substances testing program(s) in which the driver participates or participated and shall obtain from the testing program(s) the following information:
   (i) Name(s) and address(es) of the program(s).
   (ii) Verification that the driver participates or participated in the program(s).
   (iii) Verification that the program(s) conform to part 40 of this title.
(2) An employer who uses, but does not employ, a driver more than once a year must assure itself once every six months that the driver participates in an alcohol and controlled substances testing program(s) that meets the requirements of this part.

§ 382.303 Post-accident testing.
(a) As soon as practicable following an accident involving a commercial motor vehicle, each employer shall test for alcohol and controlled substances each surviving driver:
1. Who was performing safety-sensitive functions with respect to the vehicle, if the accident involved the loss of human life; or
2. Who received a citation under State or local law for a moving traffic violation arising from the accident.
(b) (1) Alcohol tests. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test and shall prepare and maintain the same record. Records shall be submitted to the FHWA upon request of the Associate Administrator.
(2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered. Records shall be submitted to the FHWA upon request of the Associate Administrator.

§ 382.305 Random testing.
(a) (1) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of the average number of driver positions.
(2) The minimum annual percentage rate for random controlled substances testing shall be 50 percent of the average number of driver positions.
(b) The FHWA Administrator's decision to increase or decrease the minimum annual percentage rate for alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol management information system reports required by § 382.403 of this part. In order to ensure reliability of the data, the FHWA Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the FHWA Administrator will publish in the Federal Register the minimum annual percentage rate for random alcohol testing of drivers. The new minimum annual percentage rate for random alcohol testing will be applicable starting January 1 of the calendar year following publication.
(c) (1) When the minimum annual percentage rate for random alcohol
testing is 25 percent or more, the FHWA Administrator may lower this rate to 10 percent of all drivers if the FHWA Administrator determines that the data received under the reporting requirements of §382.403 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or less, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(d) (1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of §382.403 for that calendar year indicate that the violation rate is equal to or greater than 0.5 percent, but less than 1.0 percent, the FHWA Administrator will increase the minimum annual percentage rate for random alcohol testing to 25 percent for all drivers.

(e) The selection of drivers from a scientifically valid method, such as a random number table of a computer-based random number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the selection process used, each driver shall have an equal chance of being tested each time selections are made.

(f) The employer shall randomly select a sufficient number of drivers for alcohol testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate of 50 percent of drivers. If the employer conducts random testing for alcohol and/or controlled substances testing at the same minimum annual percentage rate established for the calendar year by any DOT agency to which the employer is subject, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of drivers covered by the consortium who are subject to random alcohol and/or controlled substances testing at the same minimum annual percentage rate under this part or any DOT alcohol or controlled substances testing rule.

(g) Each employer shall ensure that random alcohol and controlled substances testing is conducted under this part unannounced and that the dates for administering random alcohol and controlled substances tests are spread reasonably throughout the calendar year.

(h) Each employer shall require that each driver who is notified of selection for random alcohol or controlled substances testing proceeds to the test site immediately; provided, however, that if the driver is performing a safety-sensitive function at the time of notification, the employer shall instead ensure that the driver ceases to perform the safety-sensitive function and proceeds to the testing site as soon as possible.

(i) A driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver has ceased performing such functions.

(j) If a given driver is subject to random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer shall be subject to random alcohol and/or controlled substances testing under the minimum annual percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the driver's function.

(k) If an employer is required to conduct random alcohol or controlled substances testing under the alcohol or controlled substances testing rules of more than one DOT agency, the employer may—

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

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

§382.307 Reasonable suspicion testing.

(a) An employer shall require a driver to submit to an alcohol test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning alcohol, except for §382.204. The employer's determination that reasonable suspicion exists to require the driver to undergo an alcohol test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver.

(b) An employer shall require a driver to submit to a controlled substances test when the employer has reasonable suspicion to believe that the driver has violated the prohibitions of subpart B of this part concerning controlled substances. The employer's determination that reasonable suspicion exists to require the driver to undergo a controlled substances test must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the driver. The observations may include indications of the chronic and withdrawal effects of controlled substances.

(c) The required observations for alcohol and/or controlled substances reasonable suspicion testing shall be made by a supervisor or company official who is trained in accordance with §382.603 of this part. The person who makes the determination that reasonable suspicion exists to conduct an alcohol test shall not conduct the alcohol test of the driver.

(d) Alcohol testing is authorized by this section only if the observations required by paragraph (a) of this section are made during, just preceding, or just after the period of the work day that the driver is required to be in compliance with this part. A driver may be directed by the employer to only undergo reasonable suspicion testing while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.

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

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, no driver shall report for duty or resume duty requiring the performance of safety-sensitive functions while the driver is under the influence of or impaired by alcohol, as shown by the behavioral, speech, and performance indicators of alcohol misuse, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the driver's alcohol concentration measures less than 0.02; or

(ii) Twenty-four hours have elapsed following the determination under paragraph (a) of this section that there is reasonable suspicion to believe that the driver has violated the prohibitions in this part concerning the use of alcohol.

(3) Except as provided in paragraph (e)(2) of this section, no employer shall take any action under this part against a driver based solely on the driver's behavior and appearance, with respect to alcohol use, in the absence of an alcohol test. This does not prohibit an employer with independent authority of this part from taking any action otherwise consistent with law.

(f) A written record shall be made of the observations leading to a controlled substance reasonable suspicion test, and signed by the supervisor or company official who made the observations, within 24 hours of the observed behavior or before the results of the controlled substances test are released, whichever is earlier.

§ 382.309 Return-to-duty testing.

(a) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning alcohol, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02.

(b) Each employer shall ensure that before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part concerning controlled substances, the driver shall undergo a return-to-duty controlled substances test with a result indicating a verified negative result for controlled substances use.

§ 382.311 Follow-up testing.

(a) Following a determination under § 382.605(b) that a driver is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, each employer shall ensure that the driver is subject to unannounced follow-up alcohol and/or controlled substances testing as directed by a substance abuse professional in accordance with the provisions of § 382.605(c)(2)(ii).

(b) Follow-up alcohol testing shall be conducted only when the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing safety-sensitive functions.

Subpart D—Handling of Test Results, Record Retention and Confidentiality

§ 382.401 Retention of records.

(a) General Requirement. Each employer shall maintain records of its alcohol misuse and controlled substances use prevention programs as provided in this section. The records shall be maintained in a secure location with controlled access.

(b) Period of Retention. Each employer shall maintain the records in accordance with the following schedule:

(1) Five years. The following records shall be maintained for a minimum of five years:

(i) Records of driver alcohol test results with results indicating an alcohol concentration of 0.02 or greater.

(ii) Records of driver verified positive controlled substances test results.

(iii) Documentation of refusals to take required alcohol and/or controlled substances tests.

(iv) Calibration documentation.

(v) Driver evaluation and referrals shall be maintained for a minimum of five years, and

(vi) A copy of each annual calendar year summary required by § 382.403.

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

(3) One year. Records of negative and canceled controlled substances test results (as defined in part 40 of this title) and alcohol test results with a concentration of less than 0.02 shall be maintained for a minimum of one year.

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

(1) Records related to the collection process:

(i) Collection logbooks, if used;

(ii) Documents relating to the random selection process;

(iii) Calibration documentation for evidential breath testing devices;

(iv) Documentation of breath alcohol technician training;

(v) Documents generated in connection with decisions to administer reasonable suspicion alcohol or controlled substances tests;

(vi) Documents generated in connection with decisions on post-accident tests;

(vii) Documents verifying existence of a medical explanation of the inability of a driver to provide adequate breath or to provide a urine specimen for testing; and

(viii) Consolidated annual calendar year summaries as required by § 382.403.

(2) Records related to a driver's test results:

(i) The employer's copy of the alcohol test form, including the results of the test.

(ii) The employer's copy of the controlled substances test chain of custody and control form.

(iii) Documents sent by the medical review officer to the employer, including those required by § 382.407(a).

(iv) Documents related to the refusal of any driver to submit to an alcohol or controlled substances test required by this part; and

(v) Documents presented by a driver to dispute the result of an alcohol or controlled substances test administered under this part.

(3) Records related to other violations of this part.

(4) Records related to evaluations:

(i) Records pertaining to a determination by a substance abuse professional concerning a driver's need for assistance; and

(ii) Records concerning a driver's compliance with recommendations of the substance abuse professional.

(5) Records related to education and training:

(i) Materials on alcohol misuse and controlled substances use awareness, including a copy of the employer's policy on alcohol misuse and controlled substances use;

(ii) Documentation of compliance with the requirements of § 382.601, including the driver's signed receipt of education materials;

(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for alcohol and/or controlled substances testing based on reasonable suspicion; and

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

(i) Agreements with collection site facilities, laboratories, medical review officers, and consortia;
§382.403 Reporting of results in a management information system.

(a) An employer shall prepare and maintain an annual calendar year summary of the results of its alcohol and controlled substances testing programs performed under this part. By March 15 of each year, all employers shall complete the annual summary covering the previous calendar year.

(b) If an employer is notified, during the month of January, of a request by the Federal Highway Administration to report the employer’s annual calendar year summary information, the employer shall prepare and submit the report to the Federal Highway Administration by March 15 of that year. The employer shall ensure that the annual summary report is accurate and received by March 15 at the location that the Federal Highway Administration specifies in its request. The report shall be in the form and manner prescribed by the Federal Highway Administration in its request. When the report is submitted to the Federal Highway Administration by mail or electronic transmission, the information requested shall be typed, except for the signature of the certifying official. Each employer shall ensure the accuracy and timeliness of each report submitted by the employer or a consortium.

(c) Each annual calendar year summary that contains information on a verified positive controlled substances test result, an alcohol screening test result of 0.02 or greater, or any other violation of the alcohol misuse provisions of subpart B of this part shall include the following informational elements:

(1) Number of drivers subject to part 382;

(2) Number of drivers subject to testing under the alcohol misuse or controlled substances use rules of more than one DOT agency, identified by each agency;

(3) Number of urine specimens collected by type of test (e.g., pre-employment, random, reasonable suspicion, post-accident);

(4) Number of positives verified by a MRO by type of test, and type of controlled substance;

(5) Number of negative controlled substances test results verified by a MRO by type of test;

(6) Number of persons denied a position as a driver following a pre-employment verified positive controlled substances test and/or a pre-employment alcohol test that indicates an alcohol concentration of 0.04 or greater;

(7) Number of drivers with tests verified positive by a medical review officer for multiple controlled substances;

(8) Number of drivers who refused to submit to an alcohol or controlled substances test required under this subpart;

(9) Number of supervisors who have received required alcohol training during the reporting period; and

(10) Number of supervisors who have received required controlled substances training during the reporting period;

(11) Number of drivers who were returned to duty (having complied with the recommendations of a substance abuse professional as described in §§382.503 and 382.605), in this reporting period, who previously:

(i) Had a verified positive controlled substance test result, or

(ii) Engaged in prohibited alcohol misuse under the provisions of this part.

(e) Each employer that is subject to more than one DOT agency alcohol or controlled substances rule shall identify each driver covered by the regulations of more than one DOT agency. The employer shall determine which DOT agency or agencies require the test. The test result information shall be directed to the appropriate DOT agency or agencies.

(f) A consortium may prepare annual calendar year summaries and reports on behalf of individual employers for purposes of compliance with this section. However, each employer shall sign and submit such a report and shall remain responsible for ensuring the accuracy and timeliness of each report prepared on its behalf by a consortium.
§ 382.405 Access to facilities and records.
(a) Except as required by law or expressly authorized or required in this section, no employer shall release driver information that is contained in records required to be maintained under § 382.401.
(b) A driver is entitled, upon written request, to obtain copies of any records pertaining to the driver’s use of alcohol or controlled substances, including any records pertaining to his her alcohol or controlled substances tests. The employer shall promptly provide the records requested by the driver. Access to a driver’s records shall not be contingent upon payment for records other than those specifically requested.
(c) Each employer shall permit access to all facilities utilized in complying with the requirements of this part to the Secretary of Transportation, any DOT agency, any State or local officials with regulatory authority over the employer or any of its drivers.
(d) Each employer shall make available copies of all results for employer alcohol and/or controlled substances testing conducted under this part and any other information pertaining to the employer’s alcohol misuse and/or controlled substances use prevention program, when requested by the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the employer or any of its drivers.
(e) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer’s administration of a post-accident alcohol and/or controlled substances test administered following the accident under investigation.
(f) Records shall be made available to a subsequent employer upon receipt of a written request from a driver.
Disclosure by the subsequent employer is permitted only as expressly authorized by the terms of the driver’s request.
(g) An employer may disclose information required to be maintained under this part pertaining to a driver, 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 and/or controlled substances test administered under this part, or from the employer’s determination that the driver engaged in conduct prohibited by subpart B of this part (including, but not limited to, a worker’s compensation, unemployment compensation, or other proceeding relating to a benefit sought by the driver.)
(h) An employer shall release information regarding a driver’s records as directed by the specific, written consent of the driver 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.

§ 382.407 Medical review officer notifications to the employer.
(a) The medical review officer may report to the employer using any communications device, but in all instances a signed, written notification must be forwarded within three business days of completion of the medical review officer’s review, pursuant to part 40 of this title. A medical review officer shall report to an employer clearly:
(1) That the controlled substances test being reported was in accordance with part 40 of this title and this part;
(2) The name of the individual for whom the test results are being reported;
(3) The type of test indicated on the custody and control form (i.e., random, post-accident, etc.);
(4) The date and location of the test collection;
(5) The identities of the persons or entities performing the collection, analysis of the specimens and serving as the medical review officer for the specific test;
(6) The verified results of a controlled substances test, either positive or negative, and if positive, the identity of the controlled substance(s) for which the test was verified positive.
(b) A medical review officer shall report to the employer that the medical review officer has made all reasonable efforts to contact the driver as provided in § 40.35(c) of this title. The employer shall, as soon as practicable, request that the driver contact the medical review officer prior to dispatching the driver or within 24 hours, whichever is earlier.

§ 382.408 Medical review officer record retention for controlled substances.
(a) A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of five years for verified positive controlled substances test results.
(b) A medical review officer shall maintain all dated records and notifications, identified by individual, for a minimum of one year for negative and canceled controlled substances test results.
(c) No person may obtain the individual controlled substances test results retained by a medical review officer, and no medical review officer shall release the individual controlled substances test results of any driver to any person, without first obtaining a specific, written authorization from the tested driver. Nothing in this paragraph shall prohibit a medical review officer from releasing to the employer or to officials of the Secretary of Transportation, any DOT agency, or any State or local officials with regulatory authority over the controlled substances testing program under this part, the information delineated in § 382.407(a) of this subpart.

§ 382.411 Employer notifications.
(a) An employer shall notify a driver of the results of a pre-employment controlled substance test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.
(b) The designated management official shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer’s program, regardless of the driver’s employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.
(c) The designated management official shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 24 hours.

§ 382.413 Release of alcohol and controlled substances test information by previous employers.
(a) An employer may obtain, pursuant to a driver’s written consent, any of the information concerning the driver which is maintained under this part by the driver’s previous employers.
(b) An employer shall obtain, pursuant to a driver’s consent information on the driver’s alcohol tests with a concentration result of 0.04 or greater, positive controlled substances test results, and refusals to be tested, within the preceding two years, which are maintained by the driver’s previous employers under § 382.401(b)(1)(i) through (iii).
(c) The information in paragraph (b) of this section must be obtained and
§ 382.503 Required evaluation and testing. No driver who has engaged in conduct prohibited under subpart B of this part shall perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of § 382.605.

§ 382.505 Other alcohol-related conduct. (a) No driver tested under the provisions of subpart C of this part who is found to have an alcohol concentration of 0.02 or greater but less than 0.04 shall perform or continue to perform safety-sensitive functions for an employer, including driving a commercial motor vehicle, nor shall an employer permit the driver to perform or continue to perform safety-sensitive functions, until the start of the driver’s next regularly scheduled duty period, but not less than 24 hours following administration of the test.

(b) Except as provided in paragraph (a) of this section, no employer shall take any action under this part against a driver based solely on test results showing an alcohol concentration less than 0.04. This does not prohibit an employer with authority independent of the employer’s policies or procedures, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver.

§ 382.507 Penalties.

Any employer or driver who violates the requirements of this part shall be subject to the penalty provisions of 49 U.S.C. § 521(b).

Subpart F—Alcohol Misuse and Controlled Substances Use Information, Training, and Referral

§ 382.601 Employer obligation to promulgate a policy on the misuse of alcohol and use of controlled substances.

(a) General requirements. Each employer shall provide educational materials that explain the requirements of this part and the employer’s policies and procedures with respect to meeting these requirements.

(1) The employer shall ensure that a copy of these materials is distributed to each driver prior to the start of alcohol and controlled substances testing under this part and to each driver subsequently hired or transferred into a position requiring driving a commercial motor vehicle.

(2) Each employer shall provide written notice to representatives of employee organizations of the availability of this information.

(b) Required content. The materials to be made available to drivers shall include detailed discussion of at least the following:

(1) The identity of the person designated by the employer to answer driver questions about the materials;

(2) The categories of drivers who are subject to the provisions of this part;

(3) Sufficient information about the safety-sensitive functions performed by those drivers to make clear what period of the work day the driver is required to be in compliance with this part;

(4) Specific information concerning driver conduct that is prohibited by this part;

(5) The circumstances under which a driver will be tested for alcohol and/or controlled substances under this part;

(6) The procedures that will be used to test for the presence of alcohol and controlled substances, protect the driver and the integrity of the testing processes, safeguard the validity of the test results, and ensure that those results are attributed to the correct driver;

(7) The requirement that a driver submit to alcohol and controlled substances tests administered in accordance with this part;

(8) An explanation of what constitutes a refusal to submit to an alcohol or controlled substances test and the attendant consequences;

(9) The consequences for drivers found to have violated subpart B of this part, including the requirement that the driver be removed immediately from safety-sensitive functions, and the procedures under § 382.605;

(10) The consequences for drivers found to have an alcohol concentration of 0.02 or greater but less than 0.04;

(11) Information concerning the effects of alcohol and controlled substances use on an individual’s health; work, and personal life; signs and symptoms of an alcohol or a controlled substances problem (the driver’s or a coworker’s); and available methods of intervening when an alcohol or a controlled substances problem is suspected, including confrontation, referral to any employee assistance program and or referral to management.

(c) Optional provision. The materials supplied to drivers may also include information on additional employer policies with respect to the use or possession of alcohol or controlled substances, including any consequences for a driver found to have a specified alcohol or controlled substances level, that are based on the employer’s
authority independent of this part. Any such additional policies or consequences must be clearly and obviously described as being based on independent authority.

(d) Certificate of receipt. Each employer shall ensure that each driver is required to sign a statement certifying that he or she has received a copy of these materials described in this section. Each employer shall maintain the original of the signed certificate and may provide a copy of the certificate to the driver.

§ 382.503 Training for supervisors.

(a) Each employer shall ensure that persons designated to determine whether reasonable suspicion exists to require a driver to undergo testing under § 382.307 receive at least 60 minutes of training on alcohol misuse and receive at least an additional 60 minutes of training on controlled substances use. The training shall cover the physical, behavioral, speech, and performance indicators of probable alcohol misuse and use of controlled substances.

§ 382.505 Referral, evaluation, and treatment.

(a) Each driver who has engaged in conduct prohibited by subpart B of this part shall be advised by the employer of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and use of controlled substances, including the names, addresses, and telephone numbers of substance abuse professionals and counselling and treatment programs.

(b) Each driver who engages in conduct prohibited by subpart B of this part shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse and controlled substances use.

(c) (1) Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than 0.02 if the conduct involved alcohol, or a controlled substances test with a verified negative result if the conduct involved a controlled substance.

(2) In addition, each driver identified as needing assistance in resolving problems associated with alcohol misuse or controlled substances use, (i) Shall be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph (b) of this section, and

(ii) Shall be subject to unannounced follow-up alcohol and controlled substances tests administered by the employer following the driver’s return to duty. The number and frequency of such follow-up testing shall be as directed by the substance abuse professional, and consist of at least six tests in the first 12 months following the driver’s return to duty. The employer may direct the driver to undergo return-to-duty and follow-up testing for both alcohol and controlled substances, if the substance abuse professional determines that return-to-duty and follow-up testing for both alcohol and controlled substances is necessary for that particular driver. Any such testing shall be performed in accordance with the requirements of 49 CFR part 40. Follow-up testing shall not exceed 60 months from the date of the driver’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.

(d) 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/driver agreements and employer policies.

(e) The employer shall ensure that, if a substance abuse professional who determines that a driver requires assistance in resolving problems with alcohol misuse or controlled substances use does not refer the driver to the substance abuse professional’s private practice or to a person or organization from which the substance abuse professional receives remuneration or in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring a driver for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol or controlled substances problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the driver’s health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the driver.

(f) The requirements of this section with respect to referral, evaluation and rehabilitation do not apply to applicants who refuse to submit to a pre-employment alcohol or controlled substances test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater or a controlled substances test with a verified positive test result.

PART 391—QUALIFICATION OF DRIVERS

4. The authority citation for part 391 continues to read as follows:


5. Section 391.93 is revised to read as follows:

§ 391.93 Implementation schedule.

(a) All motor carriers shall have a drug testing program that conforms to this subpart and 49 CFR part 40 by the date a motor carrier begins motor carrier operations.

(b) All motor carriers shall require all collection personnel to implement the split sample collection procedures required under § 40.25(f)(10) of this title by August 15, 1994.

(c) An employer may begin complying with the requirements of paragraph (b) of this section on or after March 17, 1994.

6. Section 391.125 is added to Subpart H to read as follows:

§ 391.125 Termination schedule of this subpart.

(a) Large employers. Each motor carrier with fifty or more drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1, 1995.

(b) Small employers. Each motor carrier with fewer than fifty drivers on March 17, 1994, shall terminate compliance with this subpart and shall implement the requirements of part 382 of this subchapter beginning on January 1, 1996.

(c) All motor carriers shall terminate compliance with this subpart on January 1, 1996.

PART 392—DRIVING OF MOTOR VEHICLES

7. The authority citation for part 392 continues to read as follows:


8. Section 392.5 is amended by revising the heading of the section,
§ 392.5 Alcohol prohibition.
(a) No driver shall—
(1) Use alcohol, as defined in § 382.107 of this subchapter, or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or
(2) Use alcohol, be under the influence of alcohol, or have any measured alcohol concentration or detected presence of alcohol, while on duty, or operating, or in physical control of a commercial motor vehicle; or
(3) Be on duty or operate a commercial motor vehicle while the driver possesses an alcoholic beverage.

However, this does not apply to possession of alcohol which is manifested and transported as part of a shipment.

(b)(2) Be on duty or operate a commercial motor vehicle if, by the driver's general appearance or conduct or by other substantiating evidence, the driver appears to have used alcohol within the preceding four hours.

§ 395.2 Definitions.
9. In § 395.2, the definition of On-duty time is amended by redesignating paragraphs (8) and (9) as (9) and (10), and adding a new paragraph (8) to read as follows:

On-duty time

(8) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 or part 391, subpart H, of this subchapter, whichever is applicable, when directed by a motor carrier.

Note: The following appendix will not appear in the Code of Federal Regulations.
ILLUSTRATION I

DRUG AND ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)
DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug and alcohol testing information sought by the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) in the Drug and Alcohol Testing MIS Data Collection Form. These instructions explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii–iv (for drug results) and v–vi (for alcohol results) as an example to facilitate the process of completing the form correctly.

This reporting form is comprised of four sections. Collectively, these sections address the data elements required in the FHWA and the DOT drug and alcohol testing regulations. The four sections, the page number for the instructions, and the page location on the reporting form are shown below.

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions</th>
<th>Reporting Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. MOTOR CARRIER EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>C. DRUG TESTING INFORMATION</td>
<td>ii–iv</td>
<td>2</td>
</tr>
<tr>
<td>D. ALCOHOL TESTING INFORMATION</td>
<td>iv–vi</td>
<td>3</td>
</tr>
</tbody>
</table>

Page 1

MOTOR CARRIER EMPLOYER INFORMATION (Section A) requires the company name for which the report is completed, a current address, the U.S. DOT number, and the ICC number (if applicable). A signature, date, and current telephone (including the area code) must be entered by the person certifying to the correctness and completeness of the report.

Page 1

COVERED EMPLOYEES (Section B) requires a count for each driver that must be tested under DOT regulations. There is only one category of covered employees for FHWA regulated employers, and that is "Drivers". The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the calendar year being reported. An employee who is hired twice or more in the reported year must be counted as a single employee.

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 drivers, who are covered employees, under the appropriate additional operating administration(s). The employees covered by more than one DOT operating administration must be counted under all appropriate operating administrations.
DRUG TESTING INFORMATION (Section C) requires information for drug testing by category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in a covered position only (i.e. "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing.

Section C is used to summarize the drug testing results for applicants and covered employees. There are seven categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following six parts are for entering drug testing data on random, post-accident/non-fatal, post-accident/fatal, reasonable suspicion, return to duty, and follow-up testing, respectively. Items necessary to complete these tables include:

1) the number of specimens collected in each testing 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 the first part, PRE-EMPLOYMENT TESTING INFORMATION. The format and explanations used for the sample table apply to all seven parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of Section C. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

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

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

The right hand portion of the table ("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 completed, (i.e., marijuana (THC), cocaine, phencyclidine (PCP), opiates, and amphetamines). The number of positive specimens 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 or employee tested positive for more than one drug; for example, both marijuana and cocaine, that person's positive results should be included once in each of the appropriate columns (marijuana and cocaine).

A sample table is provided on page iii with example numbers.
Below the table for drug testing information is a box. ("Number of persons denied a position as a covered employee following a verified positive drug test"). This is a count of those persons who were not placed in a covered position because they tested positive for one or more drugs.

Page 2:

Also following the table that summarizes DRUG TESTING INFORMATION, you must provide counts for employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule. This information should be available from the personnel office and/or drug program manager.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, DRUG TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses ‘Pre-Employment’ testing to illustrate the correct procedures for completing the form.

Urine specimens were collected for 157 job applicants for driver positions during the reporting year. This information is entered in the first column of the table in the row marked ‘PRE-EMPLOYMENT’.

The Medical Review Officer (MRO) for your company reported that 153 of those 157 specimens from applicants for driver positions were negative (i.e., no drugs were detected). Enter this information in the second column of the table in the row marked ‘PRE-EMPLOYMENT’.

The MRO for your company reported that 4 of those 157 specimens from applicants for driver positions were positive (i.e., a drug or drugs were detected). Enter this information in the third column of the table in the row marked ‘PRE-EMPLOYMENT’.

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

<table>
<thead>
<tr>
<th>Specimen</th>
<th>Drugs</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>Marijuana</td>
</tr>
<tr>
<td>#2</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>#3</td>
<td>Marijuana and Cocaine (Multi-drug specimen)</td>
</tr>
<tr>
<td>#4</td>
<td>Marijuana</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Type of Test</th>
<th>Number of Specimens Collected</th>
<th>Number of Specimens Verified Negative</th>
<th>Number of Specimens Verified Positive for One or More of the Five Drugs</th>
<th>Number of Specimens Verified Positive for Each Type of Drug</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
<td>157</td>
<td>133</td>
<td>3</td>
<td>N/A</td>
</tr>
</tbody>
</table>

A B C D
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 the table, SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG.

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 categories of testing in the table in Section C.

Page 2 SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG requires information on specimens that contained more than one drug. First, indicate the NUMBER OF VERIFIED POSITIVES. Then, specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 specimens, then you would write "3" as the number of verified positives, and "3" in the columns for "Marijuana" and "Cocaine". If marijuana and opiates were detected in 2 specimens, then you would write "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 2 EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required by FHWA regulation.

Page 2 DRUG TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required drug training during the current reporting period.

Page 3 ALCOHOL TESTING INFORMATION (Section D) requires information for alcohol testing by category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in covered positions only (i.e., "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing. A sample table is provided on page vi with example numbers.

Four types of information are necessary to complete this table. The first column ("NUMBER OF SCREENING TESTS"), requires a count of all screening alcohol tests performed. It should not include refusals to test. The second column ("NUMBER OF CONFIRMATION TESTS") requires a count of all confirmation alcohol tests performed.

The third column ("NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04"), refers to the number of test results equal to or greater than 0.02, but less than 0.04.
The fourth column ("NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04"), refers to the number of specimens with a result equal to or greater than 0.04. Note: For return to duty testing, a confirmation test result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

Below the table for alcohol testing information is a box ("Number of persons denied a position as a covered employee following an alcohol test indicating an alcohol concentration of 0.04 or greater"). This is a count of those persons who were not placed in a covered position because their alcohol test indicated an alcohol concentration of 0.04 or greater.

Also following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the "Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations)". This information should be available from the personnel office and/or drug and alcohol program manager.

**SAMPLE APPLICANT TEST RESULTS TABLE**

The following example is for ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other reasons for testing in the table which require you to summarize testing results for employees. This example will use "Pre-Employment" testing to illustrate the procedures for completing the form.

**A**

Screening tests were performed on 157 job applicants for driver positions during the reporting year. This information is entered in the first blank column of the table in the row marked "PRE-EMPLOYMENT".

**B**

Confirmation tests were necessary for 6 of the 157 applicants for driver positions. Enter this information in the second blank column of the table in the row marked "PRE-EMPLOYMENT". The confirmation test results for these 6 applicants were the following:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.06</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

The confirmation test results for 2 of the applicants for driver positions were equal to or greater than 0.02, but less than 0.04. Enter this information in the third blank column of the table in the row marked "PRE-EMPLOYMENT".

The confirmation test results for 3 of the applicants for driver positions were equal to or greater than 0.04. Enter this information in the fourth blank column of the table in the row marked "PRE-EMPLOYMENT".
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 CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all categories of testing in the table in Section D.

Page 3 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 3 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 3 EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FHWA regulation.

Page 3 ALCOHOL TRAINING/EDUCATION requires information on the number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations during the current reporting period.
A. MOTOR CARRIER EMPLOYER INFORMATION

Company ____________________________________________ Year Covered by This Report: ____________

Principal Place of Business for Safety:

Physical Address ___________________________________________________________________________

Mailing Address ___________________________________________________________________________

U.S. DOT Number ______________________ ICC Number __________________________

I, the undersigned, certify that the information provided on this Federal Highway Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

_________________________ ______________________
Signature Date of Signature

Title Phone Number

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>COVERED EMPLOYEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMPLOYEE CATEGORY</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Drivers</td>
</tr>
</tbody>
</table>

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).
2. This report is only for testing REQUIRED BY THE FEDERAL HIGHWAY ADMINISTRATION (FHWA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT).
   * Results should be reported only for employees in COVERED POSITIONS as defined by FHWA/DOT drug and alcohol testing regulations.
   * The information requested should only include testing for marijuana (THC), cocaine, phenylcyclidine (PCP), opiates, amphetamines, and alcohol using the standard procedures required by DOT regulation 49 CFR Part 40.
3. Information on refusals for testing should only be reported in the tables entitled "EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG (or AN ALCOHOL) TEST". Do not include refusals for testing in other sections of this report.
4. Do not include the results of any quality control (OC) 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.
C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SPECIMENS COLLECTED</th>
<th>NUMBER OF SPECIMENS VERIFIED NEGATIVE</th>
<th>NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG</th>
<th>NUMBER OF SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Marijuana (THC)</td>
<td>Cocaine</td>
</tr>
<tr>
<td>PRE-EMPLOYMENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RANDOM</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>POST-ACCIDENT/NON-</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FATAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>POST-ACCIDENT/FATAL</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>REASONABLE SUSPICION</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RETURN TO DUTY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FOLLOW-UP</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of persons denied a position as a covered employee following a verified positive drug test:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG**

<table>
<thead>
<tr>
<th>NUMBER OF VERIFIED POSITIVES</th>
<th>Marijuana (THC)</th>
<th>Cocaine</th>
<th>Phencyclidine (PCP)</th>
<th>Opiates</th>
<th>Amphetamines</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

**EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST**

<table>
<thead>
<tr>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

**DRUG TRAINING/EDUCATION**

<table>
<thead>
<tr>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
</tr>
</tbody>
</table>

Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by FHWA drug testing regulations.
### D. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>TYPE OF TEST</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>PRE-EMPLOYMENT</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>RANDOM</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>POST-ACCIDENT/NON-FATAL</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>POST-ACCIDENT/FATAL</td>
<td></td>
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</tr>
<tr>
<td>REASONABLE SUSPICION</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>RETURN TO DUTY</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>FOLLOW-UP</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of persons denied a position as a covered employee following an alcohol test indicating an alcohol concentration of 0.04 or greater:

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations):

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

<table>
<thead>
<tr>
<th>NUMBER OF COVERED EMPLOYEES</th>
<th>VIOLATION</th>
<th>ACTION TAKEN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Driver used alcohol while performing safety-sensitive function.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Driver used alcohol within 4 hours of performing safety-sensitive function.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Driver used alcohol before taking a required post-accident alcohol test.</td>
<td></td>
</tr>
</tbody>
</table>

### EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST

Covered employees who refused to submit to a random alcohol test required under the FHWA regulation:

Covered employees who refused to submit to a non-random alcohol test required under the FHWA regulation:

### ALCOHOL TRAINING/EDUCATION

Number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations.
ILLUSTRATION II

DRUG AND ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS)

"EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT) Drug and Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there are no positive drug tests and no alcohol misuse to be reported by your company. These instructions explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FHWA and DOT drug and alcohol testing regulations.

SECTION A - MOTOR CARRIER EMPLOYER INFORMATION requires the company name for which the report is completed, a current address, the U.S. DOT number, and the ICC number (if applicable). A signature and title, date, and current telephone (including the area code) must be entered by the person certifying the correctness and completeness of the report.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under FHWA regulations. There is only one category of covered employees for FHWA, and that is "Drivers". The most likely source for this information is the employer's personnel department. These counts should be based on the company records for the calendar year being reported. An employee who is hired twice or more in the reported year must be counted as a single employee.

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). The employees covered by more than one DOT operating administration must be counted under all appropriate operating administrations.

SECTION C - DRUG TESTING INFORMATION requires information for drug testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE in each category for testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/ non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in a covered position only (i.e. "Drivers"). Each part of this table must be completed for each category of testing. These numbers do not include refusals for testing. "COLL" requires the number of specimens collected for each category of testing. "NEG" requires a count for all completed tests that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories.
Following the table for drug testing data you must provide counts for drivers returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule. This information should be available from the personnel office and/or drug program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FHWA regulation.

DRUG TRAINING/EDUCATION requires information on the number of supervisory personnel who have received the required drug training during the current reporting period.

SECTION D - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF SCREENING TESTS CONDUCTED in each category of testing. These categories include: (1) pre-employment, (2) random, (3) post-accident/non-fatal, (4) post-accident/fatal, (5) reasonable suspicion, (6) return to duty, and (7) follow-up testing. All numbers entered into this table should be for applicants or company employees in covered positions only (i.e., "Drivers"). Enter the number of alcohol screening tests conducted for each category of testing. These numbers do not include refusals for testing.

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of the "Number of drivers who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in FHWA regulations)". This information should be available from the personnel office and/or drug and alcohol program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FHWA regulation.

ALCOHOL TRAINING/EDUCATION requires information on the number of supervisors who have received initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FHWA alcohol testing regulations during the current reporting period.
FHWA DRUG AND ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM  OMB No. 2125-0543

A. MOTOR CARRIER EMPLOYER INFORMATION

Company _______________________________ Year Covered by This Report: ____________

Principal Place of Business for Safety:

Physical Address _____________________ Mailing Address _______________________

U.S. DOT Number ___________________ ICC Number ___________________________

I, the undersigned, certify that the information provided on the attached Federal Highway Administration Drug and Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature ___________________________ Date of Signature _______________________

Title _______________________________ 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.

The Federal Highway Administration estimates that the average burden for this report form is 30 minutes. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Director, Office of Motor Carrier Standards (HCS-1); Federal Highway Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2125-0543); Washington, D.C. 20503.

B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>COVERED EMPLOYEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER OF FHWA COVERED EMPLOYEES</td>
</tr>
<tr>
<td>FAA</td>
</tr>
<tr>
<td>Drivers</td>
</tr>
</tbody>
</table>

C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>EMPLOYEE CATEGORY</td>
</tr>
<tr>
<td>-------------------</td>
</tr>
<tr>
<td>Drivers</td>
</tr>
</tbody>
</table>

Number of drivers returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FHWA rule.

FHWA Form No. MCS-155 (Rev. 1-94)
Controlled Substances and Alcohol Use and Testing; Foreign-Based Motor Carriers and Drivers

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing to extend the applicability of rules regarding controlled substance and alcohol use and testing to include foreign-based drivers of motor carriers operating in the United States. The goal of alcohol and controlled substances testing is to detect and deter misuse of alcohol and controlled substances by drivers of commercial motor vehicles, thereby enhancing U.S. highway safety by reducing accidents.

DATES: Written, signed comments must be received on or before April 18, 1994.

ADDRESSES: Submit written, signed comments to FHWA Docket No. MC-93-3, room 4232, Office of the Chief Counsel, 400 Seventh Street, SW., Washington, DC 20590. All comments received will be available for examination at the above address from 8:30 a.m. to 3:30 p.m., e.t., Monday through Friday, except Federal legal holidays.

FOR FURTHER INFORMATION CONTACT: For information regarding program issues: Mr. David Miller, Office of Motor Carrier Standards, (202) 366–2961. For information regarding legal issues: Mr. David Sett, Office of the Chief Counsel, (202) 366–0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except legal Federal holidays.

SUPPLEMENTARY INFORMATION:

I. Background

On November 21, 1988, the FHWA, along with certain other agencies within the Department of Transportation (the Department), adopted regulations requiring pre-employment/use, periodic, post-accident, reasonable cause and random drug testing of commercial motor vehicle drivers. The FHWA rule applies to all covered drivers while operating in the United States, regardless of whether they are based in a foreign country or the United States. The rule provided, however, that it would not apply to any person for whom compliance would violate the domestic laws or policies of another country. The rule as originally published further provided that in any event it would not be effective until January 1, 1990, with respect to any person for whom a foreign government contends that application of the rules raises questions of compatibility with that country's laws or policies. See 53 FR 47134, codified at 49 CFR 391.81 et seq.

The FHWA has delayed the effective date of drug testing requirements for foreign-based employees of foreign-based motor carriers on four occasions. See 54 FR 39546, September 27, 1989; 54 FR 53294, December 27, 1988; 56 FR 18994, April 24, 1991; 57 FR 31277, July 14, 1992. The last of these established January 2, 1995, as the date for compliance.

Meanwhile, on October 28, 1991, the Omnibus Transportation Employee Testing Act of 1991 (Omnibus Act) was enacted. 49 U.S.C. 2717. The Omnibus Act requires the Secretary of Transportation to issue regulations requiring drug and alcohol testing of commercial motor vehicle drivers. Proposed rules implementing such testing were published on December 15, 1992. See 57 FR 59516 for alcohol and 57 FR 59567 for drugs. These new rules would replace the current drug testing rule in 49 CFR part 391 and would institute alcohol testing. The final rule implementing the Omnibus Act is being published elsewhere in today's Federal Register. The Omnibus Act applies to foreign-based motor carriers and drivers on its face, with the proviso that the new rules be "consistent with the international obligations of the United States, and into consideration any applicable laws and regulations of foreign countries." 49 U.S.C. 2717(e)(3). Thus, foreign-based drivers are required to be covered by the statute, but the Secretary is granted the authority to deem the requirement satisfied by the testing laws of foreign nations.

On December 15, 1992, the FHWA published an advance notice of proposed rulemaking (ANPRM) to obtain specific information from interested parties. Now, based upon comments received, the FHWA seeks comments on this NPRM.

II. Comments

There were fifteen comments to the docket. All specific references to a foreign nation were to Canada. Two commenters noted they had no knowledge of the drug and alcohol testing laws or practices of Mexico. No other nations were mentioned in the comments as being a base from which drivers or motor carriers operate in the United States.

A. Applicability

Of the fifteen comments, nine expressed support for extending coverage of testing and misuse regulations to foreign-based drivers. Two commenters were opposed to extension. Another commenter, the Owner-Operator Independent Drivers Association (OOIDA), opposed all testing of drivers, except upon a probable cause determination of a law enforcement official. The OOIDA stated, however, that if United States-based drivers are tested, then foreign drivers should be tested to the same extent. Finally, the Canadian Embassy suggested that unilateral implementation of testing of Canadian drivers should be avoided in favor of continuing bilateral negotiations aimed at mutual recognition of existing United States regulations and Canadian regulations under development.

The most common rationale offered in support of coverage was fairness. Several commenters pointed to the competitive advantage enjoyed by foreign motor carriers which need not incur the substantial cost of testing. Comments in support also focused on the safety benefit to be derived from extended testing.

The commenters opposed to coverage provided a variety of reasons for excluding foreign-based drivers. The Canadian Owner-Operator Drivers Association (COODA) stated it was discriminatory to require testing of Canadian drivers because Canada has no laws authorizing such testing. The International Brotherhood of Teamsters argued that requiring testing of Canadian drivers was a violation of Canadian sovereignty, and unnecessary due to the absence of a demonstrated substance abuse problem in the industry. The Canadian Embassy referred to principles of comity, as embodied in the bilateral negotiations, and the difficulty of enforcing a unilateral prescription. The embassy noted that rules requiring pre-employment, reasonable cause, follow-up, and post-accident testing of commercial vehicle operators for controlled substances and alcohol are currently under development in Canada.

FHWA Response. The FHWA disagrees with the notion that requiring foreign-based drivers to be drug and alcohol tested as a condition of operating in the United States is a
violation of the sovereignty of Canada, or any other nation. Foreign drivers only need to be tested insofar as they operate in the United States. In no way is it being suggested that transportation occurring solely outside the borders of the United States, or that part of a cross border movement taking place on foreign soil, be subject to drug testing rules. Moreover, compliance with the testing rules may be entirely accomplished within the borders of the United States, foreclosing any concerns of conflict with laws of other nations which might prohibit, for instance, certain activities such as random testing.

Drug and alcohol testing is merely one of the many Federal requirements with which foreign and domestic drivers and motor carriers are obliged to comply while operating in the United States. That another sovereignty does not place such requirements on motor carriers and drivers is immaterial. There are, after all, motor carrier safety standards in Canada and Mexico which do not exist in this country or are inconsistent with United States standards, but nevertheless, apply to United States carriers operating in those countries. In other words, United States national standards might be different from those in other countries, but they are applied evenly across the board to all carriers and drivers operating in the United States. Because of this equality of national treatment, there is no discrimination against foreign carriers or drivers. Moreover, as a number of commentators stated, it may well be discriminatory against domestic carriers not to require testing of foreign operators.

Though there are no international legal obstacles to application of the rules to foreign-based drivers, the FHWA recognizes the efficacy of applying the principles of "comity" (recognition of another nation's laws and judicial decisions) expressed by the Canadian Embassy. As the embassy stated, the Department and its Canadian counterpart have been discussing this issue and the need for common standards since publication of the original drug testing rule. The discussions can further be viewed in the context of wider ranging trilateral, structured negotiations between Canada, Mexico, and the United States aimed at achieving greater harmonization of the national motor carrier safety standards of the three nations. These negotiations resulted, for example, in a Memoranda of Understanding in which the United States agreed to recognize certain commercial driver's licenses issued in Mexico and Canada. Though negotiations have produced no similar “international obligations” regarding drug and alcohol testing, it would be prudent to structure foreign-based applicability in such a way as to be consistent with the negotiations, allow rule development in other countries to proceed, and explore opportunities for reciprocal agreements.

B. Compliance

In addition to raising the threshold applicability issue, the ANPRM posed a number of questions on the mechanics of compliance. In general, the comments identified no serious difficulties in applying the rules to foreign-based carriers. Several implementation strategies were offered. Most commentators believed the rule could and should be administered in Canada, rather than requiring compliance activities to be performed solely in the United States. For example, the COODA recommended using Canadian doctors as Medical Review Officers and arranging for certification of Canadian laboratories. Imperial Oil Limited noted that two Canadian laboratories are certified by the U.S. Department of Health and Human Services and that a similar Canadian system of certification could be developed. While not disagreeing with allowing such activities to be performed in foreign nations, National MRO, Inc. stated that it was possible that all testing services, including collection, laboratory analysis, medical review, and substance abuse counseling could be done in the United States, and estimated an increase in cost of up to 10 percent for additional communications services. The American Trucking Associations, Inc. suggested that foreign-based drivers be required to join and participate in a United States-based consortium within 30 days of entering the United States, and that drivers be subject to review of participation at the border upon subsequent entry. Pinnacle Transport Services, Inc. suggested use of a compliance certification card which could be presented at the border upon entry. National Solid Waste Management Association stated that testing could be performed at ports of entry.

FHWA response. The FHWA agrees that the rule as written can be complied with by foreign-based carriers either totally in the United States or totally in foreign nations, or by some combination of both. The FHWA also believes that the various suggestions regarding compliance in Canada, certification of Canadian laboratories, and mutual recognition of reciprocal standards may offer benefits in efficiency, cost, and comity and should be explored further.

III. Proposal

The applicability section of the final controlled substances and alcohol testing rule is being amended to include coverage of foreign-based drivers of foreign-based carriers. To accomplish this, § 382.103(c)(4), which excludes foreign-based carriers, would be deleted. Based on the comments about the efficacy and progress of the negotiations aimed at achieving compatibility and reciprocity of testing standards, the implementation date will be delayed to provide maximum opportunity for the process to be completed successfully. However, if the process is not completed successfully, the requirements of 49 CFR parts 40 and 382 are proposed to go into effect on January 1, 1996. Accordingly, a section would be added, § 362.119, which would provide that foreign-based carriers will be required to implement the rule by January 1, 1996.

The FHWA requests comments on this proposal to require foreign-based employees of foreign-domiciled employers to be tested for the use of controlled substances and alcohol.

Rulemaking Analyses and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 and significant within the meaning of Department of Transportation regulatory policies and procedures. The FHWA has prepared a regulatory evaluation for this proposal and the evaluation indicates that the rule will have a small positive impact of $8.5 million discounted over ten years. A copy of the regulatory evaluation is included in the docket for this NPRM.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), the FHWA has evaluated the effects of this rule on small entities. Based on the regulatory evaluation, the FHWA believes that the impact on small entities will be minimal. Furthermore, it should be noted the Omnibus Act mandates alcohol and controlled substances testing irrespective of the size of the entities.

For these reasons, the FHWA certifies that this action will not have a significant economic impact on a substantial number of small entities.
This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rulemaking has no federalism implications to warrant the preparation of a Federalism Assessment. This action would require foreign-domiciled employers to test their drivers for the use of controlled substances and alcohol. The action does not place any requirements on the States to comply with this rule.

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

The information collection requirements in part 382 of this rule have been submitted to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the quality of the environment.

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

The agency has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that this action would not have any effect on the quality of the environment.

1. The authority citation for part 382 continues to read as follows:


2. In § 382.103, paragraph (c)(4) is removed and paragraph (c)(3) is revised to read as follows:

   § 382.103 Applicability.

   (c) * * * * *

   (3) Who have been granted a State option waiver from the requirements of part 383 of this subchapter.

3. Part 382, subpart A is amended by adding a new § 362.119 to read as follows:

   § 362.119 Starting date for controlled substances and alcohol testing programs of foreign-domiciled employers.

   All foreign-domiciled employers conducting transportation operations, by motor vehicle, in the United States shall have implemented controlled substances and alcohol testing programs that conform to this part and part 40 of this title by January 1, 1996. Voluntary compliance may be effected at an earlier date.
Part VIII

Department of Transportation

Federal Transit Administration

49 CFR Parts 653 and 654
Prevention of Alcohol and Prohibited Drug Misuse in Transit Operations; Rules
DEPARTMENT OF TRANSPORTATION
Federal Transit Administration
49 CFR Part 654
[Docket No 92–I]
RIN 2132-AA38
Prevention of Alcohol Misuse in Transit Operations

AGENCY: Federal Transit Administration, DOT.

ACTION: Final rule.

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers in safety-sensitive positions. This document accordingly sets forth the agency’s alcohol misuse prevention program, which is intended to increase the safety of mass transit operations.

EFFECTIVE DATE: March 17, 1994.


SUPPLEMENTARY INFORMATION: Because of the length of this preamble, the following outline of the rule’s introductory material is provided.

I. How To Read This Rule

This rule has three components: Part 654, “Prevention of Alcohol Misuse in Transit Operations”; the common preamble by the Office of the Secretary (OST), “Limitation on Alcohol Use By Transportation Workers” published elsewhere in today’s Federal Register; and Part 40, “Procedures for Transportation Workplace Drug and Alcohol Testing programs.” This document is part 654, the Federal Transit Administration’s (FTA) alcohol testing regulations for recipients of certain kinds of Federal funding. This preamble to part 654 briefly explains those issues unique to the transit industry and is followed by the text of the substantive regulation. The common preamble, on the other hand, discusses the issues and comments common to all five DOT agencies issuing final alcohol rules today. Finally, the testing procedures for administering alcohol and drug tests are set forth in part 40 and the issues concerning it are discussed in its preamble.

II. Discussion

A. Background

On December 15, 1992, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register at 57 FR 59648, entitled “Prevention of Alcohol Misuse in Transit Operations.” The NPRM invited comment from the public on the proposed rule, which would require certain recipients of Federal transit funding to have a comprehensive alcohol misuse prevention program. FTA provided a 120-day comment period and received over 125 comments on the regulation proposed in the NPRM.

In addition to receiving written comments on the NPRM, in 1993 FTA held three public hearings on the rule: on February 25–26, in Washington DC; on March 1–2, in Chicago, Illinois; and on March 4–5, in San Francisco, California. Each hearing was recorded by a court reporter; the transcript of each hearing and any statements or other material submitted to the hearing officer during the hearings are contained in the public docket to this rule and were considered in developing this final rule.

P. Indian Tribal Governments
Q. Waivers

III. Section-by-Section Analysis

IV. Americans with Disabilities Act of 1990

V. Economic Analysis

VI. Regulatory Process Matters

B. The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 (the Act) (Title V, Pub. L. 102–143, October 28, 1991) mandates some operating administrations within the Department of Transportation, including the FTA, to issue regulations on the misuse of alcohol by safety-sensitive employees. While there is a complete discussion of the various provisions of the Act in the Department-wide preamble found elsewhere in today’s issue of the Federal Register, the following discussion highlights provisions of the Act concerning the FTA.

The Federal Transit Administration must issue regulations requiring recipients of funds under section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act), or section 103(e)(4) of title 23 of the United States Code to test safety-sensitive employees for the use of alcohol in violation of law or Federal regulation. Because certain recipients of FTA funds are regulated by the Federal Railroad Administration (FRA) or the Federal Highway Administration (FHWA), the Act permits such recipients to be subject to the alcohol misuse regulations of those agencies.

Compliance with FTA’s rule is a condition of the receipt of Federal transit funding. The Act authorizes FTA to withhold that funding if a recipient is not in compliance with FTA’s rule or, as appropriate, the alcohol misuse rules of FRA or FHWA. Specifically, the Act authorizes FTA to withhold Federal funding under section 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code.

The Act directs the FTA to require four kinds of alcohol testing: pre-employment, post-accident, random, and reasonable suspicion, and permits FTA to require periodic alcohol testing. The Act further directs FTA to require a post-accident test when there has been a loss of human life.

The Act authorizes the testing only of employees who perform safety-sensitive functions, but does not define what activities constitute a safety-sensitive function, specifically authorizing the agency to make that determination.

The Act directs FTA to require its recipients to test safety-sensitive employees for the use of alcohol in violation of Federal law or regulation (alcohol misuse) and in so doing to safeguard the privacy of safety-sensitive employees to the maximum extent practicable. It also directs that all tests which indicate the misuse of alcohol be confirmed by a scientifically recognized
method of testing capable of providing quantitative data regarding alcohol.

If a safety-sensitive employee is found to have used alcohol in violation of Federal law or regulation, the Act directs FTA to provide that person with an opportunity for evaluation and treatment. Also, the Act permits FTA, as appropriate, to permit the disqualification or dismissal of any safety-sensitive employee who has used alcohol in violation of Federal law or regulation.

In providing this regulatory authority, the Act authorizes the FTA to preempt State or local laws, rules, regulations, ordinances, standards, or orders inconsistent with this rule, except for certain provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or property damage.

C. The Anti-drug Rule

The Federal Transit Administration also is publishing its final anti-drug program rule elsewhere in today’s issue of the Federal Register; the two rules will be implemented on the same dates.

D. Study of Alcohol Use in the Transit Industry.

In 1991, FTA’s Office of Safety and Security conducted a study to determine the extent of drug and alcohol use in the transit industry. The study’s findings analyze the results of two surveys designed to gather information on substance abuse policies and programs as well as drug and alcohol use patterns in the transit industry. Of the two surveys, one was completed by transit system managers and the other by safety-sensitive transit employees. (See “Substance Abuse in the Transit Industry”, Rept. No. DC-90-7021; November, 1991.)

The agency survey sought information on substance abuse program policies and procedures, test results indicating drug or alcohol use during calendar year 1990, disciplinary procedures, employees training, and substance related accident data. The survey was mailed to four hundred transit systems. Three hundred and six systems comprise the agency data base.

The employee survey was given to 1,975 safety-sensitive employees at nine randomly selected transit systems separated into three groups based on annual ridership. The employee questionnaire focused solely on personal use of drugs and alcohol; to a large extent, the questions were standardized to facilitate comparison with a National Institute on Drug Abuse (NIDA) Household Survey.

The study was designed to guarantee respondent confidentiality for both the agency and employee surveys. Since both surveys were voluntary, no data were collected from any system or employee who did not consent to participate.

The following are some key findings from the surveys about alcohol use:

- Of the 306 systems in the data base, 78 percent conduct some type of drug testing and 58 percent conduct alcohol testing. When asked which substance was most prevalently abused by the workforce, 75 percent of the agencies identified alcohol.

- The personal use data provided in the 1988 and 1990 NIDA household surveys provide a benchmark for comparisons of the transit industry results with those of the general population. Those results indicate that self-reported alcohol use by transit employees was only slightly lower than reported use by the general population.

- About six percent of the safety-sensitive employees reported using alcohol within five hours before reporting to duty or during duty hours.

- Most of these duty-related drinkers were also high-volume drinkers of six to ten or more drinks each occasion.

- The positive alcohol rate for vehicle and equipment maintenance personnel is 3.7 percent, twice that for vehicle operators. Dispatchers also have a positive alcohol rate twice that of vehicle operators.

Based on the study’s findings, the statutorily mandated testing for substance abuse is timely and well-founded. This rulemaking should aid in the control of alcohol misuse in the transit industry.

E. Summary of the Final Rule

This rule applies to recipients of funds under section 3, 9, or 18 of the FT Act, or section 103[e][4] of title 23 of the United States Code. It requires each employer to establish and conduct an alcohol misuse prevention program in which safety-sensitive employees are tested for the misuse of alcohol and supervisors are trained to recognize the signs and symptoms of alcohol misuse.

The rule requires the use of testing procedures found in Part 40 of title 49 of the Code of Federal Regulations.

The rule establishes a prohibited alcohol concentration level of 0.04 but also establishes another alcohol concentration range, 0.02 or greater but less than 0.04, with special ramifications attached to it.

The regulation specifies that employers may not allow safety-sensitive employees to consume alcohol under certain circumstances: (1) Four hours before performing a safety-sensitive function; (2) while performing a safety-sensitive function; (3) after a fatal accident unless the employee has been tested, or eight hours have elapsed, whichever occurs first; or (4) after a nonfatal accident unless the employee’s involvement can be completely discounted as a contributing factor to the accident, the employee has been tested, or eight hours has elapsed. The rule requires testing in the following situations:

1. Pre-employment (including transfer to a safety-sensitive position within the organization);

2. Reasonable suspicion;

3. Random;

4. Post-accident; and

5. Return to duty/follow-up.

The rule requires the rule testing for all tests with an evidential breath testing device (EBT), which is a device listed on the National Highway Traffic Safety Administration’s (NHTSA) Conforming Product List (CPL).

The rule requires both a screening and a confirmation test. An employer may take action based only on the results of the confirmation test.

As noted above, the rule establishes a prohibited alcohol concentration level of 0.04. If a sample from an employee on a confirmation alcohol test measures 0.04 or greater, the covered employee must be removed from his or her safety-sensitive position, be told about educational and treatment programs available, and be evaluated by a substance abuse professional to determine whether the employee has an alcohol problem. The rule does not address the issue of who should pay for the employee’s treatment, which is a local issue.

If, however, the sample tests at 0.02 or greater but less than 0.04, the covered employee must be removed from his safety-sensitive position. The employer may, after some period of time, retest the employee to ensure that his alcohol concentration level is less than 0.02 and then permit him to resume his safety-sensitive position. If the employer does not retest the employee, the employer must remove him from his safety-sensitive position for at least eight hours. If an employer elects to remove the employee for eight hours, the employer is not required subsequently to administer an alcohol test before the employee resumes performing a safety-sensitive function unless the employee exhibits signs of alcohol misuse when he returns to work.

The rule applies to any entity that receives certain Federal funding from the FTA. Such an entity, called a recipient, must certify to the FTA that it will carry out the requirements of this part. Not all such recipients provide
mass transit services directly, relying instead upon other public or private entities to provide such services in whole or in part. In these cases, the direct recipient of FTA funds is legally responsible to the FTA for assuring that any entity operating on its behalf is in compliance with the alcohol testing rule.

Compliance with the rule is a condition of Federal assistance. Failure of a recipient to comply with the rule—either in its own operations or in those of an entity operating on its behalf—will result in the suspension of Federal transit funding to the recipient.

Because, as noted above, a recipient may not always directly carry out mass transit services, the rule uses "operator" or "employer" to describe those who actually may be providing transit service and therefore must comply with the rule. Under the rule it is always the direct recipient of FTA funds that legally is responsible to FTA for complying with the rule.

F. Overview of the Comments

The FTA received 126 comments in response to the NPRM. FTA considered all comments filed in a timely manner as well as all statements and material presented at the public hearings on the rule. The breakdown among commenter categories is as follows:

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transit operators (public and private)</td>
<td>45</td>
</tr>
<tr>
<td>Cities and counties</td>
<td>8</td>
</tr>
<tr>
<td>State DOTs</td>
<td>22</td>
</tr>
<tr>
<td>Labor unions</td>
<td>6</td>
</tr>
<tr>
<td>Trade associations</td>
<td>7</td>
</tr>
<tr>
<td>Individual citizens</td>
<td>2</td>
</tr>
<tr>
<td>Nonprofit organizations/special transit providers</td>
<td>16</td>
</tr>
<tr>
<td>State governments</td>
<td>4</td>
</tr>
<tr>
<td>Public Utility</td>
<td>1</td>
</tr>
<tr>
<td>Member of Congress</td>
<td>1</td>
</tr>
<tr>
<td>Private business</td>
<td>1</td>
</tr>
<tr>
<td>Others</td>
<td>6</td>
</tr>
</tbody>
</table>

Many commenters addressed issues common to all of the DOT final alcohol rules published today, including what alcohol concentration level should be prohibited; how alcohol should be defined; or what conduct should constitute a refusal to submit to a test. All such general issues are addressed in the common preamble published elsewhere in today's Federal Register.

Other commenters addressed issues unique to the transit industry, such as whether volunteer drivers should be subject to the rule, the applicability of the regulations to providers of transportation paid with publicly subsidized vouchers or scrip (user-side subsidies), or whether the rule applies to Indian tribal governments or to section 16(b)(2) recipients. All of the major FTA issues addressed by the commenters are discussed in Section III below.

III. Discussion of the Comments

A. Multi-modal Jurisdiction

Because many FTA recipients operate a variety of different mass transit services—including bus, rapid rail, commuter rail, or ferry boat services—they may be regulated by the FTA and by another DOT agency or agencies, such as the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), or the United States Coast Guard (Coast Guard). In addition, the Act authorized FHWA, for the first time, to regulate intrastate Commercial Driver’s License (CDL) holders, which include many transit employees. To limit the alcohol rules with which such recipients would have to comply, the NPRM discussed a proposal under which (1) FTA’s alcohol misuse regulation would apply to FTA recipients that operate railroads, including the recipient’s safety-sensitive employees; (2) FTA’s alcohol misuse program, not FHWA’s, would apply to recipients who employ or use the services of safety-sensitive employees who hold a CDL, but the individual CDL holder otherwise would remain subject to FHWA’s implementation of the Commercial Motor Vehicle Safety Act of 1986; and (3) both FTA’s and Coast Guard’s alcohol misuse programs would apply to recipients operating vehicles, and the Coast Guard would continue to regulate the individual safety-sensitive employee (vessel crew member) by pursing licensing actions or other punitive measures.

FTA received several comments concerning the multi-modal jurisdictional issue suggesting a rather significant change to the FTA’s approach to this rulemaking. Several commenters suggested that DOT should issue one regulation covering all entities regulated by any DOT agency. In contrast, other commenters suggested that FTA and FHWA should issue a joint regulation or issue two separate regulations using identical language.

FTA Response. FTA is sympathetic to the concerns of recipients regulated by more than one DOT agency alcohol testing rule, some of whom proposed a single regulation. As a practical matter, however, an agency-wide DOT alcohol rule would be difficult to implement because of the different characteristics of the various communities each agency regulates. Nevertheless, FTA addresses the multi-jurisdictional issue by clarifying the jurisdiction of FTA, FHWA, and Coast Guard over transit entities. In this regard, we have adopted the proposal in the NPRM discussed above.

B. Accident

The vast majority of comments concerning this definition focused on incidents involving only property damage; specifically, how the seriousness of these incidents should be measured, thus justifying the administration of an alcohol test. In the NPRM we had proposed a dollar measurement, whereby an accident was any incident resulting in at least $1,000 in total property damage.

Most commenters addressed the dollar amount proposed in the NPRM and stated that $1,000 was too low a threshold. Some of these commenters proposed their own method of calculating a dollar threshold such as a measurement based on a vehicle’s gross vehicle weight—the greater the weight the higher the property damage threshold.

Other commenters objected to the use of a dollar threshold to measure the seriousness of incidents involving only property damage to property. These commenters urged us to adopt an objective measure of property damage such as FHWA’s definition of accident. FHWA defines an accident involving only property damage as an incident that so disables the vehicle that it must be towed away from the scene.

Another commenter objected to the use of dollar amounts and requested that we adopt a reasonable cause standard.

Other commenters addressed the overall definition of accident. In the NPRM we had limited the definition to an incident involving a revenue service vehicle, and several commenters objected to this limitation, proposing instead that we include any incident involving a non-revenue service vehicle as well.

FTA Response. FTA has changed the definition of “accident” in such a way that it is broader to some extents, and narrowed in others. In particular, FTA has broadened the definition in the final rule to include occurrences involving nonrevenue service vehicles operated by a holder of a CDL. We recognize that this decision falls short of the recommendation proposed by some commenters favoring the inclusion of all occurrences involving nonrevenue service vehicles, but it is based on another consideration, avoiding overlapping jurisdictions of FTA and FHWA. Ordinarily, FHWA would regulate CDL holders as well as their employers. This new coverage in our
The final rule is consistent with the agreement between FTA and FHWA that FTA’s alcohol misuse program applies to the transit employers of CDL holders. FTA has further modified the proposed definition of “accident” to distinguish the situations of different kinds of mass transit vehicles. Many mass transit vehicles, such as buses and vans, are passenger-carrying motor vehicles. FTA believes that it is sensible to use a definition of “accident” that is consistent with FHWA’s for such vehicles. Therefore, we are adopting a provision paralleling FHWA’s definition of “accident” (in 49 CFR 390.5). The definition states that an “accident” occurs when a vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the “accident.” This provision eliminates the subjectivity inherent in basing a definition on estimates of property damage. For other vehicles—light or rapid rail cars, ferry boats, trolley cars and buses, etc.—we also believe it is best to eliminate a property damage-based standard. Instead, the final rule provides that if the mass transit vehicle is removed from revenue service as the result of the occurrence, an “accident” is deemed to take place. FTA believes that the operating practices of employers typically result in at least the temporary removal from revenue service of vehicles that have been involved in all but the most minor of mishaps. Of course, any occurrence in which someone is killed, or injured sufficiently to require medical treatment away from the accident scene, is an “accident” for purposes of this rule, regardless of the type of transit vehicle involved. We have further narrowed the definition of accident by deleting the reference to reportable accidents. In the NPRM we proposed that any occurrence required to be reported to FRA, FHWA, or the Coast Guard would constitute an accident, but the final rule uses only the criteria discussed above.

C. Safety-sensitive Function

Most commenters addressed the definition of “safety-sensitive” function, one of the most important definitions in the rule. Because the proposed definition had a list of functional categories, most commenters objected either to the inclusion or exclusion of a particular category. Some commenters, however, merely sought clarification of the categories in the NPRM. Including those employees who “maintain a revenue service vehicle” in the definition particularly concerned several commenters. While most commenters understood that this category included mechanics, some thought that it covered workers who clean rather than repair buses, rail cars, and other mass transit facilities. The remaining commenters made specific recommendations concerning mechanics, some arguing that we should exclude all mechanics, with others stating that we should exclude only those working under contract for section 18 rural operators. Yet others suggested that we should include only those mechanics working for large transit operators.

Commenters objected to only one other safety-sensitive category, “controlling the movement of revenue service vehicles,” the category which includes dispatchers. These commenters contend that dispatchers do not perform a safety-sensitive function. Although we did not include any categories involving the construction, design, or maintenance of revenue service vehicles or other mass transit equipment or facilities, several commenters suggested that we specifically exclude them from the definition. Without this specific exclusion they believe there may be some instances in which such workers might be considered to be performing a safety-sensitive function. Other commenters recommended that we add other employee categories to the definition, including police and other security personnel, and mechanics who repair nonrevenue service vehicles. Finally, some commenters sought clarification of the definition: whether it included volunteers and CDL holders, and on the meaning of “directly supervising an employee who is performing a safety-sensitive function.”

FTA Response. We have made several changes to the definition of “safety-sensitive employee.” Before describing those changes, however, we first explain why we proposed a definition based on function rather than titles. Because each transit system uses its own job classification categories, we wanted to avoid specifying particular job titles. Instead, we concluded that four job functions were critical to safety, and in the NPRM identified operating, maintaining, and controlling the movement of vehicles as those functions critical to the safety of the traveling public, and added a fourth category, first-line supervisors of anyone operating, maintaining, or controlling the movement of the vehicle. The final rule adopts these categories, with some changes. Now a discussion of the changes made. Most notably, we have created two new categories of “safety-sensitive functions”: The carrying of a firearm for security purposes, and the operation of a nonrevenue service vehicle by a CDL holder. We include firearm-bearing police and security personnel because of the sensitivity of their position and the danger to the public should they be under the influence of alcohol.

As discussed above, FHWA regulates CDL holders, both interstate and intrastate, and their employers. FTA’s relationship is with its recipients, many of whom employ CDL holders. To avoid a jurisdictional conflict, FTA and FHWA have agreed that FTA’s alcohol misuse rule will apply to transit entities that employ or use the services of CDL holders, regardless of the kind of vehicle they operate.

We have also reduced the scope of the definition somewhat. While we proposed in the NPRM to include first-line supervisors of safety-sensitive employees, the final rule limits that category by covering only supervisors whose responsibilities include the performance of a safety-sensitive function. For instance, if a supervisor’s job description requires her to drive a vehicle, she would be covered, but if it did not, she would not be.

Further, in response to comments, we have excluded from the scope of the rule contract mechanics for any entity receiving section 18 funds.

Regarding the recommendation specifically to exclude construction, design, and manufacturing personnel, we believe it is unnecessary to do so because the list of categories in the definition is exclusive. Any functional category—such as construction or design or manufacturing—not in the definition is not subject to the rule.

Finally, some clarification on the issue of safety-sensitive employees. Volunteers are covered by the rule if they perform any safety-sensitive function. Coverage under the rule should not be based on whether an individual holds a paying position, but on whether that individual is in a position to affect the safety of the transit-riding public. The final rule definition of covered employee thus specifically includes volunteers.

Another ambiguity mentioned by several commenters concerns the maintenance category, which several commenters believed would include workers who clean rather than repair transit equipment. We do not mean to cover such workers and emphasize that only mechanics who repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule.
D. Covered Employee/Contractor

In the NPRM the definition of covered employee included three general categories of safety-sensitive employees—those directly employed by an employer, those employed by a contractor, and applicants for a safety-sensitive position. Most comments about this definition pertained to the coverage of contractors in the NPRM which included any person or organization providing services or performing work consistent with a specific understanding or arrangement, which could be a written contract or an informal arrangement reflecting an ongoing relationship between the parties.

Many commenters objected to the inclusion of contractors within the scope of the rule, believing that employers should not be accountable for a contractor's compliance with the rule because employers have little or no control over contractors or their employees.

While other commenters did not specifically object to the inclusion of contractors, they did object to the scope of the definition of contractor and recommended that it be defined to include only those who perform work or provide service under a formal written agreement.

Other commenters sought to exclude contractors in rural areas contending that many simply would refuse to do business with the recipient rather than submit to an alcohol testing program. The remaining commenters requested that we exclude only contract mechanics from the definition.

FTA Response. In response to comments, we have made a number of changes to the wording of this safety-sensitive function, although the basic concepts in the NPRM remain unchanged.

The final rule includes direct employees, contractors, and their employees, and applicants under the definition, but reflects the following changes. First, we specifically include volunteers in the definition because, as noted above, we define "safety-sensitive" functionally and look only to the function that a person performs, not whether they receive pay for their work.

Second, while many commenters objected to including contractors who perform safety-sensitive functions, we have for the most part continued to include them in light of legislative history on this issue. The following was said during the debate on the bill:

"Drug and alcohol-testing requirements must not be circumvented through contracting out of work."

Safety-sensitive employees of recipients of the Federal transit grant money identified in the bill, and those safety-sensitive employees working for contractors of such recipients must be covered exactly to the same extent and in the same fashion. I know that I speak for all conferees when I say that we will not tolerate a situation where employees performing substantially the same safety-sensitive function are covered or not covered depending on whether they work directly for a public authority or an outside contractor."


On the other hand, we are sympathetic to the persuasive arguments of rural operators on this issue, and specifically exclude from coverage under the rule contract mechanics who perform work or provide services for section 18 rural recipients. We believe that the potential cost and hardship of including such contractors outweighs any benefits including them might bring, since so many rural operators believe that they simply would be unable to get any outside servicing if providers of that service were subject to this rule.

E. Pre-employment/Pre-duty Testing

Although the NPRM included the pre-employment/pre-duty tests within one provision, in fact they apply to different types of workers/applicants in one instance, and transfers from a nonsafety-sensitive position to a safety-sensitive position in the other. Nevertheless, both applicants and transferees must take an alcohol test indicating an alcohol concentration level less than 0.04 before they can perform a safety-sensitive function for the first time. Hence, the NPRM would allow an employer to hire someone who has taken an alcohol test with a result of 0.04 or greater as long as that individual is retested and has a result less than 0.04 before he or she performs a safety-sensitive function. Under the notice provision, the NPRM required applicants and transferees to be notified that they must submit to an alcohol test. Moreover, a pre-employment alcohol test could be waived by the employer, which distinguishes the alcohol NPRM from the anti-drug NPRM.

Commenters focused on these issues. Specifically, commenters requested that we add a notification requirement to the pre-employment/pre-duty testing provision of the final rule. On the other issue, commenters stated that employers should not be able to accept the results of an alcohol test administered under the requirements of another DOT agency.

FTA Response. In the NPRM we did require an employer to notify an applicant that he or she would be required to submit to an alcohol test. We have made no changes to this requirement in the final rule.

We have, however, changed the language in the rule which ensures that the employer is aware that it has the discretion to waive a pre-employment alcohol test in one limited circumstance when the employee has been tested within the previous six months under the rules of another DOT agency. This is not a change from the NPRM, rather it is a clarification.

We have made another change in response to commenters who were confused by the term pre-duty testing and assumed that it meant that an employee must be tested every time they were about to perform a safety-sensitive function. This is not the case. We meant to apply that provision to transfers from a nonsafety-sensitive position to a safety-sensitive position. To clarify our intent we have deleted the phrase "pre-duty" (in the context of pre-employment alcohol testing) from the final rule.

F. Reasonable Suspicion Testing

Commenters responding to this general area raised numerous issues. Before discussing those issues, however, we first briefly summarize the reasonable suspicion testing provision as it appeared in the NPRM.

Reasonable suspicion testing is specifically required by the Act, and the NPRM proposed authorizing an employer to conduct a test when it believes the employee is exhibiting certain characteristics of alcohol misuse. The NPRM never identifies or defines these characteristics, but authorizes an employer to require a reasonable suspicion alcohol test on the basis of specific, contemporaneous, articulable observations concerning the appearance and behavior of the covered employee, which characterize alcohol misuse.

Moreover, those observations must be made by a supervisor trained in detecting the symptoms of alcohol misuse. The NPRM specifically required that a supervisor receive one hour of training, which must include information about the manifestations and behavioral characteristics indicating alcohol misuse.

Commenters took a number of positions on this issue. Some wanted only one supervisor to make the reasonable suspicion determination, others wanted two. Some believed that the test could be based on the observations of a third party, such as a transit passenger.

Commenters also took different positions on the amount of time a supervisor should be trained, although
most thought that one hour was not enough time to adequately train a supervisor. Some commenters suggested four hours of training, others suggested four hours of combined alcohol and drug training, and yet another suggested five to ten hours of training with the additional requirement be required of a proficiency certification.

Many commenters suggested that the language of the reasonable suspicion provision be broadened to include other factors in the determination. For instance, some suggested that employers be allowed to review an employee’s attendance records for absenteeism and tardiness. Others suggested that an employer be allowed to examine other factors, such as an employee’s moving traffic violations, operating rule violations, or operating rule violations. And others suggested that an employer be able to look at the pattern of the employee’s conduct both on and off the job.

Lastly, the commenters discussed the matter of whether there should be written documentation of a reasonable suspicion determination. The NPRM did not require written documentation, but stated that any document generated as a result of a reasonable suspicion determination must be maintained for a year. Several commenters recommended that a written determination be required, with one suggesting that a checklist also be required. One commenter recommended that a second supervisor concur in the written determination before a reasonable suspicion test could be conducted.

Another commenter suggested that written documentation be required only if the employee tested at 0.02 or greater and subsequently was disciplined.

FTA Response. In the final rule we essentially have retained the reasonable suspicion provision from the NPRM, with only minor changes, because we believe it adequately balances the rights of employees against the rights of the traveling public. For instance, we believe that the observations must be made by a supervisor trained in detecting the symptoms of alcohol misuse rather than by some third party. Of course a third party could alert a supervisor to pay particular attention to the affected employee.

We also believe that a determination made by a single supervisor in detecting the signs of alcohol misuse adequately protects the employee, and we were concerned about the cost of requiring two supervisors to make the determination.

Although many commenters recommended that supervisors receive more than one hour of training, we have not changed this requirement in the final rule, being sensitive to the costliness of such training. Individual employees of course are free to provide as much additional training beyond the required one hour as they like. Employers also are allowed to combine drug and alcohol training, provided the required time frames are satisfied.

The standard used to authorize a reasonable suspicion test remains unchanged in the final rule, which means that a supervisor may consider only short-term indicators of alcohol misuse. We stress that long-term indications of alcohol misuse such as absenteeism or tardiness or moving traffic violations cannot be used as the basis for conducting a reasonable suspicion alcohol test, which must only be based on contemporaneous and articulable observations. Of course, a supervisor may particularly be alert to the conduct and job performance of an employee based on the supervisor’s long-term knowledge of the employee.

If a supervisor determines that the employee may be operating a commercial motor vehicle in a reasonably prudent manner, the supervisor may authorize the test. If the employee refuses to take the test, the supervisor may authorize the test to proceed. The supervisor may not administer the test to the employee, but may direct the employee to perform the test. If the employee refuses to take the test, the supervisor may arrest the employee for the purpose of obtaining a blood or urine sample.

G. Random Testing/Random Testing Rate

The random testing provision generated many comments, with most commenters proposing the adoption of a particular random testing rate or a particular method of determining a random testing rate. Other commenters were concerned about the frequency of random testing and how the test should be administered. Several commenters sought clarification of certain aspects of the provision.

Several different alternatives for determining the random testing rate were offered. Many commenters suggested a flat rate, ranging from 10 percent to 50 percent.

Others suggested a performance-based rate, that is, a rate determined by the results of random testing. Under such a scheme, if the number of results of 0.04 or greater exceeds a specified rate (for example, 1 percent), then the employer would be required to test at a higher specified random rate (for example, 50 percent). If the number of positives is less than the specified rate, the employer would be required to test at a reduced random rate (for example, 25 percent).

One commenter recommended that an employer could randomly test 20 percent of its employees if less than 3 percent, of its random tests were positive, but if the number of positives exceeded 3 percent, the employer would have to raise its testing rate.

Other variations were proposed. Several commenters suggested that we set a minimum random testing rate of 10 percent, but give an employer the discretion to test at a higher rate based on its own experience. Another commenter suggested that we require a random rate less than 50 percent and allow an employer to set its own rate for different classes of employees. Yet another commenter recommended that we set a rate anywhere from 10 percent to 50 percent but allow an employer to reduce its rate if it has programs, such as training and rehabilitation programs, in addition to those required by the final rule.

Another commenter recommended that random testing be phased in, 15 percent the first year, 20 percent the second year, and 25 percent thereafter, presumably to ease cost and administrative burdens. Another commenter, however, recommended that those who had never randomly tested employees should be required to test at a higher random rate than those who have had a program in effect.

Lastly, one commenter believed that FTA should not set the rate at all, but the rate should be determined by an agreement between labor and management. Aside from the random testing rate issue, commenters also addressed how the test itself should be conducted. In this regard, several commenters were concerned about how truly random testing would be, and suggested that the testing itself should be conducted by an outside agency.

FTA Response. In determining the random alcohol testing rate, FTA has considered not only the comments on this issue but other factors as well. We therefore have established a random alcohol testing rate of 25 percent, the rate at which all DOT agencies issuing rules today are requiring. We recognize, however, that random alcohol testing does subject a large number of employees to testing and is costly. We have thus added a provision to the final rule allowing the random alcohol testing rate to drop to 10 percent annually if, based on the MIS reports, the violation rate for random alcohol testing in the transit industry is less than 0.5 percent for two consecutive years. If subsequently the violation rate for random alcohol testing rate increases to greater than 0.5 percent for any one calendar
year, the random alcohol testing rate would go to 25 percent, and if it increases to greater than one percent, the random alcohol rate would be increased to 50 percent. Each year, FTA will announce the random alcohol testing rate in the Federal Register.

Moreover, the NPRM required random testing to be completely random, which means that it must be unannounced. It must also be unpredictable, which is the reason we proposed that the tests be spread reasonably throughout a 12-month period. We have retained both of these requirements in the final rule.

We do not require the test to be conducted by an outside agency. Although requiring a third party to conduct the random alcohol testing may afford an employee additional protection, we believe the final rule provides an employee with sufficient protection. Among other things, the rule requires an employer to use a scientifically valid method to randomly select employees from a pool in which each employee has an equal chance of being selected.

Lastly, although some commenters were confused about when we would require an employer to conduct random alcohol testing, we have retained the NPRM restrictions in the final rule. In the NPRM we proposed to restrict random testing to just before, during, or just after the employee performs a safety-sensitive function because alcohol is a legal substance, and an employee who is not performing or who will not be performing a safety-sensitive function within four hours may engage in a legal activity. Thus the alcohol rule strictly limits the period of time when an employee is subject to random testing. This is particularly important for supervisors who may rarely perform alcohol testing.

II. Post-accident Testing

The comments on this provision concerned three basic questions: when should a test be performed following an accident, which employees should be tested, and who should conduct the testing.

In determining when a post-accident test should be required, the NPRM distinguished between fatal and nonfatal accidents. After an accident involving a fatality, the NPRM required the employer to test employees who were on duty and present in the vehicle at the time of the accident as well as mechanics involved in the vehicle’s most recent maintenance. After an accident not involving a fatality had occurred, the employer was required to test certain employees unless their performance could be completely discounted as a contributing factor to the accident.

If the employer found alcohol in a test, it had to require the employee to take a second test. If alcohol was found in the second test, the employee had to abstain from alcohol for at least 24 hours before the test could be administered again. If alcohol was found in the third test, the employer had to fire the employee. If alcohol was found in the second test, the employer had to fire the employee if the employer had not given the employee a reasonable chance to avoid the alcohol.

Other employees’ conduct may contribute to an accident, however. For example, if two trains are placed on the same track and collide, the performance of safety-sensitive duties by a vehicle controller could have contributed to the accident. If there are indications that brake failure was involved in a bus accident, and the vehicle’s brake system was maintained, the NTEA recommended that a mechanic was tested to determine if brake failure was caused by the mechanic.

If there is information that an employer has reason to believe an employee may have been involved in the accident, the employer may conduct a post-accident test. If there is information that an employer has reason to believe an employee may have been involved in the accident, the employer is required to conduct a post-accident test.

Accordingly, if there is information that an employer has reason to believe an employee may have been involved in the accident, the employer is required to conduct a post-accident test. If there is information that an employer has reason to believe an employee may have been involved in the accident, the employer is required to conduct a post-accident test.

With respect to other vehicles (e.g., buses and vans), a covered employee on duty in the vehicle at the time of the accident would have to be tested if the employer determined, based on the best information available at the time, that the other employee’s performance could have contributed to the accident. Examples of such a test could include the situation of the mechanics mentioned above and a situation in which a bus driver was not cited by local law enforcement personnel but the employer, in its good judgment, determined that the driver’s performance could have contributed to the accident.

With respect to other vehicles (e.g., rail vehicles), the employer would have to test covered employees on duty in the vehicle at the time of the accident, unless the employer determined, based on the best information available at the time, that an employee’s performance could be completely discounted as a contributing factor in the accident. This is a different standard than in the case of road surface vehicles, because there is little likelihood of an on-the-spot law enforcement citation to the operator of
vehicles like rail cars. As in the other post-accident testing situations, the employer could make a judgment to test other covered employees, if the employer concluded that their performance could have contributed to the accident.

After an accident has occurred, an employer—not police or hospital personnel—must test affected employees for the misuse of alcohol. The rule does not permit a waiver of the employer's obligation to test an employee after an accident, nor does it allow an employer to use the results of laboratory findings of an alcohol test administered by police, for law enforcement purposes, or hospital personnel for treatment of injury.

Under the final rule, however, an employee may be taken to a medical treatment facility immediately after an accident without being tested by the employer. An employee also may leave the scene of an accident, without being tested, so long as he remains readily available for testing, which means that the employer knows the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer and within 8 hours of the accident. Thus an employee may receive medical attention or respond to police questions or seek assistance for injured individuals.

1. Return to Duty/Follow-up Testing.

The comments concerning these two kinds of testing focused primarily on the roles of the employer and the Substance Abuse Professional (SAP). The NPRM proposed authorizing the SAP to determine not only when an employee may return to duty after testing at 0.04 or greater, but also how many follow-up tests an employee should take and for what period of time.

Many commenters objected to the extent of authority given to the SAP under the NPRM. An employer, not the SAP, should determine if and when an employee may return to duty after testing at 0.04 or greater, but also how many follow-up tests an employee should take and for what period of time.

Other commenters recommended that the final rule prescribe in detail the follow-up testing requirements, with several offering suggestions. One commenter recommended that the rule require 60 months of follow-up testing, with 12 tests required in the first year and 6 annually thereafter. Another commenter recommended 60 months of testing with a prescribed number of tests over the entire 60 month period; another a 36 month follow-up period with 6 tests required annually; and another a 24 month follow-up testing period with 3 tests required the first year. And, lastly, one commenter stated that the rule should not recommend a specific number of follow-up tests at all.

FTA Response. The final rule retains the authority of the SAP. In making this decision, we strove to balance the rights and privacy of the employee against the safety of the traveling public. Because of the extensive credentials required to be an SAP, we believe that they are most qualified to make the necessary decisions concerning the ability of an employee to return to his or her safety-sensitive position. In addition, because studies have shown that the relapse rate is highest in the first year of recovery, we mandate a minimum of 6 alcohol tests during that time. After that period, however, we believe that the SAP should determine when follow-up testing should end; in any event, it must end if 60 months have elapsed from the time of the employee's return to duty. We note that an employer may require additional follow-up testing under its own authority. It is important to emphasize, moreover, that during the 60-month period the employee remains separately subject to random testing as well.

J. Treatment

The NPRM proposed that any covered employee who tested at 0.04 or greater must be advised by his employer of the resources available to help him resolve problems associated with alcohol misuse and be evaluated by an SAP. The NPRM neither authorized nor prohibited an employer from disciplining or discharging an employee because he tested at 0.04 or greater; it simply stated that the employee who tests in that range must be removed from his safety-sensitive position.

Several commenters objected to our silence on this issue, and asked us to clarify the rule by specifically authorizing the employer to take whatever disciplinary action the employer deems necessary. The remaining commenters addressed the issue of rehabilitation. One commenter stated that we mandate rehabilitation and treatment. Another commenter stated that the final rule require reinstatement in addition to rehabilitation. Yet another commenter stated that the final rule should not address the issue of rehabilitation, which should be decided by the employer and the union. Lastly, a commenter stated that an employer should not be required to refer an employee to an SAP when the employer's policy is to discharge any employee who tests at 0.04 or greater.

FTA Response. FTA has retained the language in the NPRM on this issue. We thus remain silent on whether an employer may dismiss or disqualify an employee who has tested at 0.04 or greater, an issue best decided at the local level.

Concerning rehabilitation, we believe that we have met the requirements of the Act, which state that the rule must provide for identification and opportunity for treatment of employees who are determined to have misused alcohol. In this regard, we require that an employee who tests at 0.04 or greater be evaluated to determine whether he needs assistance. Such an employee may return to his safety-sensitive position after he has properly completed a course of treatment as determined by an SAP, and has passed a return to duty alcohol test.

If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level. Nor does the rule deal with the issue of recidivism, when an employee has repeatedly tested at 0.04 or greater and has repeatedly been referred to treatment. Again, we believe that issue should be decided at the local level.

This rule requires the removal of a safety-sensitive employee from a safety position if the employee tests at 0.04 or greater, but does not address employment or disciplinary issues in connection with such action.

K. Training

The NPRM proposed that supervisors who make reasonable suspicion determinations receive 60 minutes of training on the physical, behavioral, and performance indicators of probable alcohol misuse, which would enable the supervisor to make an informed reasonable suspicion determination. In addition, the NPRM proposed that all safety-sensitive employees be provided educational materials about the effects of alcohol misuse on health, safety, and the work environment.

We received numerous comments on this issue, virtually all of them in favor of requiring training, at least for supervisors. For employees, most commenters were silent, although one favored requiring 60 minutes of training and another asked that we help develop a curriculum for a general educational program.

Because almost all of the commenters were in favor of training for supervisors,
provisions requiring access to certain facilities to also permit access by State oversight agency officials to facilitate their oversight role as proposed in the State Safety Oversight NPRM.

M. Implementation Date

The NPRM proposed to require compliance with this rule within one year of publication in the Federal Register for large employers and within two years for States and small employers. This provision contrasted with implementation periods proposed in the drug NPRM, which were six months for large employers and one year for States and small employers.

Several commenters strongly favored implementing both the drug and the alcohol rules simultaneously. Another commenter recommended that, for budgeting reasons, FTA key the implementation period to the fiscal year.

FTA Response. In the final rule, we have decided that large employers must implement their alcohol testing programs on January 1, 1995, while small employers will have until January 1, 1996. This is consistent with the implementation date of our related drug rule and will ensure that the MIS annual report data collection effort will coincide with the calendar year.

We provide small employers additional time to implement their rule because they may find it necessary to form consortia. Large employers in many instances already have experience in testing their employees for alcohol misuse.

We further note, in response to several inquiries, that the rule provides no authority for employers to begin its program before the implementation dates included in this rule.

N. Combined Drug and Alcohol Rules

Many commenters urged us to combine the drug and alcohol NPRMs into one final rule, or, in the alternative, to combine common aspects of both rules, such as the training and reporting requirements.

FTA Response. We have decided not to combine the drug and alcohol testing rules at this time because there are significant differences between them. For instance, the random rate for the two rules differ. 25 percent for alcohol and 50 percent for drugs. Also, the time period during which an employee may be subject to random testing differs in the two rules. The alcohol rule contains an entire subpart, Prohibitions, which specifies when an employee cannot use alcohol. In contrast, the drug rule contains no comparable subpart because prohibited drugs are controlled
accompanying the Act addressed the issue of FTA granting waivers of the rule in whole or in part:

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with [FTA] drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver for certain operations from such requirements would not be contrary to the public interest and would not diminish the safe operation of rural transit conveyances, the committee would not object to a waiver, in whole or in part, of the application of regulations issued pursuant to this bill with regard to recipients of funds under section 18 of the [Federal Transit Act, as amended.], S. Rep. No. 80, 102d Cong., 1st Sess. 36 (1991).

Notwithstanding this legislative history, the Act itself does not specifically authorize the FTA to "waive" particular requirements of the rule. Nonetheless, we believe we can implement the rule in such a way that it minimizes burdens on small operators.

In this regard, we have adopted several provisions to ease the rule's impact on small operators. Small operators, which includes section 18 rural providers and smaller recipients of section 9 formula funds—are provided additional time to comply with the rule. We have also exempted from the rule mechanics under contract to or with informal agreements with a section 18 employer. To reduce costs and administrative burdens we allow and encourage section 18 providers to join a consortium of operators to comply with the rule.

IV. Section-by-Section Analysis

Subpart A—General

A. Purpose. (§ 654.1)

This section explains that the purpose of the rule is to promote safety by requiring a recipient to establish and implement an alcohol testing program to detect the misuse of alcohol, by breath testing, and to deter the misuse of alcohol by educating and training safety-sensitive employees about the safety and health ramifications of alcohol misuse.

B. Applicability. (§ 654.3) z111

This section describes FTA's jurisdiction over recipients and covered employees and how it may overlap with that of other modal agencies; whether section 16(b)(2) recipients must comply with this rule; the effect of the rule on user-side subsidies; and the effect of the rule on those who may no longer receive FTA funding.

1. FTA grant programs under sections 3, 9, and 18 and the Interstate Transfer Program. Under the section 3 discretionary grant program, FTA funds three categories of capital projects: the construction of new rail projects; the improvement and maintenance of existing rail and other fixed guideway systems; and the rehabilitation of bus systems. Under sections 9 and 18, the formula grant programs, FTA funds both capital and operating assistance to specific categories of recipients that receive Federal funds under a statutory formula based on population, population density, and other factors. Generally, urbanized areas receive section 9 funding directly, while nonurbanized areas receive section 18 funding through the State.

FTA also provides funds under 23 U.S.C. section 103(e)(4), the interstate transfer program. Under this program, FTA provides funding to States and localities for capital transit projects in lieu of nonessential Interstate highway projects. Hence, recipients of these types of FTA funding may be States, transit agencies, or other kinds of localities, but all such recipients are public entities.

2. FTA Jurisdiction. FTA is a Federal agency that makes grants of Federal financial assistance under various statutory provisions. Under all of these provisions, the agency's relationship is with the direct receiver of Federal financial assistance. That is, FTA does not directly to deal with a covered employee under any circumstances.
Rather, the Act authorizes FTA to require a recipient to implement an alcohol misuse prevention program, and it is the recipient that is responsible for assuring that covered employees comply with the rule. If a recipient fails to do so, FTA will withhold Federal funding.

3. Multi-modal jurisdiction. As discussed below, recipients may be regulated by another DOT modal agency such as the Federal Railroad Administration (FRA), which regulates railroads, the Federal Highway Administration (FHWA), which regulates holders of Commercial Driver’s Licenses (CDL) and their employers, or the United States Coast Guard, which regulates certain vessels and mariners.

Both FRA and FHWA are authorized under the Act to establish an alcohol testing program for their respective regulated communities, which include some FTA recipients. Coast Guard has jurisdiction over mariners and vessels, including the authority to take action against a seaman based on alcohol intoxication.

Coast Guard’s regulated community also includes some FTA recipients. Therefore, to clarify the jurisdiction between FTA and other DOT agencies, we have reached the following agreements with the relevant agencies.

a. Federal Railroad Administration. The FRA regulates railroads. A railroad is defined under the Federal Railroad Safety Act of 1970 as [all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

b. Federal Highway Administration. The Act authorizes FHWA to regulate intrastate motor carriers and specifically requires it to issue an alcohol rule which applies to intrastate as well as interstate motor carriers. Thus, to avoid subjecting recipients who are also motor carriers to two different rules, FTA and FHWA have agreed to certify that these recipients are subject only to FTA’s alcohol rule.

c. United States Coast Guard. If a recipient operates a ferry boat service, it is subject to both FTA’s and Coast Guard’s alcohol misuse regulations with regard to the ferry boat service. Applicable Coast Guard regulations are located in 33 CFR parts 95 and 46 CFR parts 4 and 16. FTA and Coast Guard agree, however, that a recipient in compliance with FTA’s alcohol misuse prevention rule will also probably be in compliance with the relevant Coast Guard provisions.

It is important to note that Coast Guard’s regulations require alcohol testing in only one situation, where there has been a serious marine incident. Serious marine incidents include large oil or hazardous substance spills and reportable marine casualties which result in (1) One or more deaths; (2) serious injuries; (3) damage to property in excess of $100,000; (4) loss of an inspected vessel; or (5) loss of a self-propelled uninspected vessel over 100 gross tons.

Under Coast Guard’s regulations, a test must be conducted by using blood or breath specimens. Use of an FTA—required EBT would satisfy the Coast Guard requirement. Because FTA has defined accident more broadly than Coast Guard, an FTA recipient who performs a post-accident breath test under FTA’s rule should be in compliance with Coast Guard’s rule as well.

Coast Guard also allows employer or law enforcement officer to direct reasonable cause testing under situations specified in 33 CFR part 95. We believe that this provision represents only a minor difference from FTA’s rule.

We note here that the Coast Guard is authorized to take certain actions against a marine employer or a mariner. FTA’s rule does not affect Coast Guard’s authority or requirements in any respect. Consequently, a recipient that operates a ferry boat service is subject to withholding of Federal funding if it is in non-compliance with FTA’s rule, and any appropriate action if it is in non-compliance with the Coast Guard rule.

4. Covered employees of recipients. As noted above, FTA does not directly regulate employees or workers who are subject to the provisions of this rule through action of their employers. This general proposition is not true of FHWA and the Coast Guard, which use licensing actions or other measures to enforce their safety rules, which would include their alcohol rules. A recipient’s safety-sensitive employees thus may be subject to licensing actions of these agencies, even though the recipient is regulated by FTA and its employees are covered by FTA’s alcohol misuse regulations. For example, a CDL holder employed by an FTA recipient remains subject to the Commercial Motor Vehicle Safety Act of 1986, and the consequences that attach to a violation of it. For example, a CDL holder convicted of driving under the influence of drugs or alcohol may have his or her Commercial Driver’s License suspended or revoked. Similarly, the Coast Guard is authorized to revoke a license, certificate, or document of a marine employee under certain circumstances. Coast Guard’s relevant provisions specifying the rights and responsibilities of marine employees are located in 46 CFR parts 4, 5, and 16 and 33 CFR part 95.

5. Section 16(b)(2) recipients. Some entities receive funding under section 16(b)(2) of the FT Act, which provides capital assistance, through a State, to organizations that provide specialized transportation services to elderly persons and persons with disabilities.

While some commenters suggested that we cover section 16(b)(2) recipients under the rule, we do not do so, noting that the Act references recipients of funds under sections 3, 9, or 16 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code, but not section 16. Note, however, that a section 16(b)(2) recipient may be covered by the alcohol regulation published by the FHWA elsewhere in today’s Federal Register.

6. User-side subsidies. A user-side subsidy refers to the practice of providing passengers publicly subsidized script or vouchers, which the passenger then uses to pay for transportation from a private carrier such as a taxicab company. In essence, a recipient provides transportation services indirectly through such subsidies.

The regulation applies to certain recipients of FTA funding, and to transit operators providing service under contract or other arrangements with those recipients. To the extent that a taxicab operator does not provide service under an arrangement with an FTA recipient, but is chosen at random by the passenger, it would not be subject to the rule. If, however, the taxicab company or private operator does provide service under an arrangement...
with an FTA recipient, it is covered by the rule as a contractor, as defined by the rule. In such cases, the taxi company may wish to designate only certain drivers to provide such service, in which case only those designated drivers would be subject to the rule's alcohol testing program.

7. Continuing Federal interest. Not all recipients receive a Federal grant or grants for capital or operating assistance each year under the formula or discretionary programs. Some may receive capital assistance only when they need to purchase equipment or construct or repair a facility, which could occur once every few years. Indeed, there may be a recipient that receives a capital grant just once over a five or ten year period. It is important to emphasize in these cases that once a recipient has received an FTA capital grant, it is covered by the alcohol testing program. In such cases, the taxi company with an FT A recipient, it is covered by alcohol testing program.

8. Alcohol Testing Procedures. (§ 654.5) Not all recipients receive a Federal grant or grants for capital or operating assistance each year under the formula or discretionary programs. Some may receive capital assistance only when they need to purchase equipment or construct or repair a facility, which could occur once every few years. Indeed, there may be a recipient that receives a capital grant just once over a five or ten year period. It is important to emphasize in these cases that once a recipient has received an FTA capital grant after the effective date of this rule and has therefore agreed to comply with the rule, it must continue to comply with the rule (and other Federal requirements) during the useful life of the equipment or facility funded under the grant. In short, this rule remains in effect so long as the grant-acquired assets and related grant obligations remain in effect, and is not contingent upon a recipient receiving Federal funds each year.

9. Contractor. This definition covers a broad range of arrangements between an FTA recipient and those carrying out services for it and includes not only written and oral commitments in which both parties agree to specific terms and conditions but informal arrangements as well. An informal arrangement essentially is any ongoing relationship between two parties. Hence, repeatedly doing business with another entity would come within the meaning of a contractual arrangement under the rule.

10. Covered employee. This definition describes who is subject to the rule. Not all employees in a pool with the safety-sensitive employees in a pool with the safety-sensitive function.

11. DOT. The abbreviation DOT stands for the United States Department of Transportation.

12. DOT agency. DOT contains several operating agencies, five of which are issuing alcohol misuse prevention rules in today’s issue of the Federal Register. Those agencies are: FHWA (49 CFR part 350), FRA (49 CFR part 219), FAA (14 CFR part 61), and RSPA (49 CFR part 654).

13. Employer. This definition applies to entities that must implement an alcohol misuse rule. It includes recipients and other entities that provide mass transit service or perform a safety-sensitive function for a recipient. It includes subrecipients, operators, contractors, and consortia.

14. FTA. FTA is the abbreviation for the Federal Transit Administration.

15. Large operator. A large operator is a transit provider primarily operating in an area of 200,000 or more in population.

16. Performing (a safety-sensitive function). For a general discussion of this definition, see the preamble accompanying part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today’s Federal Register.

17. Railroad. This definition is from the Railroad Safety Act of 1970 and is used in the rule to distinguish FTA’s jurisdiction from FRA’s. Basically, FRA has jurisdiction over any form of transportation that runs on rails and is connected to the general railroad system. FTA thus has jurisdiction over...
all self-contained forms of mass transportation that run on rails, so long as those systems receive Federal funding from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code. 

18. Recipient. This definition, based on the Act, defines a recipient as an entity receiving Federal financial assistance directly from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

19. Refuse to submit. For a general discussion of this definition, see the common preamble accompanying Part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today’s Federal Register.

20. Safety-sensitive function. This definition determines which categories of employees are subject to the rule. Because each recipient uses its own terminology, we have decided to define safety-sensitive based on the function performed instead of listing specific job categories. Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition.

The definition lists five categories of safety-sensitive functions. The list itself is exclusive, which means that either an employee performs a safety-sensitive function listed in a category or she does not. An employer may not add any category to the list unless it wishes to test those additional employees separately under its own authority. The first category is operating a revenue service vehicle, whether or not the vehicle is in service. In short, an employee who operates a revenue service vehicle for any purpose whatsoever is a safety-sensitive employee and is subject to the rule.

The second category is operating a nonrevenue service vehicle when required to be operated by a holder of a CDL. The third category is controlling dispatch or movement of a revenue service vehicle or equipment used in revenue service. The fourth category is maintaining a revenue service vehicle unless the recipient receives section 18 funding and contracts out such services. Maintaining a revenue service vehicle includes any act which repairs, provides upkeep to a vehicle, or any other process which keeps the vehicle operational. It does not include cleaning either the interior or the exterior of the vehicle or transit facility. This category specifically excludes only the employees of a contractor or other entity who maintains revenue service vehicles for section 18 recipients. Hence, all other employees who maintain revenue service vehicles whether by contract or otherwise are safety-sensitive employees.

The fifth category is carrying a firearm for security purposes. A security guard who does not carry a firearm is excluded from this category, and is not a safety-sensitive employee.

We note that supervisors are included in this definition so long as the supervisor performs or the supervisor’s job description includes the performance of any of the functions listed in categories 1 through 5.

21. Screening test. For a general discussion of this definition, see the preamble accompanying Part 40 of this title, Procedures for Transportation Workplace Drug and Alcohol Testing Programs, published elsewhere in today’s Federal Register.

22. Small operator. A small operator is a recipient operating primarily in an area of less than 200,000 in population.

23. Substance abuse professional. For a general discussion of this definition see the common preamble published by the Office of the Secretary, published elsewhere in today’s Federal Register.

24. Vehicle. This definition lists types of vehicles used in mass transportation, or which may be involved in accidents with such vehicles. Because mass transit encompasses travel by bus, van, ferry boat, and rail, the list is meant to be very broad, covering every type of conveyance used to provide mass transit (including such things as people movers and inclines). The term “mass transit vehicle” is used to distinguish vehicles actually used for transit purposes from those used by the general public.

25. Violation rate. For a general discussion of this definition, please see the common preamble issued by the Office of the Secretary, published elsewhere in today’s Federal Register.

F. Preemption of State and Local Laws. (§654.9)

The Act provides that this rule preempts any inconsistent State or local law, ordinance, rule, regulation, standard, or order. Consistent with long-standing Department-wide interpretation of this type of preemption language, the regulation specifies that “inconsistent with” means that the regulation:

1. Preempts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or
2. Preempts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, neither the statute nor the regulation preempts State criminal laws that impose sanctions for reckless conduct.

G. Other Requirements Imposed by an Employer. (§654.11)

An employer may impose other requirements in addition to those imposed by this rule if those additional requirements do not conflict or interfere with the requirements of this rule. For example, an employer may require a supervisor to be trained for two hours instead of one, or an employer may provide training for employees.

H. Requirement for Notice. (§654.13)

This section requires an employer to notify an employee that the employee is being tested under Federal law. This section specifically bars an employer from misrepresenting a test conducted under its own authority as a test mandated by Federal law.

I. Starting Date for Alcohol Testing Programs. (§654.15)

This section states the implementation date for large operators, States, and small operators.

Subpart B—Prohibitions

This subpart identifies the acts prohibited by the rule. Although the rule text addresses the employer, we believe these sections are best understood if they are directed to the employee.

A. Alcohol Concentration. (§654.21)

This section sets the alcohol concentration level prohibited by the rule at 0.04. A covered employee may not perform a safety-sensitive function when his or her alcohol concentration level is at 0.04 or greater.

B. On-duty Use. (§654.23)

This section prohibits a covered employee from consuming alcohol while performing a safety-sensitive function.

C. Pre-duty Use. (§654.25)

Paragraph (a) prohibits employees from consuming alcohol four hours before performing a safety-sensitive function.

For on-call employees, the employer must prohibit a covered employee from using alcohol within four hours of performing a safety-sensitive function, and must establish a procedure that allows an employee to: (1) Say he has used alcohol and (2) indicate whether he is able to perform his safety-sensitive function. If the employee believes he is not capable of performing his safety-
sensitive function, the employer shall excuse the employee from doing so. If, however, the employee believes he is capable of performing a safety-sensitive function, the employer shall test the employee and shall permit the employee to perform a safety-sensitive function if his alcohol concentration level measures less than 0.02. If an employee’s alcohol concentration level measures at 0.02 or greater but less than 0.04, the employer may allow the employee to perform his safety-sensitive function, if his alcohol concentration level measures less than 0.02. If an employee is not retested, he must wait until eight hours has elapsed before resuming the performance of a safety-sensitive function.

To encourage employees to admit that they have consumed alcohol, they shall not be subject to the consequences specified in subpart E. If, however, an on-call employee does not indicate that he has consumed alcohol and exhibits signs of alcohol misuse, she may be subject to reasonable suspicion testing. If the test indicates an alcohol concentration level at 0.04 or greater she would be subject to the consequences of violating this rule.

D. Use Following an Accident. (§ 654.27)

This section prohibits an employee from consuming alcohol after an accident until she has been tested, eight hours have elapsed, or if an employee’s conduct is completely discounted as a contributing factor to the accident. In the case of fatal accidents, the covered employee on duty in the vehicle at the time of the accident must refrain from drinking for eight hours or until she has been tested, whichever occurs first.

E. Refusal to Submit to a Required Alcohol Test. (§ 654.29)

If an employee refuses to submit to a random, post-accident, reasonable suspicion, or follow-up test, he is treated as if he tested at 0.04 or greater and subjected to the consequences established in subpart E.

Subpart C—Tests Required

A. Pre-employment Testing. (§ 654.31)

This section requires an employer to administer a pre-employment alcohol test to applicants and employees transferring from a nonsafety-sensitive position to a safety-sensitive position.

This section, however, does not preclude an employer from hiring an applicant before the administration of an alcohol test. Nor does this section preclude an employer from hiring an applicant who has taken an alcohol test indicating an alcohol concentration level of 0.04 or greater. It states that before an employee performs a safety-sensitive function, an employee must take an alcohol test with a result indicating an alcohol concentration level less than 0.04.

This section also applies to current employees transferring from a nonsafety-sensitive position to a safety-sensitive position. Similarly to an applicant, the transferee must take an alcohol test prior to the first time she performs a safety-sensitive function with a result indicating an alcohol concentration level less than 0.04. If an applicant’s or a transferee’s alcohol concentration level measures at 0.02 or greater but less than 0.04, they cannot perform a safety-sensitive function until their alcohol concentration level measures less than 0.02. The employer, therefore, may opt to retest them until their alcohol concentration level measures less than 0.02 or not to allow them to perform a safety-sensitive function for eight hours.

Paragraph (b) of this section allows the employer to waive, under very limited circumstances, the administration of a pre-employment test. A test may be waived when (1) the applicant or transferee has been tested within the previous six months under the requirements of another DOT agency’s alcohol misuse prevention rule; and (2) the employer ensures that no prior employer has knowledge or records of an employee’s violation of an alcohol misuse rule within the previous six months.

This section requires an employer to contact prior employers seeking this information. If an employer does not wish to seek this information, it may choose to administer a pre-employment test.

B. Post-accident Testing. (§ 654.33)

This section requires a test after an accident has occurred, and establishes two categories of accidents, fatal and non-fatal. Non-fatal accidents are treated differently depending on the type of transit vehicle involved. For a more complete description of the ways in which different kinds of accidents are treated, please refer to the discussion of post-accident testing in the portion of the preamble that responds to comments.

The rule requires an employer to test the appropriate covered employees as soon as possible, but within 8 hours of the accident.

The rule also requires an employer to require an employee to remain readily available for testing if the employee does not do so, the employer can treat such behavior as refusing to submit to an alcohol test. Remaining readily available means that the employer knows the whereabouts of the employee and must conduct the test as soon as practicable but within 8 hours of the accident.

This section allows an employee to seek medical attention, assist injured individuals, or obtain assistance in dealing with the accident if necessary before being tested for misusing alcohol.

C. Random Testing. (§ 654.35)

The rule requires an employer to randomly test covered employees for the misuse of alcohol. The testing must truly be random, which means that it is random with respect to the person tested and the predictability of the actual administration of the test.

An employer cannot use an employee’s name in a random selection pool. Rather, an employer must identify each covered employee by a unique number, such as a social security or a payroll identification number, which is entered into a pool from which the selection is made. Each covered employee must have an equal chance of being tested. Once an employee is selected and tested, their identification number is reentered into the pool so that they will have an equal chance of being tested the next time the employer conducts random testing.

An employer must test randomly throughout the calendar year. Testing must be unannounced and occur on a reasonable basis throughout the entire calendar year. Random tests must be conducted in an unpredictable fashion. For example, an employer may not conduct random tests only on a Monday or only at the beginning of a shift.

Further, once an employee is notified of his selection for a random test, he must report (or be escorted) immediately to the collection site.

This section also describes the random alcohol testing rate which is based on the number of test results indicating an alcohol concentration of 0.04 or greater in the transit industry and thus may be decreased or increased on the basis of data made available to FTA. The rule requires employers to randomly test at a minimum annual rate of 25 percent, which means that the number of tests to be administered during a year must be equal to 25 percent of the number of employees in the selection pool. Based on the data FTA receives, however, the rate may be lowered to 10 percent if the positive random alcohol rate of the transit industry is less than 0.5 percent per year for two consecutive years. If the rate is lowered, it may subsequently be increased to 50 percent if the transit...
industry positive random alcohol rate is equal to or greater than one percent for one year. FTA will publish a Notice in the Federal Register annually announcing the random alcohol testing rate. We emphasize that the rate is calculated and implemented industry-wide, and not on the basis of any individual employer’s rate.

For compliance purposes, it is important to note that in calculating its positive random alcohol testing results an employer must include a refusal to submit to a test as an alcohol test result of 0.02 or greater.

This section establishes definite periods of time an employee may be randomly tested for alcohol, just before, during, and just after performing a safety-sensitive function.

This section establishes definite periods of time an employee may be randomly tested for alcohol, just before, during, and just after performing a safety-sensitive function.

D. Reasonable Suspicion Testing. (§ 654.37)

This section establishes testing based on reasonable suspicion that an employee has misused alcohol and establishes the standard the employer must use in determining whether to conduct such a test. First, a supervisor, trained in detecting the signs and symptoms of alcohol misuse must observe the employee’s appearance, behavior, speech, and body odors for signs of alcohol misuse. Then the trained supervisor determines, based on specific, contemporaneous, and articulable observations, whether the employee must take a reasonable suspicion alcohol test.

This standard precludes the use of long term indicators of alcohol misuse such as absenteeism, tardiness, occupational injuries, or moving traffic or operating rule violations as a basis for a reasonable suspicion determination.

Although the observation and determination must be made by a supervisor trained in the signs and symptoms of alcohol misuse, this standard does not preclude the use of observations made by third parties such as passengers. Should a passenger believe, however, that an employee has misused alcohol, a trained supervisor should observe the employee first hand and decide whether a reasonable suspicion test is warranted.

This section limits the period of time the trained supervisor may observe the employee for signs and symptoms of alcohol misuse to just before, during, or just after the employee performs a safety-sensitive function and limits the time frame for the employer to decide that a reasonable suspicion alcohol test is necessary to these time periods as well.

Once a reasonable suspicion determination is made, paragraph (d) requires the employer to conduct a reasonable suspicion alcohol test. If, for some reason a test cannot be administered after a reasonable suspicion determination, paragraph (d) gives the employer two options. The employer can wait for eight hours to elapse before allowing an employee to perform a safety-sensitive function, or the employer can administer an alcohol test sometime during the eight hours. In any event, if a test is not conducted within two hours the employer must record why it was not conducted. If it was not conducted within eight hours, the employer must also record the reasons for that failure. The employer must maintain these records and submit them to the FTA upon request.

When an employee is not given a reasonable suspicion test, this paragraph precludes an employer from applying the consequences established in subpart E for a violation of the rule.

E. Return to Duty Testing. (§ 654.39)

This section requires an employee who has violated a prohibition of Subpart B to take a return to duty test. The employee may not perform a safety-sensitive function until she has taken a return to duty test indicating that her alcohol concentration level is less than 0.02.

In addition, because of the prevalence of combined drug and alcohol misuse, an employer may also subject an employee who previously tested at 0.04 or greater under the FTA alcohol rule to a return to duty drug test.

F. Follow-up Testing. (§ 654.41)

Upon taking a return to duty test with a result less than 0.02, an employee is subject to follow-up testing for up to 60 months. During the first 12 months the employee is subject to a minimum of 6 follow-up alcohol tests, which must be unannounced and conducted reasonably throughout the 12 months.

After those 12 months, the substance abuse professional determines whether the employee should be subject to follow-up testing for the remaining 48 months. Because many individuals abuse more than one substance at a time, an employer may, based on the recommendations of the SAP, subject an employee who previously tested at 0.04 or greater under the FTA alcohol rule to follow-up testing for the use of prohibited drugs. An employer may also subject an employee who previously failed to pass a drug test under part 653 to follow-up testing for the misuse of alcohol.

Like reasonable suspicion and random testing, follow-up testing must be conducted just before, during, or just after the employee performs a safety-sensitive function.

It is important to note that an employee subject to follow-up testing remains separately subject to random testing under this rule.

G. Retesting of Covered Employees With an Alcohol Concentration of 0.02 or Greater but Less Than 0.04. (§ 654.43)

This section applies when an employee has taken an alcohol test showing an alcohol concentration level of 0.02 or greater but less than 0.04. When this happens the consequences of subpart E do not apply. The employee, however, may not perform a safety-sensitive function with this amount of alcohol in his system. The rule provides, therefore, that the employer may opt to retest the employee or prohibit him from performing a safety-sensitive function for eight hours. If an employer selects the first option and retests the employee, the employee may perform a safety-sensitive function only if retest his alcohol concentration level measures less than 0.02. If the employer elects to do so, it may conduct several tests until the employee’s alcohol concentration level measures less than 0.02.

Subpart D—Administrative Requirements

A. Retention of Records. (§ 654.51)

Section 654.51 explains which records relating to the alcohol testing program must be retained and for how long.

The rule provides for three separate record retention periods for different types of records, five years, three years, and one year. Each employer must maintain for five years records of covered employees’ alcohol test results of 0.02 or greater, documentation of referrals to take an alcohol test, and covered employee referrals to the SAP. Collection process and employee training documents must be retained and for how long.

The rule provides for three separate record retention periods for different types of records, five years, three years, and one year. Each employer must maintain for five years records of covered employees’ alcohol test results of 0.02 or greater, documentation of referrals to take an alcohol test, and covered employee referrals to the SAP. Collection process and employee training documents must be retained and for how long.

B. Reporting of Results in a Management Information System. (§ 654.53)

The reporting requirements required in section 654.53 are part of a Department-wide effort to standardize reporting for alcohol testing, by establishing a Management Information System (MIS). The data collected will be used by FTA and DOT to identify trends, to determine the random alcohol testing rate, and to assess the success or failure of the agency’s regulatory program.
The data elements were selected to provide information on the scope of the program, the prevalence of alcohol misuse in mass transportation, the implementation of the program, and the deterrent effect of the rules over time. Recipients and subrecipients must submit to FTA their own annual reports as well as an annual report from each of their contractors with covered employees. Each report submitted must cover a calendar year. The closing date for data is December 31 and the report is due at FTA by March 15 of the following year.

C. Access to Facilities and Records.

Paragraph (a) of this section predetermines an employer, in most circumstances, from releasing information contained in records required to be maintained under this rule. Examples of such records include any document generated as a result of a reasonable suspicion determination or a refusal to take an alcohol test. An employer, however, may release information when required to do so by law or this rule, or if expressly authorized.

Paragraph (b) provides that the employer must provide the employee copies of records relating to the employee’s alcohol tests or pertaining to the employee’s use of alcohol. Once the employee has submitted his request in writing, the employer must promptly provide the records to him. The employer may charge for reproducing the records, but only for those records specifically requested.

Paragraph (c) requires the employer to allow certain governmental entities to have access to any facility used to comply with this rule. The rule provides that the Secretary of Transportation or representatives from any other DOT agency shall have access. In addition, the rule requires the employer to allow the State authority designated by the governor or other entity to oversee rail fixed guideway systems to also have access to the facilities so as to properly oversee the safety of a rail fixed guideway system as required by section 28 of the FT Act. We note here that the State oversight of rail fixed guideway systems Notice of Proposed Rulemaking published in the Federal Register on December 9, 1993 at 58 FR 68436 contains FTA’s proposal for the State oversight agency.

Paragraph (d) requires an employer to give certain governmental entities copies of test results and any other information pertaining to the employer’s alcohol misuse prevention program. Those governmental entities are the same as those specified in subsection (c).

Paragraph (e) requires an employer to disclose information about the employer’s administration of a post-accident alcohol test to the National Transportation Safety Board (NTSB) when it investigates an accident.

Paragraph (f) provides that the employer must give copies of certain records to a subsequent employer if the employee makes such a request in writing. The employer may disclose only that information specifically authorized by the employee in her written request.

Paragraph (g) requires the employer to disclose certain information when requested to do so by the employee or a decisionmaker in a lawsuit, grievance, or other proceeding when such a proceeding has been initiated by the employee and arises from the results of an alcohol test administered under this part or from the employee’s determination that the employee has violated a provision in subpart B. This provision does not cover any proceeding initiated by a third party. This provision is limited to employment-type actions such as worker’s compensation or unemployment compensation which are initiated by the employee.

Subsection (h) provides that the employer must release information to any individual when requested to do so by the employee in writing. The employer may release only that information specifically authorized by the employee.

Subpart E—Consequences for Employees Engaging in Alcohol-Related Conduct

In general, this subpart addresses the consequences to employees for violating any provision contained in subpart B. This subpart contains three sections. The first two of which apply to every employee who has violated a provision in subpart B. The third section concerns only those employees whose alcohol concentration level was tested at 0.02 or greater but less than 0.04.

A. Removal From Safety-sensitive Function.

This section explains the consequences for those employees whose alcohol concentration level measures at 0.02 or greater but less than 0.04. In this situation, the employer has two options: it can retest the employee and return her to her safety-sensitive position at the test indicates that her alcohol concentration level is less than 0.02. Or, the employer may remove the employee from her safety-sensitive position for at least eight hours.

An employer may not apply the consequences of Subpart E to an employee whose alcohol level measures at 0.02 or greater but less than 0.04.

Subpart F—Alcohol Misuse Information, Training, and Referral

A. Employer Obligation to Promulgate a Policy on the Misuse of Alcohol.

The rule requires an employer to make available to every safety-sensitive employee a policy statement describing the employer’s alcohol testing program. The policy must include the following information:

1. Specific categories of employees subject to testing.
2. Where to go for more information about the program.
3. When and why an employee will be tested.
4. The consequences of failing an alcohol test.
5. Program elements in addition to those required by the FTA regulation.

The FTA expects each employer to describe the consequences of a covered employee’s taking an alcohol test indicating an alcohol concentration at 0.04 or greater, which must include removal of the employee from his safety-sensitive position and evaluation and possible referral for treatment. In addition, at the employer’s discretion the policy statement could describe funding arrangements for treatment. The policy must indicate whether an employer would suspend or terminate a covered employee who has taken a test with a result at 0.04 or greater, and the circumstances under which such actions will be taken.

The rule does not mandate rehabilitation for a covered employee, but only requires that an employee be evaluated by an SAP to determine
whether the employee has a problem with alcohol misuse. If treatment for a covered employee is deemed necessary, the rule does not require the employer to pay for it. Any decision to provide treatment, and who should pay for it, is made at the local level.

This position on treatment is consistent with congressional debate on the topic. Both Senators Danforth and Hollings clarified this point by stating:

DOT must issue regulations . . . providing for the opportunity for treatment of employees in need of assistance in resolving problems with alcohol or drug use. My understanding is that this does not mandate that rehabilitation be provided but does encourage companies to make such programs available. The legislation does not discuss who pays for treatment, wages during this period, or rights of reinstatement. 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Danforth)

The Senator’s understanding is correct. Such an arrangement could be left to negotiation between the employer and employee, either through individual arrangement or collective bargaining, as appropriate. . . . 137 Cong. Rec. S14770 (daily ed. Oct. 16, 1991) (Statement of Sen. Hollings).

B. Training for Supervisors. (§ 654.73)

This section provides that supervisors who may make reasonable suspicion determinations must be trained about the physical, behavioral, speech, and performance indicators of probable alcohol use. Such a supervisor must receive at least 60 minutes of training, which may be added to the 60 minutes of training required under the FTA drug rule, published elsewhere in today’s issue of the Federal Register.

C. Referral, Evaluation, and Treatment. (§ 654.75)

This section concerns only those employees who have violated a provision in Subpart B. This section requires the employer to advise such an employee of the resources available to her in resolving problems associated with alcohol misuse. The information provided by the employer should include the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.

Such an employee must be evaluated by a substance abuse professional to determine whether the employee needs help in resolving problems associated with alcohol misuse. The substance abuse professional then determines what kind of help the employee needs. Any employee who has violated subpart B must take a return to duty test before she may be allowed to perform a safety-sensitive function with a result showing that her alcohol concentration level measures less than 0.02.

If, however, the SAP determines that the employee needs help in resolving problems with alcohol misuse, the employee must follow the course of treatment prescribed by the SAP. To return to duty, the employee must be evaluated by a substance abuse professional again to determine whether the employee has properly followed the treatment course originally prescribed and is able to return to work.

Then, such an employee must not only take a return to duty test but she must also submit to follow-up testing, which occurs unpredictably and unannounced for up to sixty months following her return to duty. Based on the recommendations of the SAP, the employee may be subject to both drug and alcohol follow-up testing. The employee must take at least six follow-up alcohol tests (all indicating an alcohol level less than 0.02) during the first 12 months following her return to duty. After that period of time, the SAP determines whether the employee should continue to be subject to follow-up testing for the additional 48 months and if so shall determine how many tests the employee should take and how often they should be administered.

Such an employee remains separately subject to random alcohol testing.

Paragraph (d) discusses several employment options concerning the substance abuse professional. Who pays for the services of the substance abuse professional, however, is determined at the local level.

Paragraph (e) prohibits, in some circumstances, a substance abuse professional from treating an employee after evaluation and determination that the employee needs help. This section, however, allows an evaluating SAP also to treat an employee when: (1) the SAP is an employee of or under contract to an employer; (2) the SAP is the only source of appropriate therapeutic treatment provided under the employee’s health plan or reasonably accessible to the employee; (3) or the SAP works for a public agency such as a State, county, or municipality.

Paragraph (f) provides that an employer is not required to provide applicants with an opportunity for referral, evaluation, and treatment.

Subpart G—Compliance

This subpart establishes the certification requirements for recipients of FTA funding under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code. A. Compliance a Condition of FTA Financial Assistance. (§ 654.81)

This section mandates the withholding of Federal funds from a recipient of FTA funding under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code, if it is not in compliance with the rule. To be in compliance with the rule, the recipient either must implement the requirements of the rule or require their implementation by subrecipients, operators, contractors, employers, or any other entity performing a mass transit function on behalf of the recipient.

It is important to note that any misrepresentation or false statement to FTA is a criminal violation under section 1001 of title 18 of the United States Code.

B. Requirement to Certify Compliance. (§ 654.83)

This section requires a recipient to certify that the requirements of the rule have been met. We emphasize that the direct recipient of FTA funds makes this certification to FTA.

The certifications are required annually, with large operators submitting their certifications before January 1, 1995, and small operators and States submitting their certifications before January 1, 1996. States will certify on behalf of subrecipients and their contractors.

The certification itself must comply with the sample certification provided in Appendix A to this part, be authorized by the recipient’s governing board or other authorizing official, and be signed by a party specifically authorized to do so.

V. Americans With Disabilities Act of 1990

Title I of the Americans With Disabilities Act of 1990 (ADA) focuses on responsibilities of employers for employees. A basic premise of title I is that a person with a disability must be provided a reasonable accommodation to work. It is possible that some covered workers will be considered persons with disabilities for purposes of protections under the ADA. For a more complete discussion of this issue please see the DOT-wide preamble preceding this FTA document in today’s Federal Register.

VI. Economic Analysis

The FTA has evaluated the industry-wide costs and benefits of the rule, Prevention of Alcohol Misuse in Transit Operations. This rule will require personnel who perform safety-sensitive functions to be covered by a formal program to control alcohol misuse in
mass transit operations. This rule will cover FTA recipients and combine education and testing in a comprehensive alcohol misuse prevention program. Five types of alcohol tests will be administered:
- Pre-Employment
- Reasonable Suspicion
- Post-Accident
- Random
- Return to Duty/Follow-up

Transit agencies will be required to report the number of tests given, the number of test results at 0.02 or greater and other attributes of their program to the FTA and to certify compliance with this regulation annually.

Annual costs of the alcohol testing program range from $10 to $13 million per year. Total costs over 10 years are $115 million.

Annual benefits range from $6 to $55 million per year. Total benefits over 10 years are $482 million.

A major premise in calculating both costs and benefits is the assumption that all transit systems will start from scratch or "ground zero" when implementing alcohol testing programs as a result of this regulation.

Estimates in this analysis are based on (1) the 1989 and 1991 National Urban Mass Transportation Statistics Section 15 Annual Reports, (2) the 1991 report, Substance Abuse in the Transit Industry, prepared for the FTA by Booz, Allen & Hamilton, Inc., (3) data provided by the Substance Abuse and Mental Health Service Administration, and (4) information from other agencies, individuals, and organizations knowledgeable about alcohol misuse in the United States.

VII. Regulatory Process Matters

A. Executive Order 12688

The FTA has evaluated the industry costs and benefits of the drug testing rule, and has determined that this rulemaking is a significant rule under Executive Order 12688 because the rulemaking has a significant effect on the regulatory or pricing policies of States or local governments.

This rule will not have a significant effect on the regulatory or pricing policies of States or local governments. FTA provides financial assistance to mass transportation systems throughout the country by means of grants to States and public bodies. Because this rule will affect those States and local entities, we published a Notice of Proposed Rulemaking in the Federal Register to solicit the views of the affected entities, including States and local governments, and held three public hearings in conjunction with the NPRM. In short, we actively sought the views and comments of the affected States and localities.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the FTA has evaluated the effects of this rule on small entities. Based on the evaluation, the FTA hereby certifies that this action will have a significant economic impact on a substantial number of small entities. The rule has some provisions designed to mitigate burdens on small entities which are discussed in the regulatory evaluation.

This rule applies to public recipients of Federal Transit funds, 274 of which are large and 1,341 of which are small. It is estimated that it will cost the small transit systems $40 million to implement this alcohol rule, with total benefits to them of $147 million over the 10-year analysis.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval has been submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

E. Executive Order 12612

We have reviewed this rule under the requirements of Executive Order 12612 on Federalism. Although the Federal Transit Administration has determined that this rule has significant Federalism implications to warrant a Federalism assessment, this rulemaking is mandated by the Omnibus Transportation Employee Testing Act of 1991 (the Act). In considering the Federalism implications of the rule, FTA has focused on several key provisions of Executive Order 12612.

Necessity for action. This rule is mandated by law, which requires comprehensive drug and alcohol testing programs of recipients of Federal transit funding. Congress responded to specific accidents by mandating these rules to ensure the safety of the transit-riding public.

Consultation with State and local governments. FTA provides financial assistance to mass transportation systems throughout the country by means of grants to States and public bodies. Because this rule will affect those States and local entities, we published a Notice of Proposed Rulemaking in the Federal Register to solicit the views of the affected entities, including States and local governments, and held three public hearings in conjunction with the NPRM. In short, we actively sought the views and comments of the affected States and localities.

Need for Federal action. This rule responds to a Congressional mandate that the safety of the transit riding public requires comprehensive antidrug and alcohol testing programs.

Authority. The statutory authority for this final rule is the Act mentioned above and discussed elsewhere in the preamble.

Preemption. This rule preempts any State or local law, order, or regulation to the contrary, and also is discussed elsewhere in the preamble. Because compliance with the rule is a condition of Federal financial assistance, State and local governments have the option of not seeking the Federal funds if they do not choose to comply with this rule.

F. National Environmental Policy Act

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications

This regulation does not affect the use of energy because it regulates the behavior of those safety-sensitive employees who work in the transit industry.

List of Subjects in 49 CFR Part 654

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

Accordingly, for the reasons cited above, the agency amends title 49 by adding a new part 654, to read as set forth below:

PART 654—Prevention of Alcohol Misuse in Transit Operations

Sec.

Subpart A—General

654.1 Purpose.
654.3 Applicability.
654.5 Alcohol testing procedures.
654.7 Definitions.
654.9 Preemption of State and local laws.
654.11 Other requirements imposed by employers.
654.13 Requirement for notice.
654.15 Starting date for alcohol testing programs.

Subpart B—Prohibitions

654.21 Alcohol concentration.
654.23 On-duty use.
654.25 Pre-duty use.
654.27 Use following an accident.
654.29 Refusal to submit to a required alcohol test.

Subpart C—Tests Required
654.31 Pre-employment testing.
654.33 Post-accident testing.
654.35 Random testing.
654.37 Reasonable suspicion testing.
654.39 Return to duty testing.
654.41 Follow-up testing.
654.43 Retesting of covered employees with an alcohol concentration of 0.02 or greater but less than 0.04.

Subpart D—Administrative Requirements
654.51 Retention of records.
654.53 Reporting of results in a management information system.
654.55 Access to facilities and records.

Subpart E—Consequences For Employees Engaging In Alcohol-related Conduct
654.61 Removal from safety-sensitive function.
654.63 Required evaluation and testing.
654.65 Other alcohol-related conduct.

Subpart F—Alcohol Misuse Information, Training, and Referral
654.71 Employer obligation to promulgate a policy on the misuse of alcohol.
654.73 Training for supervisors.
654.75 Referral, evaluation, and treatment.

Subpart G—Compliance
654.81 Compliance a condition of FTA financial assistance.
654.83 Requirement to certify compliance.

Appendix A to Part 654—Sample Certifications of Compliance

Appendix B to Part 654—FTA Alcohol Testing Management Information System (MIS) Data Collection Form.

Appendix C to Part 654—FTA Alcohol Testing Management Information System (MIS) "EZ" Data Collection Form.


Subpart A—General

654.1 Purpose.
The purpose of this part is to establish programs designed to help prevent accidents and injuries resulting from the misuse of alcohol by employees who perform safety-sensitive functions for employers receiving assistance from the Federal Transit Administration (FTA).

654.3 Applicability.
(a) Except as specifically excluded in paragraph (b) of this section, this part applies to a recipient under—
(1) Section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act); or
(2) Section 103(a)(4) of title 23 of the United States Code.
(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR part 219 and §654.83 of this part for its railroad operations, and this part for its non-railroad operations, if any.

(Note: For recipients who operate marine vessels, see also United States Coast Guard regulations at 33 CFR part 95 and 46 CFR parts 4, 5, and 6.)

§654.5 Alcohol testing procedures.
Each employer shall ensure that all alcohol testing conducted under this part complies with the procedures set forth in part 40 of this title. The provisions of part 40 that address alcohol testing are made applicable to employers by this part.

§654.7 Definitions.
As used in this part—
Accident means an occurrence associated with the operation of a vehicle, if as a result—
(1) An individual dies;
(2) An individual suffers a bodily injury and immediately receives medical treatment away from the scene of the accident;
(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, "disabling damage" means damage which precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage which can be remedied temporarily at the scene of the occurrence or with special tools or parts, tire disassembly without other damage even if no spare tire is available, or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative; or
(4) With respect to an occurrence in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the mass transit vehicle involved is a rail car, trolley bus, or vessel, if as a result—
(A) The mass transit vehicle involved is made inoperative; or
(B) The mass transit vehicle involved makes them inoperative; or
(C) Damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative; or
(D) Damage to windshield wipers that makes them inoperative; or
(E) Damage to lights that makes them inoperative; or
(F) Damage to air conditioners, including any medication, containing alcohol.

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

Certification means a recipient’s written statement, authorized by the organization’s governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See §654.87 for requirements on certification.)

Confirmation test means a second test, following a screening test with a result of 0.02 or greater, that provides quantitative data of alcohol concentration.

Consortium means an entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, which provides alcohol testing as required by this part, or other DOT alcohol testing rule, and which acts on behalf of the employer.

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

Covered employee means a person, including a volunteer, applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part.

DOT means the United States Department of Transportation.

DOT agency means an agency (or “operating administration”) of the United States Department of Transportation administering regulations requiring alcohol testing (14 CFR parts 61, 63, 65, 121, and 135; 49 CFR parts 399, 219, 382, and 654) in accordance with part 40 of this title.

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

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

Large operator means a recipient or subrecipient primarily operating in an area of 200,000 or more in population.

Performing (a safety-sensitive function) means a covered employee is considered to be performing a safety-sensitive function and includes any period in which he or she is actually performing, ready to perform, or immediately available to perform such functions.
Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Recipient means an entity receiving Federal financial assistance under section 3, 9, or 18, of the FT Act, or under section 103(e)(4) of title 23 of the United States Code.

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 the provisions of this part, or engages in conduct that clearly obstructs the testing process.

Safety-sensitive function means any of the following duties:
(1) Operating a revenue service vehicle, including when not in revenue service;
(2) Operating a nonrevenue service vehicle, when required to be operated by a holder of a Commercial Driver’s License;
(3) Controlling dispatch or movement of a revenue service vehicle;
(4) Maintaining a revenue service vehicle or equipment used in revenue service, unless the recipient receives section 18 funding and contracts out such services; or
(5) Carrying a firearm for security purposes.

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

Small operator means a recipient or subrecipient primarily operating in an area of less than 200,000 in population.

Substance abuse professional (SAP) means a licensed physician (Medical Doctor or Doctor of Osteopathy), or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor (certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission), with knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol-related disorders.

Violator rate means the number of covered employees (as reported under §654.53 of this part) found during random tests given under this part to have an alcohol concentration of .04 or greater, plus the number of employees who refuse a random test required by this part, divided by the total reported number of employees in the industry given random alcohol tests under this part plus the total reported number of employees in the industry who refuse a random test required by this part.

§ 654.9 Preemption of State and local laws.
(a) Except as provided in paragraph (b) of this section, this part preempts any State or local law, rule, regulation, or order, to the extent that:
(1) Compliance with both the State or local requirement and any requirement in this part is not possible; or
(2) Compliance with the State or local requirement is an obstacle to the accomplishment and execution of any requirement in this part.
(b) This part shall not be construed to preempt provisions of State criminal 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.

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

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

§ 654.15 Starting date for alcohol testing programs.
(a) Large employers. Each recipient operating in an area of 200,000 or more in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1995.
(b) Small employers. Each recipient operating in an area of 200,000 or less in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1996.
(c) An employer shall have an alcohol misuse program that conforms to this part by January 1, 1996, or by the date the employer begins operations, whichever is later.

Subpart B—Prohibitions

§ 654.21 Alcohol concentration.
Each employer shall prohibit a covered employee from using alcohol while performing safety-sensitive functions while having an alcohol concentration of .04 or greater. No employer having actual knowledge that a covered employee has an alcohol concentration of .04 or greater shall permit the employee to perform or continue to perform safety-sensitive functions.

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

§ 654.25 Pre-duty use.
(a) General. Each employer shall prohibit a covered employee from using alcohol within 4 hours prior to performing safety-sensitive functions. No employer having actual knowledge that a covered employee has used alcohol within four hours of performing a safety-sensitive function shall permit the employee to perform or continue to perform safety-sensitive functions.
(b) On-call employees. An employer shall prohibit the consumption of alcohol for the specified on-call hours of each covered employee who is on-call. The procedure shall include:
(1) The opportunity for the covered employee to acknowledge the use of alcohol at the time he or she is called to report to duty and the inability to perform his or her safety-sensitive function.
(2) The requirement that the covered employee take an alcohol test, if the covered employee has acknowledged the use of alcohol, but claims ability to perform his or her safety-sensitive function.

§ 654.27 Use following an accident.
Each employer shall prohibit any covered employee required to take a post-accident alcohol test under §654.33 from alcohol use for eight...
hours following the accident or until he or she undergoes a post-accident alcohol test, whichever occurs first.

§ 654.29 Refusal to submit to a required alcohol test.

Each employer shall require a covered employee to submit to a post-accident alcohol test required under § 654.33, a random alcohol test required under § 654.33, a reasonable suspicion alcohol test required under § 654.37, or a follow-up alcohol test required under § 654.41. No employer shall permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Subpart C—Tests Required

§ 654.31 Pre-employment testing.

(a) Prior to the first time a covered employee performs safety-sensitive functions for an employer, the employer shall ensure that the employee undergoes 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 0.04. If a pre-employment test result under this section indicates an alcohol concentration of 0.02 or greater but less than 0.04, the provisions of § 654.65 shall apply.

(b) An employer may elect not to administer an alcohol test required by paragraph (a) of this section, if:

1. The employee has undergone an alcohol test required by this Part or the alcohol misuse rule of another DOT agency under part 40 of this title within the previous six months, with a result indicating an alcohol concentration less than 0.04; and

2. The employer ensures that no prior employer of the covered employee of whom the employer has knowledge has records of a violation of this subpart or the alcohol misuse rule of another DOT agency within the previous six months.

§ 654.33 Post-accident testing.

(a) Fatal accidents. As soon as practicable following an accident involving the loss of human life, in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident if that employee has received a citation under State or local law for a moving traffic violation arising from the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(b) Nonfatal accidents. (1) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a bus, electric bus, van, or trolley car, trolley bus, or vessel, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee’s performance can be completely discounted as a contributing factor to the accident. The decision not to administer a test under this paragraph 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. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(c) A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing. Nothing in this section shall be construed to require the employer to provide assistance to 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.

§ 654.35 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random alcohol testing shall be 25 percent of covered employees.

(b) The Administrator’s decision to increase or decrease the minimum annual percentage rate for random alcohol testing is based on the reported violation rate for the entire industry. All information used for this determination is drawn from the alcohol MIS reports required by § 654.53. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from employers, and may make appropriate modifications in calculating the industry violation rate. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rate for random alcohol testing applicable starting January 1 of the calendar year following publication.

(c) (1) When the minimum annual percentage rate for random alcohol testing is 25 percent or more, the Administrator may lower this rate to 10 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that the violation rate is less than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 50 percent or greater, the Administrator shall increase the minimum annual percentage rate for random alcohol testing to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that the violation rate is equal to or greater than 0.5 percent.

(d) (1) When the minimum annual percentage rate for random alcohol testing is 10 percent, and the data received under the reporting requirements of § 654.53 for that calendar year indicate that the violation rate is equal to or greater than 1.0 percent but equal to or greater than 0.5 percent.

(2) When the minimum annual percentage rate for random alcohol testing is 25 percent or greater, the Administrator shall increase the minimum annual percentage rate for random alcohol testing to 50 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of § 654.53 for two consecutive calendar years indicate that the violation rate is equal to or greater than 1.0 percent but equal to or greater than 0.5 percent.
testing is 25 percent or less, and the data requirements of § 654.53 for that percent, the Administrator will increase all covered employees.

(b) 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.

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

(d)(1) If a test required by this section is not administered within two hours following the determination under paragraph (b) of this section, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the determination under paragraph (b) of this section, the employer shall cease attempts to administer an alcohol test and shall state in the record the reasons for not administering the test.

(2) Notwithstanding the absence of a reasonable suspicion alcohol test under this section, an employer shall not permit a covered employee to perform or continue to perform safety-sensitive functions, until:

(i) An alcohol test is administered and the employee's alcohol concentration measures less than 0.02 percent; or
(ii) The start of the employee's next regularly scheduled duty period, but not less than 6 hours following the determination under paragraph (b) of this section that there is reasonable suspicion to believe that the employee has violated the prohibitions in this part.

(d)(2) Except as provided in paragraph (d)(1), no employer shall take any action under this part against a covered employee based solely on the employee's behavior and appearance in the absence of an alcohol test. This does not prohibit an employer with the authority independent of this part from taking any action otherwise consistent with law.

§ 654.39 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 by subpart B of this part, the employee shall undergo a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02. (See § 654.75)

§ 654.41 Follow-up testing.

(a) Follow-up testing shall be conducted when 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.

(b) Following a determination under § 654.75(b) 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 testing as directed by a substance abuse professional in accordance with the provisions of § 654.75(c)(2)(i).

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

Each employer shall retest a covered employee to ensure compliance with the provisions of § 654.65, 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 0.02 or greater but less than 0.04.

Subpart D—Administrative Requirements

§ 654.51 Retention of records.

(a) 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.

(b) Period of retention. Each employer shall maintain the records in accordance with the following schedule:

(1) The employer shall maintain records for a period of 8 years following the administration of the test.

(2) The employer shall maintain records for a period of 6 years following the administration of the test.
(1) Five years. Records of employee alcohol test results with results indicating an alcohol concentration of 0.02 or greater, documentation of refusals to take required alcohol tests, calibration documentation, and employee evaluation and referrals shall be maintained for a minimum of five years. Each employer shall maintain a copy of its annual MIS report(s) for a minimum of five years.

(2) Two years. Records related to the collection process (except calibration of EBT’s) and training shall be maintained for a minimum of two years.

(3) One year. Records of all test results less than 0.02 shall be maintained for a minimum of one year.

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

(1) Records related to the collection process:
   (i) Collection logbooks, if used.
   (ii) Documents relating to the random selection process.
   (iii) Calibration documentation for evidential breath testing devices.
   (iv) Documentation of breath alcohol technician training.
   (v) Documents generated in connection with decisions to administer reasonable suspicion alcohol tests.
   (vi) Documents generated in connection with decisions on post-accident tests.
   (vii) Documents verifying existence of a medical explanation of the inability of a covered employee to provide adequate breath for testing.

(2) Records related to test results:
   (i) The employer’s copy of the alcohol test form, including the results of the test.
   (ii) Documents related to the refusal of any covered employee to submit to an alcohol test required by this part.
   (iii) Documents presented by a covered employee to dispute the result of an alcohol test administered under this part.
   (iv) Records related to other violations of this part.

(3) Records related to evaluations:
   (i) Records pertaining to a determination by a substance abuse professional concerning a covered employee’s need for assistance.
   (ii) Records concerning a covered employee’s compliance with the recommendations of the substance abuse professional.
   (iii) Copies of annual MIS reports submitted to FTA.
   (iv) Records related to education and training.
   (v) Materials on alcohol misuse awareness, including a copy of the employer’s policy on alcohol misuse.

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

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

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

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

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

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

(d) Each report with no screening test results of 0.02 or greater or violations of the alcohol misuse provisions of this part shall include the following informational elements. (This report may only be submitted if the program results meet these criteria.)

(1) Number of FTA covered employees.

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

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

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

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

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

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

§ 654.55 Access to facilities and records.

(a) Except as required by law or expressly authorized or required in this section, no employer shall release covered employee information that is contained in records required to be maintained under § 654.51.

(b) 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

(ii) Documentation of compliance with the requirements of § 654.71 of this part.

(iii) 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.

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

§ 654.53 Reporting of results in a management information system.

(a) Each recipient shall submit to the FTA Office of Safety and Security by March 15 of each year a report covering the previous calendar year (January through December 31), summarizing the results of its alcohol misuse prevention program.

(b) Each recipient shall ensure the accuracy and timeliness of each report submitted by an employer, consortium, joint enterprise, or by a third party service provider acting on the employer’s behalf.

(c) Each report that contains information on an alcohol screening test result of 0.02 or greater or a violation of the alcohol misuse provisions of this part shall include the following informational elements:

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

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

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

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

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

(5) Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater.

(6) Number of covered employees with a confirmation alcohol test indicating an alcohol concentration of 0.04 or greater who were returned to duty in covered positions during the reporting period (having complied with the recommendation of a substance abuse professional as described in § 654.75).

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

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

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

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

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

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

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

(14) Identification of FTA funding source(s).
records other than those specifically requested.

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

(d) Each employer shall make available copies of all results for employer alcohol testing conducted under this part 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, or to a State oversight agency authorized to oversee rail fixed guideway systems.

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

(f) 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.

(g) An employer may disclose information required to be maintained under this part pertaining to a covered employee to the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the Individual, and arising from the results of an alcohol test administered under this part, or from the employer’s determination that the employee engaged in conduct prohibited by subpart B of this part.

(h) An employer shall release information regarding a covered employee’s records as directed by the employee or the decisionmaker in a lawsuit, grievance, or other proceeding initiated by or on behalf of the employee.

(i) An employer shall release information related to the employee’s alcohol misuse prevention program and to each person subsequently hired or transferred to a covered position.

Subpart E—Consequences for Employees Engaging in Alcohol-related Conduct

§ 654.61 Removal from safety-sensitive function.
Except as provided in subpart F of this part, no employer shall permit any covered employee to perform safety-sensitive functions if the employee has engaged in conduct prohibited by subpart B of this part or an alcohol misuse rule of another DOT agency.

§ 654.63 Required evaluation and testing.
No employer shall permit any covered employee who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions unless the employee has met the requirements of § 654.75.

§ 654.65 Other alcohol-related conduct.

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

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

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

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

Subpart F—Alcohol Misuse Information, Training, and Referral

§ 654.71 Employer obligation to promulgate a policy on the misuse of alcohol.

(a) General requirements. Each employer shall provide educational materials that explain the requirements of this part and the employer’s policies and procedures with respect to meeting those requirements. The policy shall be adopted by the employer’s governing board.

(1) The employer shall ensure that a copy of these materials is distributed to each covered employee prior to the start of alcohol testing under this section of the employer’s alcohol misuse prevention program and to each person subsequently hired or transferred to a covered position.

(2) Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the availability of this information.

(b) Required content. The materials to be made available to covered employees shall include detailed discussion of at least the following:

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

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

(3) 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 this part.

(4) Specific information concerning employee conduct that is prohibited by this part.

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

(6) 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.

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

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

(9) The consequences for covered employees found to have violated the prohibitions imposed under subpart B, including the requirement that the employee be removed immediately from safety-sensitive functions, and the procedures under § 654.75 of this part.

(10) The consequences for covered employees found to have an alcohol concentration of 0.02 or greater but less than 0.04.

(11) Information concerning the effects of alcohol misuse on an individual’s health, work, and personal life; signs and symptoms of an alcohol problem (the employee’s or a coworker’s); and available methods of intervening when an alcohol problem is suspected, including confrontation, referral to any available EAP, and/or referral to management.

(c) 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 concentration, that are based on the
employer's authority independent of this part. Any such additional policies or consequences shall be clearly and obviously described as being based on independent authority.

§ 654.73 Training for supervisors.

Every employer shall ensure that supervisors designated to determine whether reasonable suspicion exists to require a covered employee to undergo alcohol testing under § 654.37 receive at least 60 minutes of training on the physical, behavioral, speech, and performance indicators of probable alcohol misuse.

§ 654.75 Referral, evaluation, and treatment.

(a) Each covered employee who has engaged in conduct prohibited by subpart B of this part 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.

(b) Each covered employee who engages in conduct prohibited under subpart B shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the employee needs in resolving problems associated with alcohol misuse.

(c)(1) Before a covered employee returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited by subpart B of this part, the employee shall undergo a return to duty alcohol test, performed in accordance with 49 CFR part 40. 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 not necessary.

(d) 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.

(e) The employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with alcohol misuse does not refer the employee to the substance abuse professional’s private practice from which the substance abuse professional receives remuneration or to a person or organization in which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—

(1) A public agency, such as a State, county, or municipality;

(2) The employer or a person under contract to provide treatment for alcohol problems on behalf of the employer;

(3) The sole source of therapeutically appropriate treatment under the employee’s health insurance program; or

(4) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.

(f) The requirements of this section with respect to referral, evaluation, and rehabilitation, do not apply to applicants who refuse to submit to a pre-employment alcohol test or who have a pre-employment alcohol test with a result indicating an alcohol concentration of 0.04 or greater.

§ 654.81 Compliance a condition of FTA financial assistance.

(a) General. A recipient may not be eligible for Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended, or under section 103(e)(4) of title 23 of the United States Code if a recipient fails to establish and implement an alcohol misuse prevention program as required by this part. Failure to certify compliance with these requirements, as specified in § 654.83, will result in the suspension of a grantee’s eligibility for Federal funding.

(b) Criminal violation. A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under § 1001 of title 18 of the United States Code.

(c) State’s role. Each State shall certify compliance on behalf of its section 3, 9 or 18 subrecipients, as applicable, whose grant the State administers. In so certifying, the State shall ensure that each subrecipient is complying with the requirements of this part. A section 3, 9 or 18 subrecipient, through the administering State, is subject to suspension of funding from the State if such subrecipient is not in compliance with this part.

§ 654.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office compliance with the requirements of this part, including the training requirements. Large operators shall certify compliance initially by January 1, 1995. Small operators and States shall certify compliance initially by January 1, 1996.

(b) A certification must be authorized by the organization’s governing board or other authorizing official, and must be signed by a party specifically authorized to do so. A certification must comply with the applicable sample certification provided in Appendix A to this part.

Appendix A to Part 654—Sample Certifications of Compliance

This Appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II should be used by employers who are covered by Federal Railroad Administration’s alcohol misuse prevention program regulations.

I, (name, title) on behalf of (STATE) certify that the compliance on behalf of its section 3, 9 or 18 subrecipient is not in compliance with this part.

Subpart G—Compliance

§ 654.81 Compliance a condition of FTA financial assistance.

(a) General. A recipient may not be eligible for Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended, or under section 103(e)(4) of title 23 of the United States Code if a recipient fails to establish and implement an alcohol
The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an alcohol misuse prevention program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and implemented an alcohol misuse prevention program in accordance with the terms of 49 CFR part 654 for all other covered employees who perform safety-sensitive functions.

BILLING CODE 4910-57-P
APPENDIX B TO PART 654 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the alcohol testing information in the Federal Transit Administration (FTA) Alcohol Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-iv as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

- **Section A. EMPLOYER INFORMATION**
  - Page i
  - Reporting Form Page 1

- **Section B. COVERED EMPLOYEES**
  - Page i
  - Reporting Form Page 2

- **Section C. ALCOHOL TESTING INFORMATION**
  - Pages ii-iv
  - Reporting Form Pages 3-4

- **Section D. OTHER ALCOHOL TESTING/PROGRAM INFORMATION**
  - Page v
  - Reporting Form Page 5

- **Section E. ALCOHOL TRAINING/EDUCATION**
  - Page v
  - Reporting Form Page 5

- **Section F. FTA FUNDING SOURCES**
  - Page v
  - Reporting Form Page 5

**Page 1**

**EMPLOYER INFORMATION** (Section A) requires the year covered by this report, the agency name for which the report is done, a current address, a person’s name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

**Page 2**

**COVERED EMPLOYEES** (Section B) requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer’s personnel department. These counts should be based on the
recipient's or contractor's 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.

ALCOHOL TESTING INFORMATION (Section C) requires information for alcohol testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iv.

Four types of information are necessary to complete this table. The first blank column with the heading "NUMBER OF SCREENING TESTS," requires a count for all screening tests conducted for each employee category. The second blank column with the heading "NUMBER OF CONFIRMATION TESTS," requires a count for all confirmation alcohol tests performed for each employee category.

The third blank column with the heading "NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO 0.02, BUT LESS THAN 0.04," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.02, but less than 0.04.

The fourth blank column with the heading "NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04," requires a count for each employee category of completed alcohol tests that resulted in an alcohol concentration equal to or greater than 0.04. Note: For return to duty testing, a confirmation result equal to or greater than 0.02 is a violation of the alcohol rule. Therefore, if the number of results equal to or greater than 0.04 is unknown, you may report all results in the third column of the table.

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

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

Below the part of the table containing pre-employment testing information are three boxes. This information should be available from the safety program manager or the alcohol program manager.

1) "Number of persons denied a position as a covered employee following a pre-employment alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of those persons who were not placed in a covered position because they took a breath test that resulted in an alcohol concentration of 0.04 or higher.
2) "Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatal and non-fatal accidents which resulted in post-accident breath alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the accident.

3) "Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater". This is a count of fatalities in accidents which resulted in post-accident alcohol tests indicating a concentration of 0.04 or greater for any employees involved in the fatal accidents.

Page 4

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide the number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations). This information should be available from the personnel office and/or alcohol program manager.

SAMPLE APPLICANT TEST RESULTS TABLE

The following example is for Section C, ALCOHOL TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing this section.

Screening tests were performed on 157 job applicants for revenue vehicle operator positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

Confirmation tests were necessary for 6 of the 157 applicants for revenue vehicle operator positions. Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation". The confirmation test results for these 6 applicants were the following:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>Confirmation Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>0.06</td>
</tr>
<tr>
<td>#2</td>
<td>0.01</td>
</tr>
<tr>
<td>#3</td>
<td>0.11</td>
</tr>
<tr>
<td>#4</td>
<td>0.04</td>
</tr>
<tr>
<td>#5</td>
<td>0.03</td>
</tr>
<tr>
<td>#6</td>
<td>0.02</td>
</tr>
</tbody>
</table>

The confirmation test results for 2 of the applicants for revenue vehicle operator 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 "Revenue Vehicle Operation".
The confirmation test results for 3 of the applicants for revenue vehicle operator positions were equal to or greater than 0.04. Enter this information in the third blank column of the table in the row marked "Revenue Vehicle Operation".

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 applicants for revenue vehicle operator positions and 107 applicants for armed security personnel positions were subjected to screening 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).

Please note that our sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue vehicle operators should be followed for entering the data on armed security personnel. With applicants for armed security personnel positions, 107 screening tests were conducted resulting in 3 confirmation tests. No confirmation results were equal to or greater than 0.02, but less than 0.04; and the confirmation test result for 1 of the armed security personnel applicants was equal to or greater than 0.04. This information is entered in the row marked "Armed Security Personnel".

<table>
<thead>
<tr>
<th>Employee Category</th>
<th>Number of Screening Tests</th>
<th>Number of Confirmation Tests</th>
<th>Number of Confirmation Test Results Equal to or Greater Than 0.02, but Less Than 0.04</th>
<th>Number of Confirmation Test Results Equal to or Greater Than 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
<td>157</td>
<td>3</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td>107</td>
<td>3</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td>264</td>
<td>9</td>
<td>2</td>
<td>4</td>
</tr>
</tbody>
</table>

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 CONFIRMATION TESTS". These numbers may differ since some confirmation test results may be less than 0.02.

Remember that the same procedures indicated above are to be used for completing all of the categories for testing in Section C.
OTHER ALCOHOL TESTING/PROGRAM INFORMATION (Section D) requires information on employees tested for drugs and alcohol at the same time and that you complete a table dealing with violations of other alcohol provisions/prohibitions of the regulation and a table dealing with employees who refused to submit to an alcohol test.

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.

VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION requires supplying the number of covered employees who used alcohol prior to performing a safety-sensitive function, while performing a safety-sensitive function, and before taking a required post-accident alcohol test. The action taken with covered employees who violate any of these FTA alcohol regulation provisions is also to be supplied. Other violations not delineated in this table may also be provided.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires information on the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

ALCOHOL TRAINING/EDUCATION (Section E) requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

FTA FUNDING SOURCES (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.
FTA ALCOHOL TESTING MIS DATA COLLECTION FORM  OMB No. 2132-0557

YEAR COVERED BY THIS REPORT: 19

A. EMPLOYER INFORMATION

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Contact

Phone

Consortium Used (if applicable)

<table>
<thead>
<tr>
<th>Name</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Contact

Phone

I, the undersigned, certify that the information provided on this Federal Transit Administration Alcohol Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

<table>
<thead>
<tr>
<th>Signature</th>
<th>Date of Signature</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Title

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.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0557); Washington, D.C. 20503.
B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FTA COVERED EMPLOYEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
<td></td>
</tr>
<tr>
<td>CDL/Non-Revenue Vehicle</td>
<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
</tr>
<tr>
<td>TOTAL</td>
<td></td>
</tr>
</tbody>
</table>

READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).

2. This report is only for testing REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):
   - Results should be reported only for employees in COVERED POSITIONS as defined by the FTA alcohol testing regulation.
   - 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 D ["OTHER ALCOHOL TESTING INFORMATION"]. Do not include refusals for testing in other sections of this 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.
### C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PRE-EMPLOYMENT</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<tr>
<td>Armed Security Personnel</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>RANDOM</strong></td>
<td></td>
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<td></td>
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<tr>
<td>Revenue Vehicle Operation</td>
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<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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</tr>
<tr>
<td>Armed Security Personnel</td>
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</tr>
<tr>
<td>Total</td>
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<tr>
<td><strong>POST-ACCIDENT</strong></td>
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<td></td>
</tr>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<tr>
<td>Armed Security Personnel</td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

Number of accidents, as defined by the FTA alcohol testing regulation, which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:

<table>
<thead>
<tr>
<th></th>
<th>FATAL</th>
<th>NON-FATAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of fatalities resulting from accidents which resulted in a post-accident alcohol test indicating an alcohol concentration of 0.04 or greater:</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
C. ALCOHOL TESTING INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SCREENING TESTS</th>
<th>NUMBER OF CONFIRMATION TESTS</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.02, BUT LESS THAN 0.04</th>
<th>NUMBER OF CONFIRMATION TEST RESULTS EQUAL TO OR GREATER THAN 0.04</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>REASONABLE SUSPICION</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Operation</td>
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<td></td>
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<tr>
<td>Revenue Vehicle and Equipment</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Maintenance</td>
<td></td>
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</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
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<tr>
<td><strong>RETURN TO DUTY</strong></td>
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<tr>
<td>Revenue Vehicle Operation</td>
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<td></td>
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<tr>
<td>Revenue Vehicle and Equipment</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Maintenance</td>
<td></td>
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</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<td></td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
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<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
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<tr>
<td><strong>FOLLOW-UP</strong></td>
<td></td>
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<tr>
<td>Revenue Vehicle Operation</td>
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<tr>
<td>Revenue Vehicle and Equipment</td>
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<tr>
<td>Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position during this reporting period (having complied with the recommendations of a substance abuse professional as described in FTA regulations): 4
D. OTHER ALCOHOL 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:

<table>
<thead>
<tr>
<th>VIOLATIONS OF OTHER ALCOHOL PROVISIONS/PROHIBITIONS OF THIS REGULATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER OF COVERED EMPLOYEES</td>
</tr>
<tr>
<td>----------------------------</td>
</tr>
<tr>
<td>1</td>
</tr>
<tr>
<td>2</td>
</tr>
<tr>
<td>3</td>
</tr>
</tbody>
</table>

E. ALCOHOL TRAINING/EDUCATION

Training during current reporting period:

Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:

F. FTA FUNDING SOURCES

FTA FUNDING SOURCES

Check all sections that apply: 3 9 16(b)(2) 18
APPENDIX C TO PART 654 - ALCOHOL TESTING MANAGEMENT INFORMATION SYSTEM (MIS) "EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Alcohol Testing MIS "EZ" Data Collection Form. This form should only be used if there is no alcohol misuse to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) alcohol testing regulations.

SECTION A - EMPLOYER INFORMATION requires the year covered by this report, the agency name for which the report is done, a current address, and a person’s name and phone number to contact if there are any questions about the report. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA alcohol testing regulation.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA alcohol testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer’s personnel department. These counts should be based on the recipient’s or contractor’s 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.

SECTION C - ALCOHOL TESTING INFORMATION requires information for alcohol testing, refusals for testing, and training/education. The first table requests information on the NUMBER OF ALCOHOL SCREENING TESTS CONDUCTED in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Enter the number of alcohol screening tests conducted by employee category for each category of testing. Testing categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. Each column in the table should be added and the answer entered in the row marked "TOTAL".

Following the table that summarizes ALCOHOL TESTING INFORMATION, you must provide a count of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation). This information should be available from the personnel office and/or alcohol program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-
employment, post-accident, reasonable suspicion, return to duty, or follow-up) alcohol test required under the FTA regulation.

ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of supervisory personnel who have received alcohol training during the current reporting period.

SECTION D - FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section.
FTA ALCOHOL TESTING MIS "EZ" DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19_

A. EMPLOYER INFORMATION

Company Name
Address
Contact
Phone
Consortium Used (if applicable)
Name
Address
Contact
Phone

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Alcohol Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature __________________________ Date of Signature __________

Title __________________________

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.

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### B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FTA COVERED EMPLOYEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
<td></td>
</tr>
<tr>
<td>CDL/Non-Revenue Vehicle</td>
<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
</tr>
</tbody>
</table>

### C. ALCOHOL TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>PRE-EMPLOYMENT</th>
<th>RANDOM</th>
<th>POST-ACCIDENT</th>
<th>REASONABLE SUSPICION</th>
<th>RETURN TO DUTY</th>
<th>FOLLOW-UP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
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<tr>
<td><strong>Total</strong></td>
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</tr>
</tbody>
</table>

Number of employees who engaged in alcohol misuse who were returned to duty in a covered position (having complied with the recommendations of a substance abuse professional as described in the FTA regulation):

### EMPLOYEES WHO REFUSED TO SUBMIT TO AN ALCOHOL TEST

- Covered employees who refused to submit to a random alcohol test required under the FTA regulation:
- Covered employees who refused to submit to a non-random alcohol test required under the FTA regulation:

### ALCOHOL TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD

Supervisory personnel who have received at least 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable alcohol use as required by FTA alcohol testing regulations:

### D. FTA FUNDING SOURCES

<table>
<thead>
<tr>
<th>FTA FUNDING SOURCES</th>
<th>3</th>
<th>9</th>
<th>16(b)(2)</th>
<th>18</th>
</tr>
</thead>
<tbody>
<tr>
<td>Check all sections that apply:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**BILLING CODE 4910-57-C**
DEPARTMENT OF TRANSPORTATION
Federal Transit Administration
Prevention of Prohibited Drug Use in Transit Operations
AGENCY: Federal Transit Administration, DOT.
ACTION: Final rule.

SUMMARY: The Omnibus Transportation Employee Testing Act of 1991 directs the Federal Transit Administration to issue regulations on drug and alcohol testing for mass transit workers in safety-sensitive positions. This document accordingly sets forth the agency’s anti-drug program, which is intended to increase the safety of mass transit operations.

EFFECTIVE DATE: March 17, 1994.


SUPPLEMENTARY INFORMATION: Because of the length of this preamble, the following outline of the rule’s introductory material is provided.

I. Discussion
A. Background
B. The 1988 Drug Rule
C. The Omnibus Transportation Employee Testing Act of 1991
D. Summary of the Final Rule
E. Overview of the Comments
II. Discussion of the Comments
A. Multi-modal jurisdiction
B. Accident
C. Safety-sensitive function
D. Covered employee/contractor
E. Pre-employment/pre-duty testing
F. Reasonable suspicion testing
G. Random testing/random testing rate
H. Post-accident testing
I. Return to duty/follow-up testing
J. The split sample procedure
K. Treatment
L. Training
M. Management Information System (MIS) reporting requirement
N. Implementation date
O. Combined drug and alcohol rules
P. Indian Tribal Governments
Q. Waivers
III. Section-by-Section Analysis
IV. Americans With Disabilities Act of 1991
V. Economic Analysis
VI. Regulatory Process Matters

I. Discussion
A. Background

On December 15, 1992, the Federal Transit Administration (FTA) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register, at 57 FR 59660, entitled “Prevention of Prohibited Drug Use in Transit Operations.” The NPRM invited comment from the public on the proposed rule, which would require certain recipients of Federal transit funding to have a comprehensive anti-drug program. FTA provided a 120-day comment period and received over 80 comments on the regulation proposed in the NPRM.

In addition to receiving written comments on the NPRM, in 1993 FTA held three public hearings on the rule: on February 25—26, in Washington DC, on March 1—2, in Chicago, Illinois, and on March 4—5, in San Francisco, California. Each hearing was recorded by a court reporter; the transcript of each hearing and any statements or other material submitted to the hearing officer during the hearings are contained in the public docket to this rule and were considered in developing this final rule.

B. The 1988 Drug Rule

On November 22, 1988, the FTA issued a final rule requiring certain recipients of Federal financial assistance under the Urban Mass Transportation Act of 1964, as amended, to develop and implement drug testing programs. That regulation, codified at 49 CFR part 653, was the first time the FTA had required such a program. By December 21, 1989, approximately 200 large transit systems certified compliance with the regulation and began testing the urine of safety-sensitive employees for five types of illegal drugs.

Shortly after its final rule was published in 1988, the FTA was sued by three unions representing most American transit workers. In these three suits, consolidated in the United States Court of Appeals for the District of Columbia Circuit, the plaintiffs contended, among other arguments, that FTA lacked statutory authority to issue a drug testing rule. The district court upheld the regulation and the plaintiffs appealed.


Subsequently, the Omnibus Transportation Employee Testing Act of 1991 (the Act) was enacted, authorizing FTA to require drug testing of safety-sensitive employees. (Pub. L. 102–743, Title V.) This final rulemaking is issued under the authority of that Act.

C. The Omnibus Transportation Employee Testing Act of 1991

The Act requires the FTA to issue a rule requiring recipients of certain FTA funding to test safety-sensitive employees for the prohibited use of controlled substances. The Act directs FTA to require recipients of Federal funds under section 3, 9, or 18 of the Federal Transit Act, as amended (FT Act), or section 103(e)(4) of title 23 of the United States Code, to test safety-sensitive employees for any substance listed in section 102(b)(6) of the Controlled Substances Act (21 U.S.C. 802(b)(6)) which the Secretary has determined poses a risk to transportation safety. Because certain recipients of FTA funds are regulated by the Federal Railroad Administration (FRA) or the Federal Highway Administration (FHWA), the Act permits such recipients to be subject to the anti-drug regulations of those agencies.

Compliance with FTA’s rule is a condition of the receipt of certain kinds of Federal transit funding. The Act authorizes FTA to withhold that funding if a recipient is not in compliance with FTA’s rule or, as appropriate, the anti-drug rules of FRA or FHWA. Specifically, the Act authorizes FTA to withhold Federal funding under section 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

The Act directs the FTA to require four kinds of drug testing: pre-employment, reasonable suspicion, random, and post-accident, and permits FTA to require periodic drug testing. The Act further directs FTA to require a post-accident test when there has been a loss of human life.
The Act authorizes the testing only of employees who perform safety-sensitive functions, but does not define what activities constitute a safety-sensitive function, specifically authorizing the agency to make that determination. The Act directs FTA to require its recipients to test safety-sensitive employees for the prohibited use of controlled substances, and in so doing to safeguard the privacy of safety-sensitive employees to the maximum extent practicable. Moreover, the Act requires that the specimen be subdivided, secured, and labeled in the presence of the tested employee, with one part tested and the other part retained in a secure manner to prevent tampering. If the tested portion is verified positive for the presence of illegal drugs, the Act specifies that the tested employee may request that the other portion be tested at another certified laboratory. To ensure the accuracy of the testing procedures, the Act permits only those laboratories certified by the Department of Health and Human Services (DHHS) to test specimen samples.

If a safety-sensitive employee has a verified positive drug test result for prohibited drugs, the Act directs FTA to ensure that the employee receives opportunity for evaluation and treatment. Also, the Act permits FTA, as appropriate, to permit the disqualification or dismissal of any safety-sensitive employee who has a verified positive drug test result.

In providing this regulatory authority, the Act authorizes the FTA to preempt State or local laws, rules, regulations, ordinances, standards, or orders inconsistent with this rule, except for certain provisions of State criminal law which impose sanctions for reckless conduct leading to actual loss of life, injury, or property damage.

D. Summary of the Final Rule

The final rule applies to recipients of Federal funds under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the United States Code. It requires each such recipient to establish and implement an anti-drug program, consisting primarily of a testing program but with elements requiring training, educating, and evaluating safety-sensitive employees as well.

The regulation specifies that safety-sensitive employees may not use any of the five prohibited substances identified in the regulation: marijuana, cocaine, opiates, amphetamines, or phencyclidine.

The rule mandates the following kinds of testing:

1. Pre-employment (including transfer from a nonsafety-sensitive position to a safety-sensitive position within the organization);
2. Reasonable suspicion;
3. Random;
4. Post-accident; and
5. Return to duty/follow-up (periodic).

The rule requires the use of testing procedures found in part 40 of title 49 of the Code of Federal Regulations, the procedures used in the drug testing rules of all agencies of the Department of Transportation (DOT), which requires the testing of urine samples. Part 40 conforms to the DHHS “Scientific and Technical Guidelines for Drug Testing Programs” issued on April 11, 1988 and amended today to incorporate changes required by the Act. For a discussion of those changes, please see part 40, “Procedures for Transportation Workplace Drug and Alcohol Testing Programs”, and its accompanying preamble published elsewhere in today’s Federal Register. This part 653 includes procedures that require a substance abuse professional to evaluate a covered employee who has a verified positive drug test result as defined in this part 653, the employee must be removed from the safety-sensitive position, be told about educational and treatment programs available, and be evaluated by a substance abuse professional to determine whether the employee is helping. The rule does not address who should pay for the employee’s treatment, which is a local issue.

To return to her safety-sensitive position, the employee must properly complete any course of treatment prescribed by the substance abuse professional and take a drug test with a verified negative result.

The rule requires each recipient to adopt a policy statement describing its anti-drug program policies and procedures, including the consequences of drug use and a verified positive drug test result.

The rule applies to any entity that receives certain Federal funding from the FTA. Such an entity, called a recipient, must certify to the FTA that it will carry out the requirements of this part. Not all such recipients provide mass transit services directly, relying instead upon other public or private entities to provide such services in whole or in part. In these cases, the direct recipient of FTA funds remains legally responsible to the FTA for assuring that any entity operating on its behalf is in compliance with the drug testing rule.

Compliance with the rule is a condition of Federal assistance. Failure of a recipient to comply with the rule—either in its own operations or in those of an entity operating on its behalf—will result in the suspension of all Federal transit funding to the recipient.

Because, as noted above, a recipient may not always directly carry out mass transit services, the rule uses “operator” or “employer” to describe those who actually may be providing transit service and therefore must comply with the drug testing program, but under the rule it is always the direct recipient of FTA funds that legally is responsible to FTA for complying with the rule.

E. Overview of the Comments

The FTA received 84 comments in response to the NPRM. FTA considered all comments filed in a timely manner as well as all statements and material presented at the public hearings on the rule. The breakdown among commenter categories is as follows:

- Transit operators (public and private) ........................................ 35
- Cities and counties ................................................................. 4
- State DOTs ............................................................................. 11
- Labor unions ............................................................................ 2
- Trade associations ..................................................................... 9
- Individual citizen ...................................................................... 1
- Nonprofit organizations/special transit providers ........................... 12
- State governments ................................................................. 1
- Public Utility ............................................................................ 1
- Member of Congress .................................................................. 1
- Private businesses ...................................................................... 3
- Others ...................................................................................... 4

Most of the comments addressed issues raised in the NPRM, but some commenters addressed additional issues, such as whether volunteer drivers should be subject to the rule, or the applicability of the regulation to providers of transportation paid with publicly subsidized vouchers or scrip (user-side subsidies). All of the major issues addressed by the commenters are discussed in Section II.

II. Discussion of the Comments

A. Multi-modal Jurisdiction

Because many FTA recipients operate a variety of different mass transit services—such as bus, rapid rail, commuter rail, or ferry boat services—they may be regulated by the FTA and by another DOT agency or agencies, such as the Federal Railroad Administration (FRA), the Federal Highway Administration (FHWA), or the United States Coast Guard (Coast Guard). For the most part, these agencies have regulated drug use among safety-sensitive employees since 1989,
including employees of certain FTA recipients. In addition, the Act authorized FHWA, for the first time, to regulate intrastate Commercial Driver's License (CDL) holders, which include many transit employees. To limit the anti-drug regulations with which such recipients would have to comply, the NPRM discussed a proposal under which (1) FRA’s drug testing regulation would apply to FTA recipients that operate railroads, including the recipient’s safety-sensitive employees; (2) FTA’s drug testing program, not FHWA’s, would apply to recipients who employ or use the services of safety-sensitive employees who hold a CDL, but the individual CDL holder otherwise would remain subject to FHWA’s implementation of the Commercial Motor Vehicle Safety Act of 1986; and (3) both FTA’s and Coast Guard’s drug testing program would apply to recipients operating vessels, and Coast Guard would continue to regulate the individual safety-sensitive employee (vessel crew member) by pursuing licensing actions or other punitive measures.

FTA received ten comments concerning the multi-modal jurisdictional issue suggesting a rather significant change to the FTA’s approach to this rulemaking. Several commenters suggested that DOT should issue one regulation covering all entities regulated by any DOT agency. In contrast, other commenters suggested that FTA and FHWA should issue a joint regulation or issue two separate regulations using identical language. Lastly, one commenter particularly focused on the chain-of-custody form, mandated by part 40, and recommended that all DOT agencies use the same form.

**FTA Response.** FTA is sympathetic to the concerns of recipients regulated by more than one DOT agency anti-drug rule, some of whom proposed a single regulation. As a practical matter, however, an agency-wide DOT drug rule would be difficult to implement because of the different characteristics of the various communities each agency regulates. Nevertheless, FTA addresses the multi-jurisdictional issue by clarifying the jurisdiction of FTA, FRA, FHWA, and Coast Guard over transit entities. In this regard, we have adopted the proposal in the NPRM discussed above.

In response to one commenter, DOT will amend part 40 in the near future to address the issue concerning one DOT-wide chain-of-custody form.

**B. Accident**

The vast majority of comments concerned this definition focused on incidents involving only property damage; specifically, how the seriousness of these incidents should be measured, thus justifying the administration of a drug test. In the NPRM we had proposed a dollar measurement, whereby an accident was any incident resulting in at least $1,000 in total property damage.

Most commenters addressed the dollar amount proposed in the NPRM and stated that $1,000 was too low a threshold. Some of these commenters proposed their own method of calculating a dollar threshold such as a measurement based on a vehicle’s gross vehicle weight—the greater the weight the higher the property damage threshold.

Other commenters objected to the use of a dollar threshold to measure the seriousness of incidents involving only damage to property. These commenters urged us to adopt an objective measure of property damage such as FHWA’s definition of accident. FHWA defines an accident involving only property damage as an incident that so disables the vehicle that it must be towed away from the scene.

Another commenter objected to the use of dollar amounts and requested that we adopt a reasonable cause standard.

Other commenters addressed the overall definition of accident. In the NPRM we had limited the definition to an incident involving a revenue service vehicle, and several commenters objected to this limitation, proposing instead that we include any incident involving a nonrevenue service vehicle as well.

**FTA Response.** FTA has changed the definition of “accident” in such a way that it is broadened in some respects, and narrowed in others. In particular, FTA has broadened the definition in the final rule to include occurrences involving nonrevenue service vehicles operated by a holder of a CDL. We recognize that this decision falls short of the recommendation proposed by some commenters favoring the inclusion of all occurrences involving nonrevenue service vehicles, but it is based on another consideration, avoiding a jurisdictional conflict between FTA and FHWA. Ordinarily, FHWA would regulate CDL holders as well as their employers. This new coverage in our final rule is consistent with the agreement between FTA and FHWA that FTA’s drug testing program applies to the transit employers of CDL holders.

FTA has further modified the proposed definition of “accident” to distinguish the situations of different kinds of mass transit vehicles. Many mass transit vehicles, such as buses and vans, are passenger-carrying motor vehicles. FTA believes that it is sensible to use a definition of “accident” that is consistent with FHWA’s for such vehicles. Therefore, we are adopting a provision parallel to FHWA’s definition of “accident” (49 CFR 390.5). The definition states that an accident occurs when a vehicle (whether a mass transit vehicle or another vehicle, such as a private automobile) suffers disabling damage and is towed away from the scene of the accident. This provision eliminates the subjectivity inherent in basing a definition on estimates of property damage.

For other vehicles—light or rapid rail cars, ferry boats, trolley cars and buses, etc.—we also believe it is best to eliminate a property damage-based standard. Instead, the final rule provides that if the mass transit vehicle is removed from revenue service as the result of the occurrence, an “accident” is deemed to take place. FTA believes that the operating practices of recipients typically result in at least the temporary removal from revenue service of vehicles that have been involved in all but the most minor of mishaps.

Of course, any occurrence in which someone is killed or injured sufficiently to require medical treatment away from the accident scene, is an “accident” for purposes of this rule, regardless of the type of transit vehicle involved.

We have further narrowed the definition of “accident” by deleting the reference to reportable accidents. In the NPRM we proposed that any occurrence required to be reported to FRA, FHWA, or the Coast Guard would constitute an accident, but the final rule uses only the criteria discussed above.

**C. Safety-sensitive function**

Most commenters addressed the definition of safety-sensitive function, one of the most important definitions in the rule. Because the proposed definition had a list of functional categories, most commenters objected either to the inclusion or exclusion of a particular category. Some commenters, however, merely sought clarification of the categories in the NPRM.

Including those employees who “maintain a revenue service vehicle” in the definition particularly concerned some commenters. While most commenters understood that this category included mechanics, some thought that it covered workers who clean rather than repair buses, rail cars,
and other mass transit facilities. The remaining commenters made specific recommendations concerning mechanics, some arguing that we should exclude all mechanics, with others stating that we should exclude only those working under contract for section 18 recipients. We even suggested that we should include only those mechanics working for large transit operators.

Commenters objected to only one other safety-sensitive category, “controlling the movement of revenue service vehicles”, the category which includes dispatchers. These commenters contend that dispatchers do not perform a safety-sensitive function.

Although we did not include any categories involving the construction, design, or manufacture of revenue service vehicles or other mass transit equipment or facilities, several commenters suggested that we specifically exclude them from the definition. Without this specific exclusion they believe there may be some instances in which such workers might be considered to be performing a safety-sensitive function.

Other commenters recommended that we add categories to the definition, including police and other security personnel, and mechanics who repair nonrevenue service vehicles.

Finally, some commenters sought clarification of the definition: whether it included volunteers and CDL holders, and on the meaning of “directly supervising an employee who is performing a safety-sensitive function.” FTA Response. We have made several changes to the definition of “safety-sensitive employee.” Before describing those changes, however, we first explain why we proposed a definition based on functional categories, which several commenters criticized. Because each transit system uses its own job classification categories, we wanted to avoid specifying particular job titles.

Instead, we concluded that four job functions were critical to safety, and in the NPRM identified operating, maintaining, and controlling the movement of vehicles as those functions critical to the safety of the traveling public, and added a fourth category, first-line supervisors of anyone operating, maintaining, or controlling the movement of the vehicle. The final rule adopts these categories, with some changes.

Now a discussion of the changes made. Most notably, we have created two new categories of safety-sensitive functions: The carrying of a firearm for security purposes, and the operation of a nonrevenue service vehicle by a CDL holder. We include firearm-bearing police and security personnel because of the sensitivity of their position and the danger to the public should they be under the influence of prohibited drugs.

As discussed above, FHWA regulates CDL holders, both interstate and intrastate, and their employers. FTA’s relationship is with its recipients, many of whom employ CDL holders. To avoid a jurisdictional conflict, FTA and FHWA have agreed that FTA’s drug testing rule will apply to transit entities that employ or use the services of CDL holders, regardless of the kind of vehicle they operate.

We have also reduced the scope of the definition somewhat. While we proposed in the NPRM to include supervisors of safety-sensitive employees, the final rule limits that category by covering only first-line supervisors whose responsibilities include the performance of a safety-sensitive function. For instance, if a supervisor’s job description requires her to drive a vehicle, she would be covered, but if it did not, she would not.

Further, in response to comments, we have excluded from the scope of the rule contract mechanics for any entity receiving section 18 funds.

Regarding the recommendation specifically to exclude construction, design, and manufacturing personnel, we believe it is unnecessary to do so because the list of categories in the definition is exclusive. Any functional category—such as construction or design or manufacturing—not in the definition is not subject to the rule.

Finally, some clarification on the issue of safety-sensitive employees. Volunteers are covered by the rule if they perform any safety-sensitive function. Coverage under the rule should not be based on whether an individual holds a paying position, but on whether that individual is in a position to affect the safety of the transit-riding public. The final rule definition of covered employee thus specifically includes volunteers.

Another ambiguity mentioned by several commenters concerns the maintenance category, which several commenters believed would include workers who clean rather than repair transit equipment. We do not mean to cover such workers and emphasize that only mechanics who repair vehicles or who perform routine maintenance are the types of maintenance workers covered by the rule.

D. Covered employee/contractor

In the NPRM the definition of covered employee included three general categories of safety-sensitive employees—those directly employed by an employer, those employed by a contractor, and applicants for a safety-sensitive position. Most comments about this definition pertained to the coverage of contractors in the NPRM, which included any person or organization providing services or performing work consistent with a specific understanding or arrangement, which could be a written contract or an informal arrangement reflecting an ongoing relationship between the parties.

Many commenters objected to the inclusion of contractors within the scope of the rule, believing that employers should not be accountable for a contractor’s compliance with the rule because employers have little or no control over contractors or their employees.

While other commenters did not specifically object to the inclusion of contractors, they did object to the scope of the definition of contractor and recommended that it be defined to include only those who perform work or provide service under a formal written agreement.

Other commenters sought to exclude contractors in rural areas contending that many simply would refuse to do business with the recipient rather than submit to a sophisticated drug testing program. The remaining commenters requested that we exclude only contract mechanics from the definition.

FTA Response. In response to comments, we have made a number of changes to the wording of this safety-sensitive function, although the basic concepts in the NPRM remain unchanged.

The final rule includes direct employees, contractors and their employees, and applicants under the definition, but reflects the following changes. First, we specifically include volunteers in the definition because, as noted above, we define “safety-sensitive” functionally and look only to the function that a person performs, not whether they receive pay for their work.

Second, while many commenters objected to including contractors who perform safety-sensitive functions, we have for the most part continued to include them in light of legislative history on this issue. The following was said during the debate on the bill:

Drug and alcohol-testing requirements must not be circumvented through contracting out of work.

Safety-sensitive employees of recipients of the Federal transit grant money identified in the bill, and those safety-sensitive employees working for contractors of such recipients must be covered exactly to the same extent and in the same fashion. I know that I speak.
for all conferees when I say that we will not tolerate a situation where employees performing the same job within a certain limited circumstances to accept another alcohol test result in lieu of a pre-employment test. We do not. That provision was not in the drug NPRM, nor is it in this final rule.

We have made another change in response to comments on our related alcohol rule. Some commenters were confused by the term pre-duty testing and assumed that it meant that an employee must be tested every time they were about to perform a safety-sensitive function. This is not the case. We meant to apply that provision to transfers from a nonsafety-sensitive position to a safety-sensitive position. To clarify our intent we have deleted the phrase "pre-duty" (in the context of pre-employment drug testing) from the final rule.

F. Reasonable Suspicion Testing

Commenters responding to this general area raised numerous issues. Before discussing those issues, however, we first briefly summarize the reasonable suspicion testing provision as it appeared in the NPRM.

Reasonable suspicion testing is specifically required by the Act, and the NPRM basically authorizes an employer to conduct a test when it believes the employee is exhibiting certain characteristics of prohibited drug use. The NPRM never identifies or defines those characteristics, but authorizes an employer to require a reasonable suspicion drug test on the basis of specific, contemporaneous, articulable observations concerning the appearance and behavior of the covered employee, which characterize prohibited drug use.

Moreover, those observations must be made by a supervisor-trained in the anti-drug NPRM from the alcohol NPRM. The alcohol NPRM proposed to allow the employer in certain limited circumstances to accept another alcohol test result in lieu of a pre-employment test."

Comments focused on these issues. Specifically, commenters requested that we add a notification requirement to the pre-employment/pre-duty testing provision of the final rule. On the other issue, commenters stated that employers should not be able to accept the results of a drug test administered under the requirements of another DOT agency."

"FTA Response. In the final rule we essentially have retained the reasonable suspicion provision from the NPRM, with only one change, because we believe it adequately balances the rights of employees against the rights of the employer. We also believe that a determination made by a single supervisor trained in detecting the symptoms of prohibited drug use rather than by some third party, (Of course a third party could alert a supervisor to a possible problem, which might trigger a supervisor to pay particular attention to the affected employee.)"
training. Individual employers of course are free to provide as much additional training beyond the required one hour as they like. Employers also are allowed to combine drug and alcohol training, provided the required time frames are satisfied.

The standard used to authorize a reasonable suspicion test remains unchanged in the final rule, which means that a supervisor may consider on-the-job short-term indications of drug use. We stress that long-term indications of drug use such as absenteeism or tardiness or moving traffic violations cannot be used as the basis for conducting a reasonable suspicion drug test, which must only be based on contemporaneous and articulable observations. Of course, a supervisor may particularly be alert to the conduct and job performance of an employee based on the supervisor's long-term knowledge of the employee.

We do not require a supervisor to document an employee's behavior in writing. We do, however, provide that any documents generated by the determination must be maintained for one year. Again, the final rule does not require an employer to document each and every reasonable suspicion determination, although an employer would be prudent to do so.

G. Random Testing/Random Testing Rate

The random testing provision generated many comments, with most commenters proposing the adoption of a particular random testing rate or a particular method of determining a random testing rate. Other commenters were concerned about the frequency of random testing and how the test should be administered. Several commenters sought clarification of certain aspects of the provision.

Several different alternatives for determining the random testing rate were offered. Many commenters suggested a flat rate, ranging from 10 percent to 50 percent. Others suggested a performance based rate, that is, a rate determined by the results of random testing. Under such a scheme, if the number of verified positive test results exceeds a specified rate (for example, 1 percent), then the employer would be required to test at a higher specified random rate (for example, 50 percent). If the number of verified positive test results is less than the specified rate, the employer would be required to test at a reduced random rate (for example, 25 percent). One commenter recommended that an employer could randomly test 20 percent of its employees if less than 3 percent of its random tests were verified, but if the number of verified positives exceeded 3 percent the employer would have to raise its testing rate.

Other variations were proposed. Several commenters suggested that we set a minimum random testing rate of 10 percent, but give an employer the discretion to test at a higher rate based on its own experience. Another commenter suggested that we require a random rate below 50 percent and allow an employer to set its own rate for different classes of employees. Yet another commenter recommended that we set a rate anywhere from 10 percent to 50 percent but allow an employer to reduce its rate if it has programs, such as training and rehabilitation programs, in addition to those required by the final rule.

Another commenter recommended that random testing be phased in, 15 percent the first year, 20 percent the second year, and 25 percent thereafter, presumably to ease cost and administrative burdens. Another commenter, however, recommended that those who had never randomly tested employees should be required to test at a higher random rate than those who have had a program in effect. Lastly, one commenter believed that FTA should not set the rate at all, but the rate should be determined by an agreement between labor and management. Aside from the random testing rate issue, commenters also addressed how the test itself should be conducted. In this regard, several commenters were concerned about how truly random testing would be, and suggested that the testing itself should be conducted by an outside agency.

FTA Response. In determining the random drug testing rate, FTA has considered not only the comments on this issue but other factors as well. Most importantly, because FTA, unlike other DOT agencies, has not previously required drug testing, we do not know the extent of drug use in the mass transit industry. We therefore have established a random drug testing rate of 50 percent, the rate at which other DOT agencies have been requiring random testing since 1989.

We recognize, however, that random drug testing does subject a large number of employees to urine testing and is costly. We have thus today issued an NPRM requesting comment on whether we should adopt a performance based random drug testing rate. For a complete discussion of this issue, please see the NPRM entitled “Random Drug Testing Program” published elsewhere in today's issue of the Federal Register.

Moreover, the NPRM required random testing to be completely random, which means that it must be unannounced. It must also be unpredictable, which is the reason we proposed that the tests be spread reasonably throughout a 12-month period. We have retained both of these requirements in the final rule.

We do not, however, require the test to be conducted by an outside agency. Although requiring a third party to conduct the random drug testing may afford an employee additional protection, we believe the final rule provides an employee with sufficient protection. Among other things, the rule requires an employer to use a scientifically valid method to randomly select employees from a pool in which each employee has an equal chance of being selected.

Lastly, some commenters are confused about an issue raised in the alcohol NPRM that does not relate to this rule. In our companion alcohol NPRM, we restricted random testing to the time frames just before, during, or just after the employee performs a safety-sensitive function. Several commenters to the drug rule asked us to explain the reasoning for this restriction.

We emphasize that this limitation does not apply to the drug rule. Because drugs are prohibited substances, a safety-sensitive employee may be randomly tested for drugs at any time while on duty. In contrast, alcohol is a legal substance, and an employee who is not performing or who will not be performing a safety-sensitive function within four hours of being tested is engaged in a legal activity. Thus the alcohol rule strictly limits the period of time when the employee is subject to random testing.

H. Post-accident Testing

The comments on this provision concerned three basic questions: when should a test be performed following an accident, which employees should be tested, and who should conduct the testing.

In determining when a post-accident test should be required, the NPRM distinguished between fatal and nonfatal accidents. After an accident involving a fatality, the NPRM required the employer to test employees who were on duty and present in the vehicle at the time of the accident as well as mechanics involved in the vehicle's most recent maintenance. After an accident not involving a fatality had occurred, the employer was required to test certain employees unless their performance could be completely discounted as a contributing factor to the accident.
Instead of this dual standard in the NPRM, one commenter suggested that we adopt a reasonable cause standard for determining when a post-accident test should be performed, regardless of the seriousness of the accident. Although other commenters did not specifically propose a reasonable cause standard, they did object to the scope of the fatal accident provision, in which all safety-sensitive employees on-duty and present in the vehicle at the time of the accident, as well as mechanics, must be tested.

Most of the comments on who should be tested stressed the difficulty of testing mechanics, especially when vehicle maintenance is contracted out. Some simply stated that testing mechanics in rural areas was not practical, while others stated that requiring the testing of mechanics after an accident is unreasonable. While some commenters opposed the testing of any mechanics, others suggested that we include only certain mechanics. In this connection, one commenter suggested that we require the testing only of those mechanics who have maintained the affected vehicle within the two weeks before the accident occurred. Another commenter made the same recommendation but suggested that only those mechanics who maintained the vehicle two days before the accident be tested.

Although most comments concerned the testing of mechanics, one commenter also suggested that we require the testing of drivers only if they are contributorily negligent.

Commenters also stressed the difficulty of testing employees after an accident. They cited examples of employees leaving the scene of the accident, or police or hospital personnel refusing to allow the employee to be tested by the employer. These commenters contended that the rule should address these problems.

FTA Response. FTA in its final rule has developed a dual post-accident testing provision: after accidents involving a fatality, and after accidents involving bodily injury or property damage. The Act requires us to mandate a drug test whenever someone dies as a result of a mass transit accident, and we thus have expressly rejected the adoption of a probable cause standard in such cases. Simply put, if an accident involving a fatality has occurred, a drug test must be given within 32 hours to those safety-sensitive employees on-duty in the vehicle at the time of the accident.

Other employees' conduct may contribute to an accident, however. For example, if two trains are placed on the same track and collide, the performance of safety-sensitive duties by a vehicle controller could have contributed to the accident. If there are indications that brake failure was involved in a bus accident, and the vehicle's brake system was maintained a brief time before in the garage by an identifiable mechanic, the performance of that mechanic could have contributed to the accident. In situations of this kind, the rule directs the employer to test the other employee, but only if the employer determines, based on the best information available at the time, that the other employee's performance could have contributed to the accident. Implementing this provision rests substantially on the good judgment of the employer. For example, if the performance of the relevant work by a mechanic occurred long enough ago (e.g., more than 32 hours before a test could be administered) that a meaningful test could not be administered, the employer would not be expected to administer the test. If the bus was recently in the shop only for an air conditioning repair, there would be no point in testing a mechanic after an accident in which brake failure may have been involved.

With respect to non-fatal accidents involving road surface vehicles (e.g., buses and vans), a covered employee on duty in the vehicle at the time of the accident would have to be tested if the employee had received a citation from a law enforcement officer. As in the case of fatal accidents, the employer would test other employees if the employer determined, based on the best information available at the time, that such an employee's performance could have contributed to the accident. Examples of such a test could include the situation of the mechanic mentioned above and a situation in which a bus driver was not cited by local law enforcement personnel but the employer, in its good judgment, determined that the driver's performance could have contributed to the accident.

With respect to other vehicles (e.g., rail vehicles), the employer would have to test covered employees on duty in the vehicle at the time of the accident, unless the employer determined, based on the best information available at the time, that an employee's performance could be completely discounted as a contributing factor in the accident. This is a different standard than in the case of road surface vehicles, because there is little likelihood of an on-the-spot law enforcement citation to the operator of vehicles like rail cars. As in the other post-accident testing situations, the employer could make a judgment to test other covered employees, if the employer concluded that their performance could have contributed to the accident.

After an accident has occurred, an employer—not police or hospital personnel—must test affected employees for the use of prohibited drugs. The rule does not permit a waiver of the employer's obligation to test an employee after an accident, nor does it allow an employer to use the results of laboratory findings of a drug test administered by police or hospital personnel.

Under the final rule, however, an employee may be taken to a medical treatment facility immediately after an accident without being tested by the employer. An employee also may leave the scene of an accident, without being tested, so long as he remains readily available for testing, which may not be the case if the employer knows the whereabouts of the employee until he is tested and that the employee is available to be tested immediately after being notified by the employer and within 32 hours of the accident. Thus an employee may receive medical attention or respond to police questions or seek assistance for injured individuals.

I. Return to Duty/Follow-up Testing

The comments concerning these two kinds of testing focused primarily on the roles of the employer and the Substance Abuse Professional (SAP). The NPRM proposed authorizing the SAP to determine not only when an employee may return to duty after a verified positive drug test result, but also how many follow-up tests which employee should take and for what period of time.

Many commenters objected to the extent of authority given to the SAP under the NPRM. An employer, not the SAP, should determine if and when an employee may resume a safety-sensitive function after a verified positive drug test result, these commenters stated. They also contended that an employer should control the follow-up testing requirements, such as the length of time an employee must submit to follow-up testing and the number of tests the employee must take and pass annually.

Other commentators recommended that the final rule prescribe in detail the follow-up testing requirements, with several offering suggestions. One commenter recommended that the rule require 60 months of follow-up testing, with 12 tests required in the first year and 6 annually thereafter. Another commentator recommended 60 months of testing with a prescribed number of tests over the entire 60 month period; another a 36 month follow-up period with 6
tests required annually; and another a 24 month follow-up testing period with 3 tests required the first year. And, lastly, one commenter stated that the rule should not recommend a specific number of follow-up tests at all.

The NPRM would have provided an employee with the option of having an additional follow-up testing under its own authority. It is important to emphasize, moreover, that during the 60-month period the employee remains separately subject to random testing as well.

J. The Split Sample Procedure

The NPRM proposed that the urine sample be split, and poured-off into two specimen bottles. This provides an employee with the option of having an analysis of the split sample performed at a separate laboratory should the primary specimen test result be verified positive. The NPRM would have provided an employee 72 hours to decide whether to have the analysis of the split sample performed.

Only a few commenters responded to this provision, with most recommending that the employer be allowed to test the urine sample for more than the five prohibited drugs. Others focused on the amount of time the NPRM gave the employee to request that the secondary sample be tested. Some contend that 72 hours is too short a period of time, and others asked whether the 72 hours included weekends and holidays. Yet another commenter asked that the rule require the employee to pay for the test of the split sample.

FTA Response. On the time period issue, an employee, after being notified by the Medical Review Officer (MRO) that the primary specimen has been verified positive, must request within 72 hours that the split be tested. Although several commenters objected to the 72-hour time period, the Act specifies that an employee must be given three days to request that the split sample be analyzed. In the final rule we interpret three days to mean 72 hours, and because most transit systems operate seven days a week and during holidays, we have decided that the 72-hour time period includes both holidays and weekends.

Concerning who pays for the test of the split sample, the rule is silent, and this issue properly must be decided at the local level.

Finally, for a complete discussion of FTA’s and DOT’s response to this issue, please see part 40 and its preamble published elsewhere in today’s issue of the Federal Register.

K. Treatment

The NPRM proposed that any covered employee who has a verified positive drug test result must be advised by his employer of the resources available to help him resolve problems associated with drug use. It must be evaluated by a SAP. The NPRM did not authorize nor prohibited an employer from disciplining or discharging an employee because he has a verified positive drug test result for prohibited drug use; it simply stated that such an employee must be removed from his safety-sensitive position.

Several commenters objected to our silence on this issue, and asked us to clarify the rule by specifically authorizing the employer to take whatever disciplinary action the employer deems necessary.

The remaining commenters addressed the issue of rehabilitation. One commenter suggested that we mandate rehabilitation and treatment. Another commenter recommended that the final rule require reinstatement in addition to rehabilitation. Yet another commenter stated that the final rule should not address the issue of rehabilitation, which should be decided by the employer and the union. Lastly, a commenter stated that an employer should not be required to refer an employee to an SAP when the employer’s policy is to discharge any employee who has a verified positive drug test result.

FTA propose. FTA has retained the language in the NPRM on this issue. We thus remain silent on whether an employer may dismiss or disqualify an employee who has a verified positive drug test result, an issue best decided at the local level.

Concerning rehabilitation, we believe that we have met the requirements of the Act, which state that the rule must provide for identification and opportunity for treatment of employees who are determined to have used prohibited drugs. In this regard, we require that an employee who has a verified positive drug test result be evaluated to determine whether he needs assistance. Such an employee may return to his safety-sensitive position after he has properly completed a course of treatment as determined by an SAP, and takes a return to duty drug test with a verified negative result.

If an employee undergoes treatment, the rule does not address the issue of who should pay for it. We believe that this issue should be decided at the local level. Nor does the rule deal with the issue of recidivism, when an employee has repeated verified positive drug test results and has repeatedly been referred to treatment. Again, we believe that this issue should be decided at the local level. This rule requires the removal of an employee from a safety-sensitive position if the employee has a verified positive drug test result, but does not address employment or disciplinary issues in connection with such action.

L. Training

The NPRM proposed that supervisors who make reasonable suspicion determinations receive 120 minutes of training on the physical, behavioral, and performance indicators of probable drug use, which would enable the supervisor to make an informed reasonable suspicion determination. In addition, the NPRM proposed that all safety-sensitive employees be trained about the effects of drug use on health, safety, and the work environment.

We received numerous comments on this issue, virtually all of them in favor of requiring training, at least for supervisors. For employees, most commenters were silent, although one favored requiring 60 minutes of training and another asked that we help develop a curriculum for a general educational program.

Because almost all of the commenters were in favor of training for supervisors, many commenters proposed certain training specifications. Some commenters proposed a combined drug and alcohol training program; one commenter specifically recommended four hours of combined drug and alcohol training, while another made the same recommendation but added a one-hour yearly refresher course.

The remaining commenters did not specifically recommend that the drug and alcohol training be combined. Instead, one commenter suggested that supervisors be required to receive four hours of training and that the class size be limited to four individuals. Other commenters recommended a full day of...
employers should be required to keep the FTA on time. In fact, one collected, nor for submitting the reports the accuracy of the information most commenters believed that the State merely "passes through" the prepared by their subrecipients. Because proposed to require States to collect and record collection. Under the NPRM, we forward to FTA the annual reports employees.

The vast majority of comments on this issue concerned the State's role in record collection. Under the NPRM, we proposed to require States to collect and forward to FTA the annual reports prepared by their subrecipients. Because the State merely "passes through" the Federal grant funds to a subrecipient, most commenters believed that the State should not be responsible for ensuring the accuracy of the information collected, nor for forwarding the reports to the FTA on time. In fact, one commenter suggested that only large employers should be required to keep and submit detailed information on test results.

Some States focused on the overlap between this NPRM and a rulemaking required under section 28 of the FT Act, which requires certain States to oversee the safety of certain kinds of fixed guideways. Some commenters explained that they would not be able effectively to oversee certain fixed guideway systems unless they were given access to the records generated under this rule.

Finally, some commenters asked that we provide States an extra 60 days from the annual February 15th reporting date. In the final rule we have retained the requirement that a State collect and submit to FTA on behalf of its subrecipients the data required under this rule. This requirement is consistent with the fundamental legal relationship between FTA and the direct recipient of Federal funding, which in some instances is a State, in which case the State must collect and submit the annual report required under this rule and meet the same reporting deadline as other recipients. The due date of the annual report has been changed to March 15. States must collect the reports prepared by their subrecipients and their contractors, as appropriate, and forward the reports to the FTA.

The final rule includes two different reporting forms, FTA Drug Testing Management Information System (MIS) Data Collection Form (Appendix B) and FTA Drug Testing Management Information System (MIS) "EZ" Data Collection Form (Appendix C).

We appreciate those comments directing our attention to the overlap between this rule and the State Safety Oversight NPRM published in the Federal Register on December 9, 1993 at FR 64856. We have amended those provisions requiring access to certain facilities to also permit access by State oversight agency officials to facilitate their oversight role as proposed in the State Safety Oversight NPRM.

We believe that training for covered employees is important because of the profound ramifications of prohibited drug usage on personnel health, public safety, and the work environment. We also believe that one hour of training is sufficient to train supervisors who may make reasonable suspicion determinations to recognize the signs and symptoms of drug use; moreover, an employer may, at its own discretion, choose to provide additional training.

We have decided to adopt the recommendation of one commenter and require all safety-sensitive employees to receive at least 60 minutes of training. We believe that training for covered employees is important because of the profound ramifications of prohibited drug usage on personnel health, public safety, and the work environment. We also believe that one hour of training is sufficient to train supervisors who may make reasonable suspicion determinations to recognize the signs and symptoms of drug use; moreover, an employer may, at its own discretion, choose to provide additional training. These requirements are one-time only; the final rule does not require annual or recurring training, although an employer certainly is not prohibited from providing any additional training. Moreover, we do allow employers to combine drug and alcohol training providing that the minimum time requirements are observed.

N. Implementation Date

The NPRM proposed to require compliance with this rule within six months of publication in the Federal Register for large employers and within one year for States and small employers.

This provision contrasted with implementation periods proposed in the alcohol NPRM, which were one year for large employers and two years for States and small employers.

Several commenters strongly favored implementing both the drug and the alcohol rules simultaneously. Another commenter recommended that, for budgeting reasons, FTA key the implementation period to the fiscal year. Other commenters recommended specific implementation periods. For instance, one commenter suggested that all employers be given four months while another suggested three to six months. Another commenter recommended that large employers comply with the rule within six to nine months of the publication date.

Several commenters strongly favored combining the drug and alcohol requirements into one final rule, or, in the alternative, to combine common aspects of both rules, such as the training and reporting requirements. We have decided not to combine the drug and alcohol testing rules at this time because there are significant differences between them. For instance, the random rate for the two rules differ, 25 percent for alcohol and 50 percent for drugs. Also, the time period during which an employee may be subject to random testing differs in the two rules. The alcohol rule contains an entire subpart, Prohibitions, which specifies when an employee cannot use alcohol. In contrast, the drug rule contains no comparable subpart because prohibited drugs are controlled substances. On the other hand, we do allow an employer to combine certain aspects of the rules, most notably the training requirements. In addition, we encourage the employer to formulate
and promulgate one policy statement concerning both drugs and alcohol.

P. Indian Tribal Governments

Several commenters have asked us to clarify the applicability of the rule to Indian tribal governments and have suggested that we preempt Indian tribal law. Because Indian tribal governments are not subject to State law or regulation, these commenters are concerned about the ability of a State to proceed to a policy statement of Indian tribal governments and have no information, moreover, on the issues addressed in points one and two.

Q. Waivers

Several commenters have asked us to waive the application of the rule to certain categories of employers. For instance, one commenter recommended that employers with less than 16 employees be excluded from complying with the rule. Another recommended that section 18 recipient certifying that it has not had an alcohol or drug related accident in three years should be exempted from the rule.

FTA Response. Language in a report of the Senate Committee on Commerce, Science, and Transportation accompanying the Act addressed the issue of FTA granting waivers of the rule in whole or in part:

The Committee is aware of concerns raised with regard to the difficulties some believe may be faced by small transit operations located in rural areas in complying with [FTA] drug and alcohol testing requirements. If, after notice and opportunity for comment, the Secretary determines that a waiver for certain operations from such requirements would not be contrary to the public interest and would not diminish the safe operation of rural transit conveyances, the committee would not object to a waiver, in whole or in part, of the application of regulations issued pursuant to this bill with regard to recipients of funds under section 16 of the [Federal Transit Act, as amended]. S. Rep. No. 60, 102d Cong., 1st Sess. 36 (1991).

C. Applicability. (§653.5)

This section describes FTA's jurisdiction over recipients and covered employees and how it may overlap with that of other modal agencies; whether section 16(b)(2) recipients must comply with this rule; the effect of the rule on user-side subsidies; and the effect of the rule on those who may no longer receive FTA funding.

1. FTA grant programs under sections 3, 9, and 18 and the Interstate Transfer Program. Under the section 3 discretionary grant program, FTA funds three categories of capital projects: the construction of new rail projects; the improvement and maintenance of existing rail and other fixed guideway systems; and the rehabilitation of bus systems. Under sections 9 and 18, the formula grant programs, FTA funds both capital and operating assistance to specific categories of recipients that receive Federal funds under a statutory formula based on population, population density, and other factors. Generally, urbanized areas receive section 9 funding directly, while nonurbanized areas receive section 18 funding through the State. FTA also provides funds under 23 U.S.C. section 103(e)(4), the interstate transfer program. Under this program, FTA provides funding to States and localities for capital transit projects in lieu of nonessential interstate highway projects. Hence, recipients of these types of FTA funding may be States, transit agencies, or other kinds of localities, but all such recipients are public entities.

2. FTA Jurisdiction. FTA is a Federal agency that makes grants of Federal financial assistance under various statutory provisions. Under all of these provisions, the agency's relationship is with the direct receiver of Federal financial assistance, the recipient. Such a recipient of Federal funds must comply with a variety of Federal requirements, including this rule, and enters into a grant agreement with the FTA to that end. After accepting a grant from the FTA, a recipient is responsible for ensuring that it, or any entity that it uses to provide further transportation services, will comply with all relevant Federal requirements.

While the Act requires us to issue this drug testing rule, it does not change the fundamental relationship between FTA and a direct recipient of Federal financial assistance. That is, FTA does not directly regulate covered employees, which means that FTA has no authority directly to deal with a covered employee under any circumstances.
Rather, the Act authorizes FTA to require a recipient to implement an anti-drug program, and it is the recipient that is responsible for assuring that covered employees comply with the rule. If a recipient fails to do so, FTA will withhold Federal funding.

3. Multi-modal jurisdiction. As discussed below, recipients may be regulated by another DOT modal agency, such as the Federal Railroad Administration (FRA), which regulates railroads, the Federal Highway Administration (FHWA), which regulates holders of Commercial Driver’s Licenses (CDL), or the United States Coast Guard, which regulates certain vessels and mariners.

a. Federal Railroad Administration. The FRA regulates railroads. A railroad is defined in the Federal Railroad Safety Act of 1970 as: [a]ll forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, as well as any commuter rail service which was operated by the Consolidated Rail Corporation as of January 1, 1979, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.


If an FTA recipient solely operates a commuter railroad, those railroad operations are subject to FRA’s drug rules. Similarly, the Act must certify to the FTA that it complies with FRA’s rule as provided for under section 653.83 of this part. See Appendix A for the certification such a recipient must execute.

If a recipient operates a railroad as well as other mass transit services, its railroad operations are subject to FRA’s drug rules while its non-railroad mass transit operations are subject to the FTA rule.

b. Federal Highway Administration. Before the Act, FHWA was authorized to regulate only intrastate motor carriers. Hence, when FHWA issued its anti-drug rule in 1988, most of FTA’s recipients, which generally operate intrastate, were not affected by it. The Act, however, authorizes FHWA to regulate intrastate motor carriers and specifically requires it to issue an anti-drug rule which applies to intrastate as well as interstate motor carriers. Thus, to avoid subjecting recipients who are also motor carriers to two different rules, FTA and FHWA have agreed that these recipients are subject only to FTA’s anti-drug rule.

c. United States Coast Guard. If a recipient operates a ferry boat service, it is subject both to FTA and Coast Guard anti-drug regulations with regard to that service. Applicable Coast Guard regulations may be found at 33 CFR part 95 and 46 CFR parts 4 and 16.

Generally, the FTA’s drug testing regulation is consistent with the Coast Guard’s. Moreover, both FTA and the Coast Guard require employers to follow 49 CFR part 40 when conducting a drug test. Unlike the Coast Guard, however, FTA requires an additional procedure set forth in this rule—which is not in Part 40. That is, we require that in the case of a verified positive drug test result, the covered employee be referred to a substance abuse professional (SAP) for evaluation.

As noted earlier, if a recipient complies with this part 653, the recipient generally will also be in compliance with the Coast Guard regulation. To assist in the compliance with both regulations, we note in various provisions of the Section-by-Section Analysis portion of this preamble the differences between the FTA and Coast Guard rules.

4. Covered employees of recipients. As noted above, FTA does not directly regulate employees or workers who are subject to the provisions of this rule through the actions of their employers. This general proposition is not true of FHWA and the Coast Guard, which use licensing actions or other measures to enforce their safety rules, including their anti-drug rules. A recipient’s safety-sensitive employees thus may be subject to licensing actions of these agencies, even though the recipient is regulated by FTA’s anti-drug regulations. For example, a CDL holder employed by an FTA recipient remains subject to the Commercial Motor Vehicle Safety Act of 1986, and the consequences that attach to a violation of it. For example, a CDL holder convicted of driving under the influence of drugs or alcohol may have his or her Commercial Driver’s License suspended or revoked. Similarly, the Coast Guard is authorized to revoke a license, certificate of registry, or merchant mariner’s document of a crewmember under certain circumstances. Coast Guard’s relevant provisions specifying the rights and responsibilities of crewmember are located in 46 CFR parts 4, 5, and 16 and 33 CFR part 95.

5. Section 16(b)(2) recipients. Some entities receive funding under section 16(b)(2) of the FT Act, which provides capital assistance, through a State, to organizations that provide specialized transportation services to elderly persons and persons with disabilities.

While some commenters suggested that we cover section 16(b)(2) recipients under the rule, we do not do so, noting that the Act references recipients of funds under sections 3, 9, or 16 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code, but not section 16. Note, however, that a section 16(b)(2) recipient may be covered by the anti-drug regulation published by the FHWA elsewhere in today’s Federal Register.

6. User-side subsidies. A user-side subsidy refers to the practice of providing passengers publicly subsidized script or vouchers, which the passenger then uses to pay for transportation from a private carrier such as a taxicab company. In essence, a recipient provides transportation services indirectly through such subsidies.

The regulation applies to certain recipients of FTA funding, and to transit operators providing service under contract or other arrangements with those recipients. To the extent that a taxicab company does not provide service under an arrangement with an FTA recipient, but is chosen at random by the passenger, it would not be subject to the rule. If, however, the taxicab company or private operator does provide service under an arrangement with an FTA recipient, it is covered by the rule as a contractor, as defined by the rule.

In such cases, the taxicab company may wish to designate only certain drivers to provide such service, in which case only those designated drivers would be subject to the rule’s drug testing program.

7. Continuing Federal interest. Not all recipients receive a Federal grant or grants for capital or operating assistance each year under the formula or discretionary programs. Some may receive capital assistance only when they need to purchase equipment or construct or repair a facility, which could occur once every few years. Indeed, there may be a recipient that receives a capital grant just once over a five or ten year period. It is important to emphasize that once a recipient has received an FTA capital grant after the effective date of this rule and has therefore agreed to comply with the rule, it must continue to comply with the rule (and other Federal requirements) during the useful life of the equipment or facility funded under the grant.

In short, this rule remains in effect so long as the grant-acquired assets and related grant obligations remain in effect, and is not contingent
upon a recipient receiving Federal funds each year.

This is not the case with operating assistance, however, which essentially is "used up" each year and is not considered to have a useful life beyond any given year. Thus in the event a recipient receives an operating assistance grant just once (and has not separately received a capital grant), it would only have to comply with this rule for that one year. This is probably a hypothetical example, however, since most recipients receive operating assistance on an annual basis, while others receive capital funding at some point, in which case they would have to comply with the rule over the life of the grant-acquired asset.

D. Definitions. (§ 653.7)

1. Accident. An accident may trigger a post-accident alcohol test, and is defined as an incident in which a person has died or is treated at a medical facility or when there has been property damage resulting in the towing of a vehicle or the removal of a transit vehicle from revenue service.

For accidents not involving a fatality, we have created two categories of vehicles. The first is for "road surface" vehicles, including buses, vans, automobiles, and electric buses. For this category, an accident is an occurrence resulting in a vehicle—either a mass transit vehicle or another vehicle—suffering disabling damage and having to be towed away. This definition parallels that used by FHWA for commercial motor vehicle accidents, and includes language drawn from FHWA's regulations specifying what kind of damage is viewed as disabling.

The second category includes rail cars, trolley buses and trolley cars, and vessels. This category would also include other kinds of transit conveyances operated by FTA recipients, such as people movers, inclines, and monorails. An accident is deemed to occur to such a vehicle when the occurrence results in the vehicle being removed from revenue service. FTA views an accident happening when the vehicle is not operating in revenue service (e.g., an accident that occurs in a rail yard) as falling within this definition if it results in damage that would result in a comparable vehicle being withdrawn from revenue service or results in a delay in the vehicle being placed into or returned to revenue service.

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

3. Anti-drug program. This definition describes the scope of the program created by this rule, which encompasses testing and training intended to promote safety by deterring the use of prohibited substances.

4. Canceled test. This definition describes a test that has not taken place, a specimen that cannot be analyzed by a laboratory, or a test that is declared invalid by a Medical Review Officer (MRO). For instance, a urine specimen that is rejected by the laboratory is a canceled test. A canceled test is different from a verified positive or negative test. It is also different from the behavior that constitutes a refusal to submit; for a test to be canceled the employee must be ready to submit to a test.

5. Certification. This definition describes the statement that must be executed by the recipient.

6. Chain-of-custody. This definition refers to the procedures specified in part 40 for the handling of a urine sample. These procedures are designed to protect the integrity of the test and the rights of the employee by ensuring that a particular employee's specimen is sent to a particular laboratory without any intervening steps or opportunity for tampering with the sample.

7. Consortium. This definition describes an arrangement in which employers place their safety-sensitive employees in a pool with the safety-sensitive employees of other employers. Any employer subject to any DOT agency anti-drug regulation may join a consortium for the purpose of complying with the rule. It may be particularly advantageous for smaller entities to join a consortium and thereby limit costs and administrative burdens.

8. Contractor. This definition covers a broad range of contracts between an FTA recipient and those carrying out services for it and includes not only written and oral commitments in which both parties agree to specific terms and conditions but informal arrangements as well. An informal arrangement essentially is any ongoing relationship between two parties. Hence, repeatedly doing business with another entity would come within the meaning of a contractual arrangement under the rule.

9. Covered employee. This definition describes who is subject to the rule. Only safety-sensitive employees that work for a recipient or any entity performing a mass transit function on behalf of a recipient are covered by the rule, except for contract mechanics for small operators, which are not covered.

10. DOT. The abbreviation DOT stands for the United States Department of Transportation.

11. DOT agency. DOT contains several operating agencies, five of which issued anti-drug rules in 1988. Those agencies are: FHWA (49 CFR part 382), FRA (49 CFR part 219), FAA (14 CFR part 121, appendix J), Coast Guard (46 CFR parts 4 and 16), and RSPA (49 CFR part 199).

12. Employer. This definition applies to entities that must implement an anti-drug rule. It includes recipients and other entities that provide mass transit service or perform a safety-sensitive function for a recipient. It includes subrecipients, operators, contractors, and consortia.

13. FTA. FTA is the abbreviation for the Federal Transit Administration.

14. Large operator. A large operator is a transit provider primarily operating in an area of 200,000 or more in population.

15. Medical Review Officer. A medical review officer is a medical doctor who has been trained to interpret and evaluate laboratory test results in conjunction with an employee's medical history. A medical review officer verifies a positive test result by reviewing a laboratory report and an employee's unique medical history to determine whether the result was caused by the use of prohibited drugs or by an employee's medical condition.

16. Prohibited drug. This definition lists the drugs listed in section 102(6) of the Controlled Substances Act that have been determined by the Secretary as being a risk to public safety: marijuana, opiates, amphetamines, cocaine, or phencyclidine.

17. Railroad. This definition is from the Railroad Safety Act of 1970 and is used in the rule to distinguish FTA's jurisdiction from FRA's. Basically, FRA has jurisdiction over any form of transportation that run on rails and is connected to the general railroad system. FTA thus has jurisdiction over all self-contained forms of mass transportation that run on rails, so long as those systems receive Federal funding from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

18. Recipient. This definition, based on the Act, defines a recipient as an entity receiving Federal financial assistance directly from the FTA under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code.

19. Refuse to submit (to a drug test). This definition describes the behavior that constitutes a refusal to submit to a drug test, that is, the refusal to produce a specimen.
20. Safety-sensitive function. This definition determines which categories of employees are subject to the rule. Because each recipient uses its own terminology, we have decided to define safety-sensitive based on the function performed instead of listing specific job categories. Each employer must decide for itself whether a particular employee performs any of the functions listed in this definition.

The definition lists five categories of safety-sensitive functions. The list itself is exclusive, which means that either an employee performs a safety-sensitive function listed in a category or she does not. An employer may not add any category to the list unless it wishes to test those additional employees separately under its own authority.

The first category is operating a revenue service vehicle, whether or not the vehicle is in service. In short, an employee who operates a revenue service vehicle for any purpose whatsoever is a safety-sensitive employee and is subject to the rule.

The second category is operating a nonrevenue service vehicle when required to be operated by a holder of a CDL. The third category is controlling dispatch or movement of a revenue service vehicle or equipment used in revenue service.

The fourth category is maintaining a revenue service vehicle unless the recipient receives section 18 funding and contracts out such services. Maintaining a revenue service vehicle includes any act which repairs, provides upkeep to a vehicle, or any other process which keeps the vehicle operational. It does not include cleaning either the interior or the exterior of the vehicle or transit facility. This category specifically excludes only the employees of a contractor or other entity who maintains revenue service vehicles for section 18 recipients. Hence, all other employees who maintain revenue service vehicles whether by contract or otherwise are safety-sensitive employees.

The fifth category is carrying a firearm for security purposes. A security guard who does not carry a firearm is excluded from this category, and is not a safety-sensitive employee.

We note that supervisors are included in this definition so long as the supervisor performs or the supervisor's job description includes the performance of any function listed in categories 1 through 5.

21. Small operator. A small operator is a recipient operating primarily in an area of less than 200,000 in population.

22. Substance abuse professional. This definition establishes the requirements for anyone who evaluates employees subject to drug testing under this part. The SAP must be knowledgeable about and have clinical experience in the diagnosis and treatment of both drug and alcohol-related disorders. The SAP must also be a licensed physician, either a Medical Doctor or Doctor of Osteopathy, or a licensed or certified psychologist, social worker, employee assistance professional, or addiction counselor who is certified by the National Association of Alcoholism and Drug Abuse Counselors Certification Commission.

23. Vehicle. This definition lists types of vehicles used in mass transportation, or which may be involved in accidents with such vehicles. Because mass transit encompasses travel by bus, van, ferry, boat, and rail, the list is meant to be very broad, covering every type of conveyance used to provide mass transit (including such things as people movers and inclines). The term “mass transit vehicle” is used to distinguish vehicles actually used for transit purposes from those used by the general public.

24. Verifed negative drug test result. This definition explains that, if a medical review officer determines there is no evidence of prohibited drugs in an employee's urine sample, the drug test result shall be declared negative.

25. Verified positive drug test result. This definition explains that, if a medical review officer determines there is evidence of prohibited drugs in an employee's urine sample, the drug test result shall be declared positive.

E. Preemption of State and Local Laws. (§ 653.9)

The Act provides that this rule preempts any inconsistent State or local law, ordinance, rule, regulation, standard, or order.

Consistent with long-standing Department-wide interpretation of this type of preemption language, the regulation specifies that “inconsistent with” means that the regulation:

(1) Preempts a State or local requirement if compliance with the local requirement and the FTA regulation is not possible; or

(2) Preempts a State or local requirement if compliance with the local requirement is an obstacle to accomplishing the provisions of the FTA regulation.

On the other hand, neither the statute nor the regulation preempts State criminal laws that impose sanctions for reckless conduct.

F. Other Requirements Imposed by an Employer. (§ 653.11)

An employer may impose other requirements in addition to those imposed by this rule if those additional requirements do not conflict or interfere with the requirements of this rule. For example, an employer may require a supervisor to be trained for four hours instead of one, or an employer may provide annual training for both supervisors and employees. An employer may also require an employee to provide another urine sample in a separate void and may then test that sample for drugs other than the five prohibited drugs. Under the rule, when an employer imposes additional requirements the employer must advise the employee that the requirements are not pursuant to this regulation.

G. Starting Date for Drug Testing Programs. (§ 653.13)

This section states the implementation date for large operators, States, and small operators.

Subpart B—Program Requirements

This subpart describes the four elements of the anti-drug program each employer must implement to be in compliance with this part. An employer must: develop and disseminate a policy statement; train and educate employees about the consequences of prohibited drug use; require testing under five separate voids and may then test that sample for drugs other than the five prohibited drugs. Under the rule, when an employer imposes additional requirements the employer must advise the employee that the requirements are not pursuant to this regulation.

A. Requirement To Establish an Anti-Drug Program. (§ 653.21)

This section requires an employer to establish an anti-drug program to deter and detect the use of prohibited drugs, consisting of educating and training about drug usage and urine testing for prohibited drugs. The anti-drug program must comply with the requirements imposed by the rule.

B. Required Elements of an Anti-drug Program. (§ 653.23)

This section includes a checklist of the main requirements of the anti-drug program and cross references those provisions which address specific requirements.

C. Policy Statement Contents. (§ 653.25)

The rule requires an employer to make available to every safety-sensitive employee a policy statement describing the employer’s anti-drug testing program. The policy must include the following information:
This section addresses two situations, when an employee has a verified positive drug test result, or has refused to submit to a test. In either case, the employer must remove the safety-sensitive employee from his/her position as soon as practicable after being notified of the result. In both instances, the employer must ensure that the employee is assessed under the provisions of section 653.37, which require that the employee be evaluated by an SAP. Marine transit operators have additional responsibilities. Consistent with 46 CFR 16.201(c), an employer or prospective employer of an individual holding a license, certificate of registry, or merchant mariner's document who has a verified positive drug test result must report the test result to the nearest Coast Guard Officer in Charge, Marine Inspection (OCMI).

I. Referral. Evaluation and Treatment. (§653.37)

This section requires an employer to advise an employee who has a verified positive drug test result of the resources available in resolving problems associated with drug misuse. The information provided by the employer shall include the names, addresses and telephone numbers of substance abuse professionals, and counseling and treatment programs.

Such an employee must be evaluated by a substance abuse professional to determine whether the employee needs help in resolving problems associated with drug misuse. The SAP then determines what kind of help the employee needs. Any such employee must take a return to duty drug test with a verified negative result before he or she may be allowed to perform a safety sensitive function again.

The employee must follow the course of treatment prescribed by the SAP. To return to duty, the employee must be evaluated by a SAP to determine that the employee has properly followed the course of prescribed treatment and is able to return to work.

The employee then must take a return-to-duty test with a verified negative result and is then subject to follow-up testing, which occurs unpredictably for up to 60 months following return to duty. In any event, the employee must take at least six follow-up tests with verified negative results during the first twelve months after returning to duty. The SAP then determines how many follow-up tests
should be administered over the remaining 48 months.

In addition, the SAP may recommend that the employee also be subject to return to duty and follow-up testing for alcohol misuse.

Such an employee remains separately subject to random drug testing.

An employer is not required to provide applicants with an opportunity for referral, evaluation, and treatment.

Subpart C—Types of Drug Tests

A. Pre-employment Testing. (§ 653.41)

This section prohibits an employer from hiring an applicant for a safety-sensitive function unless the applicant takes a drug test with a verified negative result administered in accordance with this regulation. This section also requires that an employee who transfers from a nonsafety-sensitive position to a safety-sensitive position to be tested before he or she actually begins performing a safety-sensitive function for the first time.

For marine employers, 46 CFR 16.210(a) prohibits hiring or giving a commitment of employment to an individual unless the individual takes a drug test with a verified negative result or meets a stated pre-employment exemption requirement under 46 CFR 16.210(b). Marine employers that also are FTA recipients, however, must in every instance require an applicant to take a drug test with a verified negative result before they may be hired.

B. Reasonable Suspicion Testing. (§ 653.43)

This section requires an employer to test a covered employee for prohibited drug use if the employer has reasonable suspicion to believe that the covered employee has used prohibited drugs. The reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, or speech of the covered employee, which are characteristic of prohibited drug use.

The rule requires the decision to be made by a supervisor trained in detecting the signs and symptoms of prohibited drug use.

C. Post-accident Testing. (§ 653.45)

This section requires a test after an accident has occurred, and establishes two categories of accidents, fatal and nonfatal. Non-fatal accidents are treated differently depending on the type of transit vehicle involved. For a more complete description of the ways in which different kinds of accidents are treated, please refer to the discussion of post-accident testing in the portion of the preamble that responds to comments.

The rule requires an employer to test the appropriate covered employees as soon as possible, but within 32 hours, consistent with other DOT agency existing drug testing rules.

The rule also requires an employer to require an employee to remain readily available for testing; if the employee does not do so, the employer can treat such behavior as refusing to submit to a drug test. Remaining readily available means that the employer knows the whereabouts of the employee and must conduct the test as soon as practicable but within 32 hours of the accident.

This section allows an employee to seek medical attention, assist injured individuals, or obtain assistance in dealing with the accident, if necessary, before being tested for prohibited drugs.

D. Random Testing. (§ 653.47)

The rule requires an employer to randomly test covered employees for the use of prohibited drugs. The testing must truly be random, which means that it is random with respect to the person tested and the predictability of the actual administration of the test.

An employer cannot use an employee’s name in a random selection pool. Rather, an employer must identify each covered employee by a unique number, such as a social security or a payroll identification number, which is entered into a pool from which the selection is made. Each covered employee must have an equal chance of being tested. Once a covered employee is selected and tested, their identification number is reentered into the pool so that they will have an equal chance of being tested the next time the employer conducts random testing.

An employer must test randomly throughout the calendar year. Testing must be unannounced and occur on a reasonable basis throughout the entire calendar year. Random tests must be conducted in an unpredictable fashion. For example, an employer may not conduct random tests only on a Monday or only at the beginning of a shift. Further, once an employee is notified of his selection for a random test, he must report (or be escorted) immediately to the collection site.

The random drug testing rate is set at 50 percent. For compliance purposes, it is important to note that in calculating its random testing results an employer must include adulterated urine samples and refusals to submit to a test as verified positive test results.

E. Return to Duty Testing. (§ 653.49)

Return to duty testing refers to the test that employees who have verified positive drug test results or refuse to submit to a drug test.

In addition, because of the prevalence of combined drug and alcohol misuse, an employer may, based on the recommendations of the substance abuse professional, subject an employee who previously had a verified positive drug test result under the FTA anti-drug rule to a return to duty alcohol test.

F. Follow-up Testing. (§ 653.51)

Upon taking a return to duty test with a verified negative result, an employee is subject to follow-up testing for up to 60 months. During the first 12 months the employee is subject to a minimum of 5 follow-up drug tests which must be unannounced and conducted reasonably throughout the 12 months.

After those 12 months, the substance abuse professional determines whether the employee should be subject to follow-up testing for the remaining 48 months. Because many individuals abuse more than one substance at a time, an employer may, based on the recommendations of the SAP, subject an employee who previously had a verified positive drug test result for prohibited drugs under this rule to follow-up testing for the misuse of alcohol. An employer may also subject an employee who previously tested at 0.04 or greater on an alcohol test under part 654 to follow-up drug testing for the use of prohibited drugs.

It is important to note that an employee subject to follow-up testing remains separately subject to random drug testing under this rule.

Subpart D—Drug Testing Procedures

This subpart contains a drug testing procedure required by the Act in addition to those required in 49 CFR part 40.

A. Compliance With Testing Procedures Requirements. (§ 653.61)

This section requires an employer to use the testing procedures in 49 CFR Part 40 unless expressly provided otherwise in this part. This Part 653 contains the additional testing requirement mandated by the Act, namely, the evaluation by an SAP.

B. Substance Abuse Professional. (§ 653.63)

This section explains the role of the substance abuse professional. In relation to a covered employee, a substance abuse professional is neither a counselor nor a treating professional. Rather, an
SAP evaluates an employee who either has a verified positive drug test result or refused to be tested to determine whether the covered employee needs help resolving a problem with prohibited drug use. The SAP then makes certain recommendations to the employee, which the employee must follow. Before returning to duty, the employee is reevaluated by an SAP to determine whether the employee has followed the SAP’s recommendations. The SAP then determines whether the employee is ready to return to her safety-sensitive function. The SAP also determines the number of follow-up tests the employee should be subject to in addition to the six mandatory follow-up tests in the first 12 months after the employee’s return to duty. 

The rule discusses several employment options concerning the substance abuse professional. Who pays for the services of the substance abuse professional, however, is determined at the local level. 

This section prohibits, in some circumstances, a substance abuse professional from treating an employee after evaluation and determination that the employee needs help. This section, however, allows an evaluating SAP also to treat an employee when the SAP is an employee of or under contract to an employer, the SAP is the only source of appropriate therapeutic treatment provided under the employee’s health plan or reasonably accessible to the employee, or the SAP works for a public agency such as a State, county, or municipality. 

Subpart E—Administrative Requirements 

A. Retention of Records. (§ 653.71) 

Section 653.71 explains which records relating to the drug testing program must be retained and for how long. The rule provides for three separate record retention periods for different types of records—five years, three years, and one year. Each employer must maintain for five years records of covered employees’ verified positive drug test results, documentation of refusals to take a drug test, and covered employee referrals to the SAP. Collection process and employee training documents must be retained for two years, while records of negative test results must be retained for one year. 

B. Reporting of Results in a Management Information System. (§ 653.73) 

The reporting requirements required in section 653.73 are part of a Department-wide effort to standardize reporting for drug testing by means of a Management Information System (MIS). The data collected will be used by FTA and DOT to identify trends and to assess the success or failure of the agency’s anti-drug rule. 

The data elements were selected to provide information on the scope of the program, the prevalence of drug use in mass transportation, the implementation of the program and its related costs, and the deterrent effect of the rule over time. Appendix B must be used in reporting both verified positive and negative drug test results; Appendix C must be used by employers who have no verified positive drug results to report. FTA does intend to combine the drug and alcohol annual reporting forms within two to three years after the implementation date. 

Recipients and subrecipients must submit to FTA their own annual reports as well as an annual report from each of their contractors with covered employees. Each report submitted must cover a calendar year. The closing date for data is December 31 and the report is due at FTA by March 15 of the following year. 

C. Access to Facilities and Records. (§ 653.75) 

Paragraph (a) of this section precludes an employer, in most circumstances, from releasing information contained in records required to be maintained under this rule. Examples of such records include any document generated as a result of a refusal to take a drug test or a reasonable suspicion determination. An employer, however, may release information when required to do so by law or this rule, or if expressly authorized. 

Paragraph (b) provides that the employer must provide the employee copies of records relating to the employee’s alcohol tests or pertaining to the employee’s prohibited use of drugs. Once the employee has submitted his request in writing, the employer must promptly provide the records to him. The employer may charge for reproducing the records but only for copies of those records specifically requested. 

Paragraph (c) requires the employer to allow certain governmental entities to have access to any facility used to comply with this rule. The rule provides that the Secretary of Transportation or representatives from any other DOT agency shall have access. In addition, the rule requires an employer to allow the State agency designated by the governor to oversee rail fixed guideway systems to also have access to its facilities to properly oversee the safety of a rail fixed guideway system as required by section 28 of the FT Act. We note here that the State oversight of rail fixed guideway systems NTSB in the Federal Register on December 9, 1993 at 58 FR 64856 contains FTA’s proposal for the State oversight agency. 

Paragraph (d) requires an employer to give certain governmental entities copies of test results and any other information pertaining to the employer’s anti-drug program. Those governmental entities are the same as those specified in subsection (c). 

Paragraph (e) requires an employer to disclose information about the employer’s administration of a post-accident drug test to the National Transportation Safety Board (NTSB) when it investigates an accident. 

Paragraph (f) provides that the employer must give copies of certain records to a subsequent employer if the employee makes a reasonable written request. The employer may disclose only that information specifically authorized by the employee in her written request. 

Paragraph (g) requires the employer to disclose certain information when requested to do so by the employee or a decisionmaker in a lawsuit, grievance, or other proceeding when such a proceeding has been initiated by the employee and arises from the results of a drug test administered under this part. This provision does not cover any proceeding initiated by a third party and is limited to employment actions such as worker’s compensation or unemployment compensation which are initiated by the employee. 

Subsection (b) provides that the employer must release information to any individual who requested to do so by the employee in writing. The employer may disclose only that information specifically authorized by the employee. 

Subpart F—Certifying Compliance 

This subpart establishes the certification requirements for recipients of FTA funding under sections 3, 9, or 18 of the FT Act or section 103(e)(4) of title 23 of the U.S. Code. 

A. Compliance a Condition of FTA Financial Assistance. (§ 653.81) 

This section mandates the withholding of Federal funds from a recipient of FTA funding under sections 3, 9, or 18 of the FT Act, or section 103(e)(4) of title 23 of the U.S. Code, if it is not in compliance with the rule. To be in compliance with the rule, the recipient either must implement the requirements of the rule or require their
implementation by subrecipients, operators, contractors, employers, or any other entity performing a mass transit function on behalf of the recipient.

It is important to note that any misrepresentation or false statement to FTA is a criminal violation under section 1001 of title 18 of the United States Code.

B. Requirement to Certify Compliance. (§ 653.83)

This section requires a recipient to certify that the requirements of the rule have been met. We emphasize that the direct recipient of FTA funds makes this certification to FTA.

The certifications are required annually, with large operators submitting their certification before January 1, 1995 and small operators and States submitting their certifications before January 1, 1996. States will certify on behalf of subrecipients and their contractors.

The certification itself must comply with the sample certification provided in Appendix A to this part, be authorized by the recipient’s governing board or other authorizing official, and be signed by a party specifically authorized to do so.

IV. Americans With Disabilities Act

Title I of the American With Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in employment. A basic premise of Title I is that a person with a disability must be provided a reasonable accommodation to work. It is possible that some covered workers will be considered persons with disabilities for purposes of protections under the ADA.

For a more complete discussion of this issue, please see the DOT-wide Preamble preceding this FTA document in today’s Federal Register.

V. Economic Analysis

The Federal Transit Administration (FTA) has evaluated the industry-wide costs and benefits of the rule, Prevention of Prohibited Drug Use in Transit Operations. This rule will require personnel who perform safety-sensitive functions to be covered by a formal program to control drug use in mass transit operations. This rule will cover FTA recipients and combine education and testing in a comprehensive anti-drug program. Five types of drug tests will be administered:

- Pre-Employment
- Reasonable Suspicion
- Post-Accident
- Random
- Return to Duty/Follow-up

Transit agencies will be required to report the number of tests given, the number of failures-to-pass and other attributes of their program to the FTA and to certify compliance with this regulation annually.

Annual costs of the drug testing program range from $25 to $32 million per year. Total costs over 10 years are $296 million. Random tests are the most costly.

Annual benefits range from $11 to $103 million per year. Total benefits over 10 years are $867 million.

A major premise in calculating both costs and benefits is the assumption that all transit systems will start from scratch or “ground zero” when implementing drug testing programs as a result of this regulation. Estimates in this analysis are based on (1) the 1989 and 1991 National Urban Mass Transportation Statistics Section 15 Annual Reports, (2) the 1991 report, Substance Abuse in the Transit Industry, prepared for the FTA by Booz Allen & Hamilton, Inc., (3) data provided by the Substance Abuse and Mental Health Service Administration, and (4) information from other agencies, individuals, and organizations knowledgeable about drug abuse and chemical testing in the United States.

VI. Regulatory Process Matters

A. Executive Order 12688

The FTA has evaluated the industry costs and benefits of the drug testing rule, and has determined that this rulemaking is a significant rule under Executive Order 12688 because the required anti-drug program raises novel policy issues and will materially affect public safety as well as State and local governments. This rule will not, however, have an annual impact on the economy of $100 million or more.

B. Departmental Significance

This rule is a “significant regulation” as defined by the Department’s Regulatory Policies and Procedures, because it involves an important departmental policy and will probably generate a great deal of public interest.

The purpose of this rule is to make mass transit systems safer by ensuring that safety-sensitive employees do not use prohibited substances.

C. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the FTA has evaluated the effects of this rule on small entities. Based on the evaluation, the FTA hereby certifies that this action will have a significant economic impact on a substantial number of small entities. This rule has some provisions designed to mitigate burdens on small entities which are discussed in the regulatory evaluation.

This rule applies to public recipients of Federal Transit funds, 274 of which are large and 1314 of which are small. It is estimated that it will cost the small transit systems $56 million to implement this drug rule, with total benefits to them of $287 million over the 10 year analysis.

D. Paperwork Reduction Act

This rule includes information collection requirements subject to the Paperwork Reduction Act. A request for Paperwork Reduction Act approval has been submitted to the Office of Management and Budget in conjunction with this rule. Information collection requirements are not effective until Paperwork Reduction Act clearance has been received.

E. Executive Order 12612

We have reviewed this rule under the requirements of Executive Order 12612 on Federalism. Although the Federal Transit Administration has determined that this rule has significant Federalism implications to warrant a Federalism assessment, this rulemaking is mandated by the Omnibus Transportation Employee Testing Act of 1991 (the Act). In considering the Federalism implications of the rule, FTA has focused on several key provisions of Executive order 12612.

Necessity for action. This rule is necessary for action. This rule is mandated by law, which requires comprehensive drug and alcohol testing programs of recipients of Federal transit funding. Congress responded to specific accidents in mass transportation by mandating these rules to ensure the safety of the transit-riding public.

Consultation with State and local governments. FTA provides financial assistance to mass transportation systems throughout the country by means of grants to States and public bodies. Because this rule will affect those States and local entities, we published a Notice of Proposed Rulemaking (NPRM) in the Federal Register to solicit the views of the affected entities, including States and local governments, and held three public hearings in conjunction with the NPRM. In short, we actively sought the views and comments of the affected States and localities.

Need for Federal action. This rule responds to a Congressional mandate that the safety of the transit riding public requires comprehensive anti-drug and alcohol testing programs. Authority. The statutory authority for this final rule is the Act, mentioned...
above and discussed elsewhere in the preamble.

Preemption. This rule preempts any State or local law, order, or regulation to the contrary, as discussed elsewhere in the preamble. Because compliance with the rule is a condition of Federal financial assistance, State and local governments have the option of not receiving the Federal funds if they do not choose to comply with this rule. We have not preempted Indian tribal law.

F. National Environmental Policy Act.

The agency has determined that this regulation has no environmental implications. Its purpose is to regulate the behavior of those safety-sensitive employees who work in the transit industry and will have no appreciable effect on the quality of the environment.

G. Energy Impact Implications.

This regulation does not affect the use of energy because it regulates the behavior of those safety-sensitive employees who work in the transit industry.

List of Subjects in 49 CFR Part 653

Drug testing, Grant programs—transportation, Mass transportation, Reporting and recordkeeping requirements, Safety, Transportation. Accordingly, for the reasons cited above, the agency amends title 49 by revising part 653, as set forth below:

Part 653—Prevention of Prohibited Drug Use in Transit Operations

Subpart A—General

§ 653.1 Overview.

(b) The part includes six subparts. Subpart A covers the general requirements of the FTA anti-drug program. Subpart B specifies the basic requirements of each employer's anti-drug program, including the types of tests to be conducted, and the elements required to be in each employer's drug testing program. Subpart C describes the different types of drug tests to be conducted. Subpart D describes a new drug testing procedural requirement mandated by the Act. Subpart E contains administrative matters such as reports and recordkeeping requirements. Subpart F specifies how a recipient certifies compliance with the rule.

§ 653.3 Purpose.

The purpose of this part is to require a recipient to implement an anti-drug program to deter and detect the use of prohibited drugs by covered employees.

§ 653.5 Applicability.

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

(1) Section 3, 9, or 18 of the Federal Transit Act, as amended (PT Act); or

(2) Section 103(e)(4) of title 23 of the United States Code.

(b) A recipient operating a railroad regulated by the Federal Railroad Administration (FRA) shall follow 49 CFR part 219 and § 653.83 of this part for its railroad operations, and this part for its non-railroad operations, if any.

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

(3) With respect to an occurrence in which the mass transit vehicle involved is a bus, electric bus, van, or automobile, one or more vehicles incurs disabling damage as the result of the occurrence and is transported away from the scene by a tow truck or other vehicle. For purposes of this definition, disabling damage means damage which precludes departure of any vehicle from the scene of the occurrence in its usual manner in daylight after simple repairs. Disabling damage includes damage to vehicles that could have been operated but would have been further damaged if so operated, but does not include damage which can be remedied temporarily at the scene of the occurrence without special tools or parts, tire disassembly without other damage even if no spare tire is available, or damage to headlights, taillights, turn signals, horn, or windshield wipers that makes them inoperative.

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

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

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

Canceled test means a test that has been declared invalid by a Medical Review Officer. It is neither a verified positive nor a verified negative test, and includes a specimen rejected for testing by a laboratory.

Certification means a recipient's written statement, authorized by the organization's governing board or other authorizing official, that the recipient has complied with the provisions of this part. (See § 653.77 for certification requirements.)

Chain-of-custody means the procedures in part 40 of this title.
concerning the handling of a urine specimen.

**Consortium** means an entity, including a group or association of employers, operators, recipients, subrecipients, or contractors, which provides drug testing as required by this part, or other DOT drug testing rule, and which acts on behalf of the employer.

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

**Covered employee** means a person, including a volunteer, applicant, or transferee, who performs a safety-sensitive function for an entity subject to this part.

**DQT agency** means the United States Department of Transportation.

**DOT** means the United States Department of Transportation.

**Medical Review Officer (MRO)** means a licensed physician (Medical Doctor or Doctor of Osteopathy) responsible for reviewing laboratory results generated by an employer’s drug testing program. An anti-drug program shall include a medical review officer and determined to have evidence of prohibited drug use.

§ 653.9 Preemption of State and local laws.

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

1. Compliance with both the State or local requirement and any requirement in this part is not possible; or

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

(b) This part shall not be construed to preempt provisions of State criminal 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.

§ 653.11 Other requirements imposed by an employer.

An employer may not impose requirements that are inconsistent with, contrary to, or frustrate the provisions of this part.

§ 653.13 Starting date for drug testing programs.

(a) **Large employers.** Each recipient operating in an area of 200,000 or more in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1995.

(b) **Small employers.** Each recipient operating in an area of 200,000 or less in population on March 17, 1994 shall implement the requirements of this part beginning on January 1, 1996.

(c) An employer shall have an anti-drug program that conforms to this part by January 1, 1996, or by the date the employer begins operations, whichever is later.

Subpart B—Program Requirements

§ 653.21 Requirement to establish an anti-drug program.

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

§ 653.23 Required elements of an anti-drug testing program.

An anti-drug program shall include the following:

1. A statement describing the employer’s policy on prohibited drug use in the workplace, including the consequences associated with prohibited drug use. This policy statement shall include all of the elements specified in § 653.25. Each employer shall disseminate the policy consistent with the provisions of § 653.27.
(b) An education and training program which meets the requirements of §653.29.
(c) A testing program, as described in §653.31 that meets the requirements of this part and part 40 of this title.
(d) Procedures for assessing the covered employee who has a verified positive drug test result as described in §653.37.

§ 653.25 Policy statement contents.
The policy statement shall be adopted by the local governing board of the employer or operator, be made available to each covered employee, and shall include, at a minimum, detailed discussion of:
(a) The identity of the person designated by the employer to answer employee questions about the anti-drug program.
(b) The categories of employees who are subject to the provisions of this part.
(c) Specific information concerning the behavior that is prohibited by this part.
(d) The specific circumstances under which a covered employee will be tested for prohibited drugs under the provisions of this part.
(e) The procedures that will be used to test for the presence of drugs, protect the employee and the integrity of the drug testing process, safeguard the validity of the test results, and ensure the test results are attributed to the correct covered employee.
(f) The requirement that a covered employee submit to drug testing administered in accordance with this part.
(g) A description of the kind of behavior that constitutes a refusal to take a drug test and a statement that such a refusal constitutes a verified positive drug test result.
(h) The consequences for a covered employee who has a verified positive drug test result or refuses to submit to a drug test under this part, including the mandatory requirements that the covered employee be removed immediately from his or her safety-sensitive function and be evaluated by a substance abuse professional.
(i) If the employer implements elements of an anti-drug program that are in addition to this part (See §653.31), the employer shall give each covered employee specific information concerning which provisions are mandated by this part and which are not.

§ 653.27 Requirement to disseminate policy.
Each employer shall provide written notice to every covered employee and to representatives of employee organizations of the employer's anti-drug policies and procedures.

§ 653.29 Education and training programs.
Each employer shall establish an employee education and training program for all covered employees, including:
(a) Education. The education component shall include display and distribution to every covered employee of informational material and a community service hot-line telephone number for employee assistance, if available.
(b) Training.—(1) Covered employees. Covered employees must receive at least 60 minutes of training on the effects and consequences of prohibited drug use on personal health, safety, and the work environment, and on the signs and symptoms which may indicate prohibited drug use.
(2) Supervisors. Supervisors who may make reasonable suspicion determinations shall receive at least 60 minutes of training on the physical, behavioral, and performance indicators of probable drug use.

§ 653.31 Drug testing.
(a) An employer shall establish a program which provides for testing for prohibited drugs and drug metabolites in the following circumstances: pre-employment, post-accident, reasonable suspicion, random, and return to duty/follow-up, as described in detail in each case in subpart C of this part.
(b) When administering a drug test, an employer shall ensure that the following drugs are tested for:
(1) Marijuana;
(2) Cocaine;
(3) Opiates;
(4) Amphetamines; and
(5) Phencyclidine.

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

§ 653.35 Action when employee has a verified positive drug test result.
(a) As soon as practicable after receiving notice from the medical review officer (MRO) that an employee has a verified positive drug test result, or if an employee refuses to submit to a drug test, the employer shall require that a covered employee cease performing a safety-sensitive function.
(b) Before allowing the covered employee to resume performing a safety-sensitive function, the employer shall ensure that the covered employee meets the requirements of this part for returning to duty, including taking a return to duty drug test with a verified negative result, as required by §653.49.

§ 653.37 Referral, evaluation, and treatment.
(a) A covered employee who has a verified positive drug test result refuses to submit to a drug test under this part shall be advised by the employer of the resources available to the covered employee in evaluating and resolving problems associated with prohibited drug use, including the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.
(b)(1) The employer shall ensure that each covered employee who has a verified positive drug test result or refuses to take a drug test shall be evaluated by a substance abuse professional who shall determine whether the covered employee is in need of assistance in resolving problems associated with prohibited drug use.
(2) 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.
(3) The employer shall ensure that a substance abuse professional who determines that a covered employee requires assistance in resolving problems with prohibited drug use does not refer the employee to the substance abuse professional's private practice from which the substance abuse professional receives remuneration or to a person or organization from which the substance abuse professional has a financial interest. This paragraph does not prohibit a substance abuse professional from referring an employee for assistance provided through—
(f) A public agency, such as a State, county, or municipality;
(ii) The employer or a person under contract to provide treatment for prohibited drug use problems on behalf of the employer;
(iii) The sole source of therapeutically appropriate treatment under the employee's health insurance program;
(iv) The sole source of therapeutically appropriate treatment reasonably accessible to the employee.
(c) An employer shall ensure that, before returning to duty to perform a safety-sensitive function, a covered
employee has complied with the referral and evaluation provisions of this part and takes a return to duty drug test with a verified negative result under §653.49.

(d) The requirements of this section do not apply to applicants.

Subpart C—Types of Drug Testing

§ 653.41 Pre-employment testing.

(a) An employer may not hire an applicant to perform a safety-sensitive function unless the applicant takes a drug test with a verified negative result administered under this part.

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

(c) If an applicant or employee drug test is canceled, the employer shall require the employee or applicant to take another pre-employment drug test.

§ 653.43 Reasonable suspicion testing.

(a) An employer shall conduct a drug test when the employer has reasonable suspicion to believe that the covered employee has used a prohibited drug.

(b) An employer’s determination that reasonable suspicion exists shall be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the covered employee. The required observations must be made by a supervisor who is trained in detecting the signs and symptoms of drug use.

(c) An employer shall not permit a direct supervisor of an employee to serve as the collection site person for a drug test of the employee.

§ 653.45 Post-accident testing.

(a)(1) Fatal accidents. As soon as practicable following an accident involving the loss of human life, an employer shall test each surviving covered employee on duty in the mass transit vehicle at the time of the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(ii) As soon as practicable following an accident not involving the loss of human life, in which the mass transit vehicle involved is a rail car, trolley car, trolley bus, or vessel, the employer shall test each covered employee on duty in the mass transit vehicle at the time of the accident unless the employer determines, using the best information available at the time of the decision, that the covered employee’s performance can be completely discounted as a contributing factor to the accident. The employer shall also test any other covered employee whose performance could have contributed to the accident, as determined by the employer using the best information available at the time of the decision.

(b) An employer shall ensure that a covered employee required to be tested under this section is tested as soon as practicable and within 32 hours of the accident. A covered employee who is subject to post-accident testing who fails to remain readily available for such testing, including notifying the employer or the employer representative of his or her location if he or she leaves the scene of the accident prior to submission to such test, may be deemed by the employer to have refused to submit to testing.

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

§ 653.47 Random testing.

(a) Each employer shall, at various times, randomly select covered employees for unannounced drug testing. The selection of covered employees shall be made by a scientifically valid method, such as a random-number table or a computer-based random number generator that is matched with covered employees’ Social Security numbers, payroll identification numbers, or other comparable identifying numbers.

(b) During each calendar year following the start of the anti-drug program required by this part, the employer shall meet the following conditions:

(1) The dates for administering unannounced testing of randomly-selected covered employees shall be spread reasonably throughout the calendar year; and

(2) The number of covered employees randomly selected for testing during the calendar year shall be equal to a minimum annual percentage rate of 50 percent of the total number of covered employees subject to drug testing under this part.

(c) Each covered employee shall be in a pool from which random selection is made. Each covered employee in the pool shall have an equal chance of selection and shall remain in the pool, whether or not the covered employee is ever tested.

(d) If an employer conducts random testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

§ 653.49 Return to duty testing.

(a) Return to duty. An employer shall ensure that, before returning to duty to perform a safety-sensitive function, each covered employee who has refused to submit to a drug test or has a verified positive drug test result—

(1) Has been evaluated by a substance abuse professional to determine whether the covered employee has properly followed the recommendations for action by the substance abuse professional, including participation in any rehabilitation program;

(2) Has taken a return to duty drug test with a verified negative result. If a test is canceled, the employer shall require the employee to take another return to duty drug test.

(3) A substance abuse professional may recommend that the employee be subject to a return to duty alcohol test with a result indicating an alcohol concentration of less than 0.02, to be conducted in accordance with 49 CFR part 40.

(b) Marine employers. Marine employers subject to U.S. Coast Guard chemical testing regulations shall ensure that each covered employee who has a verified positive drug test result administered under this part is evaluated by a Medical Review Officer.
§ 653.51 Follow-up testing.
Each employer shall ensure that each covered employee who returns to duty after a required evaluation made under § 653.37 is subject to unannounced follow-up drug testing as provided for in § 653.65(d). The employer may require the employee to take one or more follow-up alcohol tests, with a result indicating an alcohol concentration of less than 0.04, as directed by the SAP, to be performed in accordance with 49 CFR part 40.

Subpart D—Drug Testing Procedures

§ 653.61 Compliance with testing procedures requirements.
The drug testing procedures of part 40 of this title apply to employers covered by this part, unless expressly provided otherwise in this part.

§ 653.63 Substance abuse professional.
(a) An employer's anti-drug program shall have available the services of a designated substance abuse professional.
(b) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result is in need of assistance in resolving problems associated with prohibited drug use. The substance abuse professional then recommends a course of action to the employee.
(c) The substance abuse professional shall determine whether a covered employee who has refused to submit to a drug test or has a verified positive drug test result has properly followed the SAP's recommendations.
(d) The substance abuse professional shall determine the frequency and duration of follow-up testing for a covered employee. Such employee shall be required to take a minimum of six follow-up drug tests with verified negative results during the first 12 months after returning to duty. After that period of time, the substance abuse professional may recommend to the employer the frequency and duration of follow-up drug testing, provided that the follow-up testing period ends 60 months after the employee returns to duty. In addition, follow-up testing may include testing for alcohol, as directed by the substance abuse professional, to be performed in accordance with 49 CFR part 40.

Subpart E—Administrative Requirements

§ 653.71 Retention of records.
(a) General requirement. An employer shall maintain records of its anti-drug program as provided in this section. The records shall be maintained in a secure location with controlled access.
(b) Period of retention. In determining compliance with the retention period requirement, each record shall be maintained for the specified period of time, measured from the date of the document's or data's creation. Each employer shall maintain the records in accordance with the following schedule:
(1) Five years: Records of covered employee verified positive drug test results, documentation of refusals to take required drug tests, and covered employee referrals to the SAP, and copies of annual MIS reports submitted to FTA.
(2) Two years: Records related to the collection process and employee training.
(3) One year: Records of negative drug test results.
(c) Types of records. The following specific records must be maintained.
(1) Records related to the collection process:
(i) Collection logbooks, if used.
(ii) Documents relating to the random selection process.
(iii) Documents generated in connection with decisions to administer reasonable suspicion drug tests.
(iv) Documents generated in connection with decisions on post-accident drug testing.
(v) MRO documents verifying existence of a medical explanation of the inability of a covered employee to provide an adequate urine sample.
(2) Records related to test results:
(i) The employer's copy of the custody and control form.
(ii) Documents related to the refusal of any covered employee to submit to a drug test required by this part.
(iii) Documents presented by a covered employee to dispute the result of a drug test administered under this part.
(3) Records related to referral and return to duty and follow-up testing:
(i) Records pertaining to a determination by a substance abuse professional concerning a covered employee's need for referral for assistance in resolving problems associated with drug use.
(ii) Records concerning a covered employee's entry into and completion of the program of treatment recommended by the substance abuse professional.
(4) Records related to employee training:
(i) Training materials on drug use awareness, including a copy of the employer's policy on prohibited drug use.
(ii) Names of covered employees attending training on prohibited drug use and the dates and times of such training.
(iii) Documentation of training provided to supervisors for the purpose of qualifying the supervisors to make a determination concerning the need for drug testing based on reasonable suspicion.
(iv) Certification that any training conducted under this part complies with the requirements for such training.
(5) Copies of annual MIS reports submitted to FTA.

§ 653.73 Reporting of results in a management information system.
(a) Each recipient shall submit to FTA's Office of Safety and Security by March 15 of each year a report covering the previous calendar year (January 1 through December 31), which summarizes the results of its anti-drug program.
(b) Each recipient shall be responsible for ensuring the accuracy and timeliness of each report submitted by an employer, consortium or joint enterprise or by a third party service provider acting on the employer's behalf.
(c) Each report that contains information on verified positive drug test results shall be submitted on the FTA Drug Testing Management Information System (MIS) Data Collection Form and shall include the following informational elements:
(1) Number of FTA covered employees by employee category.
(2) Number of covered employees subject to testing under the anti-drug regulations of the United States Coast Guard.
(3) Number of specimens collected by type of test (i.e., pre-employment, periodic, random, etc.) and employee category.
(4) Number of positives verified by a Medical Review Officer (MRO) by type of test, type of drug, and employee category.
(5) Number of negatives verified by a MRO by type of test and employee category.
(6) Number of persons denied a position as a covered employee following a verified positive drug test.
(7) Number of covered employees verified positive by an MRO or who refused to submit to a drug test, who were returned to duty in covered positions during the reporting period having complied with the recommendations of a substance abuse professional as described in § 653.37.
(8) Number of employees with tests verified positive by a MRO for multiple drugs.
(9) Number of covered employees who were administered alcohol and...
drug tests at the same time, with both a verified positive drug test result and an alcohol test result indicating an alcohol concentration of 0.04 or greater.

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

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

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

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

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

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

(b) A covered employee is entitled, with specific, written consent of the employee, to obtain copies of all records, including copies of the records pertaining to the employee’s use of prohibited drugs, that the employer is permitted only as expressly authorized or required in this part.

§ 653.75 Access to facilities and records.

(a) Except as required by law, or expressly authorized or required in this section, no employer may release information pertaining to a covered employee who is contained in records required to be maintained by §653.37.

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

(c) An employer shall disclose data for its drug testing program and any other information pertaining to the employer’s anti-drug program required to be maintained by this part, when requested by the Secretary of Transportation or any DOT agency with regulatory authority over the employer or covered employee or to a State oversight agency authorized to oversee fixed guideway systems.

(d) When requested by the National Transportation Safety Board as part of an accident investigation, employers shall disclose information related to the employer’s administration of a drug test following the accident under investigation.

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

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

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

Subpart F—Certifying Compliance

§ 653.81 Compliance a condition of FTA financial assistance.

(a) General. A recipient may not be eligible for Federal financial assistance under section 3, 9, or 18 of the Federal Transit Act, as amended, or under section 103(e)(4) of title 23 of the United States Code if a recipient fails to establish and implement an anti-drug program as required by this part. Failure to certify compliance with these requirements, as specified in §653.83, will result in the suspension of a grantee’s eligibility for Federal funding.

(b) Criminal violation. A recipient is subject to criminal sanctions and fines for false statements or misrepresentations under section 1001 of title 18 of the United States Code.

§ 653.83 Requirement to certify compliance.

(a) A recipient of FTA financial assistance shall certify annually to the applicable FTA Regional Office that the recipient is in compliance with the requirements of this part, including the training requirements. Large operators shall certify compliance initially by January 1, 1985. Small operators and States shall certify compliance initially by January 1, 1986.

(b) A certification must be authorized by the organization’s governing board or other authorizing official, and must be signed by a party specifically authorized to do so. A certification must comply with the applicable sample certification provided in Appendix A to this part.

Appendix A to Part 653—Certification of Compliance

This appendix contains two separate examples of certification language. The first example consists of the generally applicable certification language. Example II should be used by employers who are covered by the Federal Railroad Administration’s anti-drug regulation.

I

(a) For recipients who are large or small operators

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653. I further certify that the employee training conducted under this part meets the requirements of 49 CFR part 653.

(b) For States certifying on behalf of its subrecipients and their contractors

I, (name, title) on behalf of (STATE) certify that the entities on the attached list of FT Act subrecipients operating in this State, have established and implemented anti-drug programs in accordance with the terms of 49 CFR part 653.
II

The text of the certification of an employer that provides commuter rail transportation service regulated by the Federal Railroad Administration shall be as follows:

I, (name), (title), certify that (name of recipient) and its contractors, as required, for (name of recipient), has an anti-drug program that meets the requirements of the Federal Railroad Administration's regulations for employees regulated by the Federal Railroad Administration, and has established and implemented an anti-drug program in accordance with the terms of 49 CFR part 653 for all other covered employees who perform safety-sensitive functions.

BILLING CODE 4910-07-P
INSTRUCTIONS

The following instructions are to be used as a guide for completing the drug testing information in the Federal Transit Administration (FTA) Drug Testing MIS Data Collection Form. These instructions outline and explain the information requested and indicate the probable sources for this information. A sample testing results table with a narrative explanation is provided on pages iii-v as an example to facilitate the process of completing the form correctly.

This reporting form includes six sections. Collectively, these sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations. The six sections, the page number for the instructions, and the page location on the reporting form are:

<table>
<thead>
<tr>
<th>Section</th>
<th>Instructions Page</th>
<th>Reporting Form Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. EMPLOYER INFORMATION</td>
<td>i</td>
<td>1</td>
</tr>
<tr>
<td>B. COVERED EMPLOYEES</td>
<td>i</td>
<td>2</td>
</tr>
<tr>
<td>C. DRUG TESTING INFORMATION</td>
<td>ii-v</td>
<td>3-4</td>
</tr>
<tr>
<td>D. OTHER DRUG TESTING/PROGRAM INFORMATION</td>
<td>v</td>
<td>5</td>
</tr>
<tr>
<td>E. DRUG TRAINING/EDUCATION</td>
<td>vi</td>
<td>5</td>
</tr>
<tr>
<td>F. FTA FUNDING SOURCES</td>
<td>vi</td>
<td>5</td>
</tr>
</tbody>
</table>

Page 1 EMPLOYER INFORMATION (Section A) requires the name of the employer for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title and date are required certifying the correctness and completeness of the form. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

Page 2 COVERED EMPLOYEES (Section B) requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the
recipient’s or contractor’s 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 the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). NUMBER OF EMPLOYEES COVERED BY THE USCG, requires that you identify the number of employees in each employee category.

Section C is used to summarize the drug testing results for applicants and covered employees. There are six categories of testing to be completed. The first part of the table is where you enter the data on pre-employment testing. The following five parts are for entering drug testing data on random, post-accident, reasonable suspicion, return to duty and follow-up 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 the first part, PRE-EMPLOYMENT testing information. The format and explanations used for the sample apply to all six parts of the table in Section C.

Information on actions taken with those persons testing positive is required at the end of both pages. Specific instructions for providing this latter information are given after the instructions for completing the table in Section C.

DRUG TESTING INFORMATION (Section C) requires information for drug testing by category of testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. These numbers do not include refusals for testing. A sample section of the table with example numbers is presented on page iv.

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. 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 applicants or employees 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 or employee 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 iv with example numbers.

Below the part of the table containing 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 C, DRUG TESTING INFORMATION, which summarizes pre-employment testing results. The procedures detailed here also apply to the other categories of testing in Section C which require you to summarize testing results for employees. This example uses the categories "Revenue Vehicle Operation" and "Armed Security Personnel" to illustrate the procedures for completing the form.

**A**

Urine specimens were collected for 157 applicants for revenue service vehicle operation positions during the reporting year. This information is entered in the first blank column of the table in the row marked "Revenue Vehicle Operation".

**B**

The Medical Review Officer (MRO) for the employer reported that 153 of those 157 specimens from applicants for revenue service vehicle operation positions were negative (i.e., no drugs were detected). Enter this information in the second blank column of the table in the row marked "Revenue Vehicle Operation".

**C**

The MRO for the employer reported that 4 of those 157 specimens from applicants for revenue service vehicle operation 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 "Revenue Vehicle Operation".

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

<table>
<thead>
<tr>
<th>Specimen</th>
<th>Drugs</th>
</tr>
</thead>
<tbody>
<tr>
<td>#1</td>
<td>Marijuana</td>
</tr>
<tr>
<td>#2</td>
<td>Amphetamines</td>
</tr>
<tr>
<td>#3</td>
<td>Marijuana and Cocaine (Multi-drug specimen)</td>
</tr>
<tr>
<td>#4</td>
<td>Marijuana</td>
</tr>
</tbody>
</table>

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. Two different drugs were detected in specimen #3 (multi-drug) so an entry is made in both the marijuana and the cocaine column for this specimen. Information on multi-drug specimens must also be entered in Section D, OTHER DRUG TESTING/PROGRAM INFORMATION, on page 5 of the reporting form.

Please note that the sample data collection form also has information for armed security personnel on line two. The same procedures outlined for revenue service vehicle operation should be followed for entering the data on armed security personnel. With applicants for armed security personnel 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 "Armed Security Personnel".

The last row, marked "TOTAL", requires you to add the numbers in each of the columns. With this example, 157 specimens from applicants for revenue service vehicle operation positions were collected and 107 for applicants for armed security personnel 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.
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 categories for testing in Section C.

Page 4 Following the table that summarizes DRUG TESTING INFORMATION, you must provide counts of fatal and non-fatal accidents and fatalities which resulted in positive post-accident drug tests for any employee involved in the accident. This information should be available from the safety program manager or the drug program manager.

Page 4 Also following the table that summarizes DRUG TESTING INFORMATION, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.

Page 5 OTHER DRUG TESTING/PROGRAM INFORMATION (Section D) requires that you complete a table dealing with specimens positive for more than one drug, employees testing positive for both drugs and alcohol, and a table dealing with employees who refused to submit to a drug test.

Page 5 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 specify the combination of drugs reported as positive by placing the number in the appropriate columns. For example, if marijuana and cocaine were detected in 3 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" 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 revenue vehicle operator specimens, then you would write "Revenue Vehicle Operation" as the employee category, "2" as the number of verified positives, and "2" in the columns for "Marijuana" and "Opiates".

Page 5 Next you must provide a count 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.

Page 5 EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires information on the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.
DRUG TRAINING/EDUCATION (Section E) requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

FTA FUNDING SOURCES (Section F) asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).
FTA DRUG TESTING MIS DATA COLLECTION FORM

YEAR COVERED BY THIS REPORT: 19__

A. EMPLOYER INFORMATION

Name
Address
Contact
Phone
Consortium Used (if applicable)
Name
Address
Contact
Phone

I, the undersigned, certify that the information provided on this Federal Transit Administration Drug Testing Management Information System Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature
Date of Signature
Title

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.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; or Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.
### B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FTA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY THE USCG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
<td></td>
<td></td>
</tr>
<tr>
<td>CDL/Non-Revenue Vehicle</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**READ BEFORE COMPLETING THE REMAINDER OF THIS FORM:**

1. All items refer to the current reporting period only (for example, January 1, 1994 - December 31, 1994).

2. This report is only for testing REQUIRED BY THE FEDERAL TRANSIT ADMINISTRATION (FTA) AND THE U.S. DEPARTMENT OF TRANSPORTATION (DOT):
   - Results should be reported only for employees in COVERED POSITIONS as defined by the FTA drug testing regulation.
   - 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 D ["OTHER DRUG TESTING 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).

### C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>Employee Category</th>
<th>Number of Specimens Collected</th>
<th>Number of Specimens Verified Negative</th>
<th>Number of Specimens Verified Positive for One or More of the Five Drugs</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Marijuana (THC)</td>
</tr>
<tr>
<td>PRE-EMPLOYMENT</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Operation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Revenue Vehicle Control/Dispatch</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>CDL/Non-Revenue Vehicle</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Armed Security Personnel</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
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<tr>
<td>RANDON</td>
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<td>Revenue Vehicle Operation</td>
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<td>Revenue Vehicle and Equipment Maintenance</td>
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<td>Revenue Vehicle Control/Dispatch</td>
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<td>Armed Security Personnel</td>
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<td>Total</td>
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<tr>
<td>POST-ACCIDENT</td>
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<tr>
<td>Revenue Vehicle Operation</td>
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<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<tr>
<td>Armed Security Personnel</td>
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<tr>
<td>Total</td>
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</tbody>
</table>

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

3
### C. DRUG TESTING INFORMATION (cont.)

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF SPECIMENS COLLECTED</th>
<th>NUMBER OF SPECIMENS VERIFIED NEGATIVE</th>
<th>NUMBER OF SPECIMENS VERIFIED POSITIVE FOR ONE OR MORE OF THE FIVE DRUGS</th>
<th>NUMBER OF SPECIMENS VERIFIED POSITIVE FOR EACH TYPE OF DRUG</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Marijuana (THC)</td>
<td>Cocaine</td>
</tr>
<tr>
<td>Revenue Vehicle Operation</td>
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<td></td>
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<tr>
<td>Revenue Vehicle and Equipment</td>
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<tr>
<td>Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<tr>
<td>Armed Security Personnel</td>
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</tr>
<tr>
<td>Total</td>
<td></td>
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</tr>
</tbody>
</table>

#### REASONABLE SUSPICION

#### RETURN TO DUTY

#### FOLLOW-UP

Number of accidents, as defined by the FTA drug testing regulation, which resulted in a positive post-accident drug test:

<table>
<thead>
<tr>
<th>FATAL</th>
<th>NON-FATAL</th>
</tr>
</thead>
</table>

Number of fatalities resulting from accidents which resulted in a positive post-accident drug test:

Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:

4
### D. OTHER DRUG TESTING/PROGRAM INFORMATION

#### SPECIMENS VERIFIED POSITIVE FOR MORE THAN ONE DRUG

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF VERIFIED POSITIVES</th>
<th>Marijuana (THC)</th>
<th>Cocaine</th>
<th>Phencyclidine (PCP)</th>
<th>Opiates</th>
<th>Amphetamines</th>
</tr>
</thead>
<tbody>
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</tbody>
</table>

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:

#### EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST

<table>
<thead>
<tr>
<th>Number</th>
<th>Covered employees who refused to submit to a random drug test required under the FTA regulation:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Covered employees who refused to submit to a non-random drug test required under the FTA regulation:</td>
</tr>
</tbody>
</table>

#### E. DRUG TRAINING/EDUCATION

#### TRAINING DURING CURRENT REPORTING PERIOD

<table>
<thead>
<tr>
<th>Number</th>
<th>Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:</td>
</tr>
</tbody>
</table>

#### F. FTA FUNDING SOURCES

<table>
<thead>
<tr>
<th>FTA FUNDING SOURCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Check all sections that apply:</td>
</tr>
</tbody>
</table>
APPENDIX C TO PART 653 - DRUG TESTING MANAGEMENT INFORMATION SYSTEM (MIS)  
"EZ" DATA COLLECTION FORM

INSTRUCTIONS

The following instructions are to be used as a guide for completing the Federal Transit Administration (FTA) Drug Testing MIS "EZ" Data Collection Form. This form should only be used if there are no positive tests to be reported by your company. These instructions outline and explain the information requested and indicate the probable sources for this information. This reporting form includes four sections. These sections address the data elements required in the FTA and the U.S. Department of Transportation (DOT) drug testing regulations.

SECTION A - EMPLOYER INFORMATION requires the company name for which the report is done, a current address, contact name, and phone number. Below this, information must be entered for the consortium used (if applicable). Finally, a signature, title, and date are required certifying the correctness and completeness of the form. Also indicate the year covered by this report. Note: A separate report must be submitted by each FTA recipient for each of its contract service and contract maintenance providers covered by the FTA drug testing regulation.

SECTION B - COVERED EMPLOYEES requires a count for each employee category that must be tested under the FTA drug testing regulation. The employee categories are: Revenue Service Vehicle Operation, Revenue Service Vehicle and Equipment Maintenance, Revenue Service Vehicle Control/Dispatch, Commercial Driver License (CDL) Holders who operate Non-Revenue Service Vehicles, and Security Personnel who carry Firearms. The most likely source for this information is the employer's personnel department. These counts should be based on the recipient's or contractor's 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 the employer has personnel who perform duties also covered by the anti-drug rule of the United States Coast Guard (USCG). NUMBER OF EMPLOYEES COVERED BY THE USCG, requires that you identify the number of employees in each employee category.

SECTION C - DRUG TESTING INFORMATION requires information for drug testing, refusal for testing, and training. The first table requests information on the NUMBER OF SPECIMENS COLLECTED AND VERIFIED NEGATIVE in each category for testing. All numbers entered into the pre-employment category section of the table should be separated into the category of employment for which the person was applying or transferring. The other categories are for employee testing and require information for employees in covered positions only. Each part of this table must be completed for each category of testing. These categories include: (1) random, (2) post-accident, (3) reasonable suspicion, (4) return to duty, and (5) follow-up testing. "COLL" requires the number of specimens collected in each employee category for each category of testing. "NEG" requires a count for all completed tests by employee category that were verified negative by your Medical Review Officer (MRO). Do not include results of quality control (QC) samples submitted to the testing laboratory in any of the categories. Each column in the table should be added and the answer entered in the row marked "TOTAL".
Following the table that summarizes DRUG TESTING INFORMATION, you must provide a count of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule. This information should be available from the personnel office and/or drug program manager.

EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST requires a count of the NUMBER OF COVERED EMPLOYEES who refused to submit to a random or non-random (pre-employment, post-accident, reasonable suspicion, return to duty, or follow-up) drug test required under the FTA regulation.

DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD requires information on the number of covered employees and supervisory personnel who have received drug training during the current reporting period.

SECTION D - FTA FUNDING SOURCES asks for the sources of FTA funds for your organization. Simply place a check mark by each applicable funding section(s).
<table>
<thead>
<tr>
<th>Company Name</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Address</td>
<td></td>
</tr>
<tr>
<td>Contact</td>
<td></td>
</tr>
<tr>
<td>Phone</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Consortium Used (if applicable)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name</td>
</tr>
<tr>
<td>Address</td>
</tr>
<tr>
<td>Contact</td>
</tr>
<tr>
<td>Phone</td>
</tr>
</tbody>
</table>

I, the undersigned, certify that the information provided on the attached Federal Transit Administration Drug Testing Management Information System "EZ" Data Collection Form is, to the best of my knowledge and belief, true, correct, and complete for the period stated.

Signature  
Date of Signature  
Title

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.

The Federal Transit Administration estimates that the average burden for this report form is 8 hours. You may submit any comments concerning the accuracy of this burden estimate or any suggestions for reducing the burden to: Office of Safety and Security (TTS-3); Federal Transit Administration; 400 7th St., S.W.; Washington, D.C. 20590; OR Office of Management and Budget, Paperwork Reduction Project (2132-0556); Washington, D.C. 20503.
### B. COVERED EMPLOYEES

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>NUMBER OF FTA COVERED EMPLOYEES</th>
<th>NUMBER OF EMPLOYEES COVERED BY THE USCG</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revenue Vehicle Operation</td>
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<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<tr>
<td>Revenue Vehicle Control/Dispatch</td>
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<tr>
<td>CDL/Non-Revenue Vehicle</td>
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<tr>
<td>Armed Security Personnel</td>
<td></td>
<td></td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### C. DRUG TESTING INFORMATION

<table>
<thead>
<tr>
<th>EMPLOYEE CATEGORY</th>
<th>PRE-EMPLOYMENT</th>
<th>RANDOM</th>
<th>POST-ACCIDENT</th>
<th>REASONABLE SUSPICION</th>
<th>RETURN TO DUTY</th>
<th>FOLLOW-UP</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>COLL</td>
<td>NEG</td>
<td>COLL</td>
<td>NEG</td>
<td>COLL</td>
<td>NEG</td>
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<tr>
<td>Revenue Vehicle Operation</td>
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<tr>
<td>Revenue Vehicle and Equipment Maintenance</td>
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<td>Armed Security Personnel</td>
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<td><strong>TOTAL</strong></td>
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</tbody>
</table>

Number of employees returned to duty during this reporting period who had a verified positive drug test or refused a drug test required under the FTA rule:

#### EMPLOYEES WHO REFUSED TO SUBMIT TO A DRUG TEST

Number

Covered employees who refused to submit to a random drug test required under the FTA regulation:

Covered employees who refused to submit to a non-random drug test required under the FTA regulation:

#### DRUG TRAINING/EDUCATION DURING CURRENT REPORTING PERIOD

Number

Covered employees who have received at least 60 minutes of initial training on the consequences, manifestations, and behavioral cues of drug use as required by the FTA drug testing regulation:

Supervisory personnel who have received 60 minutes of initial training on the specific contemporaneous physical, behavioral, and performance indicators of probable drug use as required by the FTA drug testing regulation:

### D. FTA FUNDING SOURCES

| FTA FUNDING SOURCES | 3 | 9 | 16(b)(2) | 18 |
Federico Pena,
Secretary of Transportation.
Gordon J. Linton,
Administrator.

[FR Doc. 94-2041 Filed 2-3-94; 1:00 pm]
BILLING CODE 4910-57-P
Part IX

Department of Transportation

Federal Aviation Administration
14 CFR Part 121
Coast Guard
46 CFR Part 16
Research and Special Programs Administration
49 CFR Part 199
Federal Railroad Administration
49 CFR Part 219
Federal Highway Administration
49 CFR Part 382
Federal Transit Administration
49 CFR Part 653
Random Drug Testing Program; Proposed Rule
DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration
14 CFR Part 121
Coast Guard
46 CFR Part 16
Research and Special Programs Administration
49 CFR Part 199
Federal Railroad Administration
49 CFR Part 219
Federal Highway Administration
49 CFR Part 382
Federal Transit Administration
49 CFR Part 653
[OST Docket No. 48498, Notice 94-2]
RIN 2105-AB94
Random Drug Testing Program

AGENCIES: 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: Notice of proposed rulemaking (NPRM).

SUMMARY: Five operating administrations—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)—currently require random drug testing of safety-sensitive employees. In a final rule published elsewhere in today's Federal Register, the Federal Transit Administration (FTA), also a part of DOT, is adopting a parallel rule for covered transit employees.

In response to public comments, petitions submitted by industry, and on its own initiative, the FAA, FRA, FHWA, RSPA, USCG and FTA (the operating administrations or "OAs") are proposing to lower the minimum random drug testing rate to 25 percent where the industry-wide random positive rate is less than 1.0 percent for 2 calendar years while testing at 50 percent. The rate would return to 50 percent if the industry random positive rate were 1.0 percent or higher in any subsequent calendar year. The industry-wide random positive rate for each transportation industry would be calculated from data submitted to the Department and announced yearly by the respective Administrator or the Commandant of the Coast Guard.

DATES: Comments are due April 18, 1994.

ADDRESSES: Comments should be sent to the docket number and address of the relevant OA. General comments may 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. It is not necessary to send copies to both the OST docket and the operating administration docket.

FAA—Docket 25148 and 26604, Federal Aviation Administration, 800 Independence Ave SW., room 915-C, Washington, DC 20591.

USCG—Docket 93-089, United States Coast Guard, 2100 2nd Street SW., room 3406, Washington, DC 20593.

RSPA—Docket PS-134, Research and Special Programs Administration, 400 Seventh Street SW., room 8419, Washington, DC 20590.

FRA—Docket RSOR-6, Federal Railroad Administration, 400 Seventh Street SW., room 8209, Washington, DC 20590.

FHWA—Docket No. MC-94-5, Federal Highway Administration, 400 Seventh Street SW., room 4232, Washington, DC 20590.


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

SUPPLEMENTARY INFORMATION:

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 random drug testing of certain of its civilian employees in September 1987.

The Department's civilian employee drug testing 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 federal civilian employees (primarily air traffic controllers, safety inspectors and individuals with high security clearances) at a testing rate of at least 50 percent annually 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 six years. Over the past four years, the rate has consistently stayed well below 0.5 percent. The data 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. 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 will adjust the random testing rate, as necessary. The testing rate adjustment saved the Department approximately 40 percent in 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 and transit industries and expanded the requirements of the existing FRA rule. 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 wide scale random testing requirements because unannounced random drug testing is...
generally regarded as the best method of deterring illegal drug use, thereby enhancing the safety of the transportation industries. The OAs’ 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 random 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 testing rate after one year. After the final rules were issued, lawsuits delayed implementation of the rules for three of the six DOT agencies. Currently, 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 misuse and illegal drug use by individuals in various transportation industries who perform safety-sensitive duties. A final rule covering transit employees is published elsewhere in today’s Federal Register. The rule provides, among other things, that transit employees will be subject to a random testing rate of at least 50 percent.

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 initiated testing.

Testing of pipeline personnel began with phase-in (25 percent) testing 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 increased to 50 percent. (The current rule covers just interstate motor carriers, but a final rule in today’s Federal Register will extend coverage to all employers and persons who use individuals who are required to have commercial driver’s licenses, including employees of intrastate motor carriers and school bus drivers who drive vehicles covered by the drug rule.)

The USCG rule regarding random testing of some commercial vessel personnel 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.

The purpose of the ANPRM was 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 ANPRM asked for comment on a number of alternatives to the current 50 percent random testing rate that DOT could consider. These alternatives included:

(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;

(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;

(8) Combining some of the alternatives.

In addition, we asked for comment on a number of other issues, most notably costs and data on positive test results.
Comments

Over 115 comments were filed in response to the ANPRM. Commenters included governmental agencies, trade associations, regulated entities, unions, contractors and consultants, and individuals.

In terms of the appropriate random testing rate, the comments ranged from suggestions to abolish all random testing requirements to greatly increasing the current 50 percent testing rate. Those favoring abolition of random testing argued that the federal requirements are intrusive, punitive, costly, and unnecessary. Several commenters argued that post accident and reasonable suspicion testing were adequate. Others supported pre-employment and periodic testing, in addition to post accident and reasonable suspicion testing.

Over 20 commenters favored a rate of less than 25 percent. These commenters tended to focus on the low prevalence of drug use in the workplace, the high cost of testing and time lost from the job. Over 50 commenters favored a testing rate of 25 percent. A number argued that the drug problem is not as widespread as originally believed. In general, these commenters argued that a 25 percent rate would provide substantial savings while maintaining a serious deterrent effect. Many focused on the cost of the current program and argued that the savings from reducing the incremental number of tests and associated non-productive time would be significant. Others took a more holistic approach and noted that other types of tests, training and education were also deterrents.

Over a dozen commenters supported the current system. They argued that a decrease in the rate will increase recreational use and undermine the deterrent purpose of the program. Several stated that the data were inadequate to justify a reduction and that costs will not drop because the lower volume will result in higher per test costs. Others took an "if it ain't broke, don't fix it" attitude.

Four commenters argued that the rate should be increased. These commenters stated that a greater perception of getting caught would result in less drug use. At least one noted that at a 50 percent testing rate, some employees are never tested while others are tested two or more times per year.

The ANPRM asked for comment on whether any change should be made across all operating administrations or selectively by industry, company, or job classification. Most who favored a differentiated approach suggested that the rate be set by industry. Many of these commenters believed that their industry was better than others and that they were being penalized unfairly by unrelated "bad actors." There was some support for setting the rate by job categories tempered by the concern that such differentiation not be arbitrary. An equal number of commenters stated that it would be confusing to have too many subgroups and argued for a more even-handed approach. A number of commenters suggested that employers should have flexibility to set the rate at whatever level they thought best, based on their own past experience.

Many commenters focused on the importance of research, employee and supervisor education, employee assistance programs and effective enforcement to deter drug use. Most of these comments focused on making the drug testing requirements and the employers' policies highly visible to employees. In particular, a strong "for cause" testing policy and firm discipline was seen by most of these commenters to be essential.

A number of commenters provided information on costs and positive rates. Virtually all the commenters that discussed positive rates stated that there had been no, or very few, positive random test results in their companies or industries. Comments on the cost per test ranged from the teens to well over a hundred dollars. The general comments on cost savings that could be attributed to a change in the random rate also varied considerably. Some argued that the savings would be proportionate to the change in the testing rate because they pay a set fee per drug test. Most believed there would be a substantial savings, although the amount of savings would not directly correlate to the testing rate because the employer still had fixed administrative costs in running the program. A few commenters argued that costs would not drop at all because labs will simply charge more for tests. The comments on costs and benefits are discussed in greater detail in the accompanying regulatory evaluations prepared by each OA and available for review in the docket.

Commenters differed on how much data they believed necessary to justify a change in the testing rate. Most commenters believed at least two years were necessary, although some believed one year was adequate and others, up to five years. There was some support for demonstration programs, particularly if they would result in the random testing rate being lowered without delay. Those viewing demonstration programs as a "tactic" to delay across the board lowering of the testing rate opposed them vigorously.

Technical Meeting

In addition to soliciting written comments, the Department held a public meeting on workplace random testing and its impact on drug use deterrence in Washington, DC, on February 1 and 2, 1993. The meeting included presentations by experts from federal agencies and the military, academia and private industry. Over 20 participants presented papers and sparked discussions that ranged from mathematical models of drug testing rates and their impact on drug use to program data from corporations using random drug testing as part of a drug-free workplace strategy. The participants presented no definitive data that identified optimal random testing rates for achieving maximum deterrence of drug use. Many corporate representatives expressed views that favored reducing required random testing rates; however, they did not support their views with specific data on the causal or correlative relationship between random testing rates and drug use deterrence. The discussions also covered the corollary issue of detection of drug abusers who are not deterred by workplace drug prevention policies or programs. The meeting was attended by over 200 people and included question and answer periods. Transcripts of the meeting are included in the docket.

Available Data

The Department would appreciate public comment in identifying additional 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 military personnel.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number of Random Tests</th>
<th>Number of Positives</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>64,585</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1991</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1992</td>
<td></td>
</tr>
<tr>
<td>170,439</td>
<td>1,307</td>
<td></td>
</tr>
<tr>
<td>133,176</td>
<td>1,258</td>
<td></td>
</tr>
</tbody>
</table>
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:

<table>
<thead>
<tr>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Rate</td>
<td>5.1%</td>
<td>5.6%</td>
<td>3.0%</td>
<td>3.0%</td>
<td>1.1%</td>
<td>1.8%</td>
</tr>
</tbody>
</table>

In the rail industry, reasonable cause testing occurs whenever there is a violation of a federal safety rule (Rule G), as opposed to when there is individual suspicion of drug use. The positive rates are as follows:

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Rate</td>
<td>5.4%</td>
<td>4.7%</td>
<td>3.6%</td>
<td>1.8%</td>
<td>1.9%</td>
<td>1.9%</td>
</tr>
</tbody>
</table>

In July 1991, the FRA initiated a comparative study of random testing rates and the impact on deterrence, as measured by the positive rate. The study compared four railroads testing at 50 percent (control group) with four railroads testing at 25 percent (experimental group). The positive rate for the control group when the study was initiated was 1.1 percent; for the experimental group it was 0.89 percent. In the first year (July 1991 through June 1992), the control group positive rate was 0.90 percent, the experimental group's was 0.87 percent. For the period July 1992 through June 1993, these groups had positive rates of 0.80 percent and 0.94 percent, respectively. Statistically, the differences in the positive rates between the control and experimental groups are not significant.

Motor Carriers

In general compliance investigations of 4,967 interstate motor carrier drug testing programs by FHWA in the first six months of FY 1993, records indicated that 28,250 random tests were conducted. There were 878 verified positive results (3.11 percent). The audits represent less than 2 percent of the motor carriers subject to the FHWA rule. The FHWA selects interstate motor carriers for general safety rule 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.

The Omnibus Transportation Employee Testing Act of 1991 (Pub.L. 102-143, Title V, Section 5) requires FHWA to conduct a demonstration project to study the feasibility of random roadside alcohol and controlled substances testing. The project's goal is to consider alternative methodologies for implementing random testing systems for commercial motor vehicle operators. Congress' intent was for the FHWA to report and make recommendations concerning random testing administered by means other than carrier-administered testing. Preliminary data from the four state random roadside testing project indicate that of 34,127 drug tests conducted, 1,241 (3.6 percent) were positive for drugs. An additional 1,305 drivers randomly selected for a drug test refused to be tested.

The report is to address the effectiveness of State-administered testing in detecting individuals, such as owner-operators, who might otherwise avoid detection in carrier-administered testing programs. The report, Congress stated, may also include testing or other detection methods performed by Federal or local agencies. In addition, the report is to address the funding of such testing through existing State grant programs or other similar programs. The report is due to Congress by April 1994.

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 include 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. (FY93 figures reflect a full year with the lower testing rate) The following table summarizes DOT federal employee random testing data:

<table>
<thead>
<tr>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive</td>
<td>0.34</td>
<td>0.37</td>
<td>0.41</td>
<td>0.44</td>
<td>0.45</td>
<td>0.44</td>
</tr>
<tr>
<td>Testing Rate Percent</td>
<td>1.57</td>
<td>1.31</td>
<td>1.68</td>
<td>2.41</td>
<td>2.41</td>
<td>2.41</td>
</tr>
</tbody>
</table>

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 is as follows:

<table>
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<td>2.41</td>
<td>2.41</td>
<td>2.41</td>
<td>2.41</td>
</tr>
<tr>
<td>Testing Rate Percent</td>
<td>95</td>
<td>95</td>
<td>95</td>
<td>95</td>
<td>95</td>
<td>95</td>
<td>95</td>
</tr>
</tbody>
</table>

The USCG has been conducting random drug testing programs by USCG in the first six months of FY 1993, records indicated that 28,250 random tests were conducted. There were 878 verified positive results (3.11 percent). The audits represent less than 2 percent of the motor carriers subject to the FHWA rule.
Testing Rates in Various Federal Agencies


The Proposal

This NPRM proposes to lower the random testing rate to 25 percent for each industry regulated by an operating administration where the industry-wide random positive rate is less than 1.0 percent for 2 consecutive calendar years while testing at 50 percent. The rate would increase back to 50 percent if the employer conducts random testing at the highest percentage rate, or randomly select such employees to testing at the same required number of more than one DOT agency, the employer is required to conduct random testing under the drug testing rules established for the calendar year by the DOT agency regulating more than 50 percent of the employee's function. Similarly, the NPRM provides that if an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may either establish separate pools for random selection, with each pool containing covered employees subject to testing at the same required rate, or randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.

The proposal includes several provisions to provide employers greater flexibility or to provide greater clarity. For example, the NPRM proposes that, if the employer conducts random testing through a consortium, the number of employees to be tested may be calculated for each individual employer or may be based on the total number of covered employees subject to random testing by the consortium. In order to ensure deterrence, the dates for administering random tests would be required to be spread reasonably throughout the calendar year.

There are a number of important issues related to calculating the positive rate. Consistent with the final rules addressing alcohol misuse prevention requirements published in today's Federal Register, the term "positive rate" would be defined in the definition section of each operating administration drug rule as, "the number of positive results for random tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random tests conducted under this part plus the number of refusals of random tests required by this part.

This NPRM would add a definition of "refuse to submit" in each operating administration drug rule. The definition would be "a covered employee [who] fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process." As a practical matter this means that refusals to take a random drug test would count as a positive result for the purpose of calculating the industry random test rate and would count toward the number of tests required to be conducted. Since they are treated as if they are positive, we believe they should be counted in the totals. Moreover, without this approach, the system could be easily abused. For example, employers with high positive rates might have an incentive to subtly communicate that employees that test positive will be fired but employees that refuse to be tested will receive little or no punishment.

Drug urine samples found to be adulterated are considered a refusal to test because they are an obstruction of the testing process. In addition, they count as positives for the purpose of calculating the industry random test rate and count toward the number of tests required to be conducted. Administrative or procedural errors during the testing process, such as breaking the container holding the sample, are considered canceled tests and are not counted in the totals when calculating the industry random test rate.

Before lowering the testing rate in any industry, the Department wants to be confident that the data are reliable and fairly represent the drug prevalence in the industry. The MIS rules require that employers submit data for each calendar
year by the following March 15th. We envision that the OAs and the OST Drug Office would review the data and that the Administrator (or Commandant) would issue a determination within a few months. If the data indicated that a change in the rate were warranted, the change would take effect the following year, beginning January 1. This process is the same as the one established in the alcohol final rules published elsewhere in today's Federal Register. As in that rule, we believe that covered entities generally need approximately one-half year lead time to adjust their procedures, make changes in any contracts and take other necessary action to adjust to an increase or decrease. We also believe it would be best to keep the reporting determination process on a consistent, calendar year basis. We are aware that this process has a built-in delay, and request comments on whether there is some easier method that, at the same time, provides adequate time to gather and submit data, issue a Federal Register notice, and implement the change.

Of equal or greater concern is the built-in lag time between industry reports of rising positive rates and the OA's re-imposition of the 50 percent testing rate. To address this concern, the rule provides that the rate will be raised after 1 year of data indicating a positive rate of 1.0 percent or greater. As a practical matter, however, any industry that is lowered to a 25 percent rate cannot be returned, under the current proposal, to a 50 percent rate until a year after the data indicating the problem. For the reasons noted above, we do not think it is practical to require a change in the testing rate on shorter notice.

We recognize that because the reported positive rate is obtained from data whose precision is eroded by sampling variance and measurement error, and whose accuracy is diminished by non-response bias, there is a greater risk that it diverges from the actual positive rate in the population. Each OA will be using MIS data collection and sampling methods that address these issues to the extent possible and make sense in the context of its particular industry. Where not all employers are included in the reported data, the OA will decide how many covered employers must be required to report or be sampled; this decision will be based on the number of employers (not otherwise required to report) that must be sampled to ensure that the reported data from the sampled employers reliably reflects the data that would have been received if all were required to report. However, we retain for our discretion the decision on whether the reported data reliably support the conclusion (e.g., based on audits of company records that show significant falsification of reports). If the reported data are not sufficiently reliable, the OA will not permit the random rate adjustment to occur.

We have proposed using industry positive rates (positive tests and refusals to test) as the performance benchmark rather than individual employer or job category positive rates urged by some commenters. Company-by-company rates would be extremely difficult to implement and enforce, would be extremely difficult to apply to small companies, would require reports from all companies, could encourage cheating (especially in areas of heavy competition), and could excessively complicate the use of consortia. Although an individual company may have reduced incentive to lower its positive rate, industry organizations may pressure it to work toward a more favorable industry random testing rate. Industry-wide rates should be much more effective, and easier to implement and enforce. In addition, setting testing rates by job category would raise difficult questions of classification and might appear discriminatory to the employees involved.

The practical implication of this NPRM is that FHWA, RSPA and USCSC would remain at 50 percent until they have 2 years of data showing that random positive rates for their industries are less than 1.0 percent. FTA, which is just issuing its drug testing rules in today's Federal Register, will begin random drug testing at 50 percent. Like the other operating administrations, it may only lower the rate after 2 years of data showing that the random positive rate for its industry is less than 1 percent. The 2-year period for motor carriers and mass transit would only start after their new drug testing requirements are fully implemented, i.e., two years after testing for small entities starts. If this proposal is adopted, we will announce in the final rule in this rulemaking whether one, or both, industries may lower their random drug testing rate.

The Coast Guard is also proposing to remove existing (and no longer applicable) regulatory language that allowed existing marine employers to begin their random drug testing at a 25 percent rate (46 CFR 16.205(d)). This provision was included to reduce the initial burden that the then-new random drug testing program would impose on employers. Because the provision no longer serves any purpose, and may lead to confusion, the Coast Guard proposes to remove this regulatory language.

RSPA is proposing to revise the random testing cycle to a calendar year beginning on January 1 and ending December 31. The December 23, 1994, Management Information System final rule requires operators to begin collecting drug testing data in 1994, and to report that information to RSPA on an annual basis beginning in 1995. The current regulations required operators to begin their drug testing programs, including random testing, in April and August 1990. RSPA believes this proposed change will eliminate the confusion and administrative burden expressed by many operators who are conducting random testing on an April-April or August-August cycle as required by the current regulations. The proposed revision will allow operators to conduct random testing and collect their drug testing data on a calendar year cycle.

Comparison With Alcohol Misuse Prevention Final Rules

With one major exception, this proposal is intended to mirror, in concept, the final rules for alcohol testing being issued in today's Federal Register. Those rules initiate random alcohol testing at a 25 percent rate and make provision for the testing rate to be increased to 50 percent if the positive rate is 1.0 percent or greater for any entire subsequent year, and decreased to a 10 percent testing rate if less than 0.5 percent for two consecutive years. The exception is that this NPRM does not propose to lower the random testing rate to 10 percent if the industry positive rate is less than 0.5 percent.

The Department tentatively finds that a 25 percent random testing rate is the minimal effective rate to ensure deterrence for drug use and to allow at least a modicum of detection. The drug rules are dealing, by and large, with illegal substances or, at least, legal substances that are being used contrary to lawful purposes. Unlike alcohol, few people can readily detect most drug use from behavior or appearance. Because of the legality of alcohol and its everyday use throughout society, many people can detect when it has been consumed or when a person is under the influence. Another distinction is that drugs are often packaged in very small form, such as a tablet or powder, while many common forms of alcohol, such as beer or wine, are more visible because of the size of their containers. Thus, alcohol misuse appears to be more easily deterred or detected than drug use and it is not as necessary to establish as strong a deterrence for alcohol through...
the tool of random testing. We solicit comment, however, on whether the 
alcohol approach should be considered for the final drug rule.

Regulatory Analyses and Notices

D O T Regulatory Policies and Procedures

The NPRM 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. Regulatory evaluations for each 
OA have been prepared and are available for review in the respective 
dockets. This NPRM was reviewed by the Office of Information and Regulatory 
Affairs pursuant to Executive Order 12866.

F A A estimates an average potential cost savings of approximately $8.9 
million per year if the testing rate is dropped to 25 percent. USCG estimates an 
annual cost savings of between $0.8 million to $1.6 million annually; RSPA 
estimates $2.05 million per year; FRA estimates $1 million per year, FHWA 
estimates $107 million per year; and FTA estimates an average of over $7 
million per year. Further detail is available in the OA regulatory 
evaluations, which are available in the respective dockets.

Executive Order 12612

This NPRM 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 significant federalism implications to warrant the preparation of 
a Federalism Assessment.

Executive Order 12630

This NPRM 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 how many, if any, 
transportation industries qualify for a 
reduction in the random testing rate, the 
proposal could have a significant 
economic impact on a substantial 
number of small entities. Some 
transportation industries, particularly 
motor carriers, pipelines, maritime, and 
transit, are composed of many small 
companies. If the random testing rate 
were reduced, there would be a 
significant cost savings, as discussed in 
the accompanying regulatory flexibility 
analyses. In addition, to the extent that 
the rate is lowered it might have a 
negative economic impact on those 
contractors who provide services to 
employers covered under the rules, 
some of whom are 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.

Paperwork Reduction Act

There are a number of reporting or 
recordkeeping requirements associated 
with DOT-mandated drug testing. Some 
of the requirements are currently part of 
the OAs' drug testing rules and some have 
been incorporated as a result of the final 
rules setting up the management 
information systems that were 
published in the Federal Register on 
December 23, 1993. To the extent that 
fewer random tests are required in a 
given transportation industry, there will 
be a proportionate reduction in 
recordkeeping, but no change in the 
reporting requirement.

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.

Issued on January 25, 1994, in Washington, 
DC.

Federico Peña, 
Secretary of Transportation.

List of Subjects in 14 CFR Part 121

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

For the reasons set out in the preamble, the Federal Aviation 
Administration proposes to amend 14 
CFR part 121, 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. 1354(a), 1355, 1356, 
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, 
October 28, 1981); 49 U.S.C. 106(g) (revised 

2. In Appendix I, Sec. II, the 
definition of "positive rate" would be 
added in Alphabetized order, and the 
definition of "refusal to submit" would 
be revised, to read as follows:

Appendix I to Part 121—Drug Testing 
Program

II. Definitions

* * * * *

Positive rate means the number of positive 
results for random drug tests conducted 
under this part plus the number of refusals 
to take random tests required by this part,
divided by the total number of random drug 
tests conducted under this part plus the 
number of refusals to take random tests 
required by this part.

* * * * *

Refusal to submit means that a covered 
employee failed to provide a urine sample as 
required by 49 CFR part 40, without a valid 
medical explanation, after he or she has 
had notice of the requirement to be 
tested in accordance with this appendix or 
engaged in conduct that clearly obstructs 
the testing process.

3. Appendix I, Section V, Paragraph C 
is revised to read as follows:

Appendix I to Part 121—Drug Testing 
Program

* * * * *

V. Types of Drug Testing

* * * * *

C. Random testing. 1. Except as provided in 
paragraphs 2–4 of this section, the 
minimum annual percentage rate for random 
drug testing shall be 50 percent of covered 
employees.

2. The Administrator's decision to increase 
or decrease the minimum annual percentage 
rate for random drug testing is based on the 
reported positive rate for the entire industry.

All information used for this determination 
(determined) is drawn from the drug MIS reports required 
by this appendix. In order to ensure 
reliability of the data, the Administrator 
considers the quality and completeness of the 
reported data, may obtain additional 
information or reports from employers, and 
may make appropriate modifications in 
calculating the industry positive rate. Each 
year, the Administrator will publish in the 
Federal Register the minimum annual 
percentage rate for random drug testing of 
covered employees. The new minimum 
annual percentage rate for random drug 
testing will be applicable starting 
January 1 of the calendar year following publication.

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

4. When the minimum annual percentage 
rate for random drug testing is 25 percent, 
and the data received under the reporting 
requirements of this appendix for any 
consecutive calendar year indicate that the reported 
positive rate is equal to or greater than 1.0


percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

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

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

7. Each employer shall ensure that random drug tests conducted under this appendix are announced and that the dates for administering random tests are spread reasonably throughout the calendar year.

8. If a given covered employee is subject to random drug testing under the drug testing rules of more than one DOT agency, the employee shall be subject to random drug testing at the percentage rate established for the calendar year by the DOT agency regulating more than 50 percent of the employee’s function.

9. If an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may:
   (a) Establish separate pools for random selection, with each pool containing the covered employees who are subject to testing at the same required rate; or
   (b) Randomly select such employees for testing at the highest percentage rate established for the calendar year by any DOT agency to which the employer is subject.


David R. Hinson,
Administrator, Federal Aviation Administration.

List of Subjects in 46 CFR Part 16
Drug testing, Marine safety, Reporting and recordkeeping requirements, Safety, Transportation.

For the reasons set out in the preamble, the Coast Guard proposes to amend 46 CFR part 16, as follows:

PART 16—CHEMICAL TESTING

1. The authority citation for part 16 continues to read as follows:

Authority: 46 U.S.C. 2103, 3306, 7101, 7301 and 7701; 49 CFR 1.46.

2. In §16.105, the definitions of Positive rate and Refuse to take (a drug test) are added in alphabetized order to read as follows:

§16.105 Definitions of terms used in this part.
* * * * *
Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals to take random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals to take random tests required by this part.

Refuse to submit means that a crewmember fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.
* * * * *

§16.205 [Amended]

3. In §16.205, paragraph (d) is removed and reserved.

4. In §16.230, paragraphs (c) and (e) are revised, paragraph (f) is redesignated as paragraph (k), and new paragraphs (f) through (j) are added to read as follows:

§16.230 Random testing requirements.
* * * * *
(c) The selection of crewmembers for random drug testing shall be made by a scientifically valid method, such as a random number table or a computer-based random number generator that is matched with crewmembers’ Social Security numbers, payroll identification numbers, or other comparable identifying numbers. Under the testing frequency and selection process used, each covered crewmember shall have an equal chance of being tested each time selections are made and an employee’s chance of selection shall continue to exist throughout his or her employment. As an alternative, random selection may be accomplished by periodically selecting one or more vessels and testing all crewmembers covered by the section, provided that each vessel subject to the marine employer’s test program remains equally subject to selection.
* * * * *

(f) The annual rate for random drug testing may be adjusted in accordance with this paragraph.

(1) The Commandant’s decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported random positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Commandant considers the quality and completeness of the reported data, may obtain additional information or reports from marine employers, and may make appropriate modifications in calculating the industry positive rate. Each year, the Commandant will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered crewmembers. The minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(2) When the minimum annual percentage rate for random drug testing is 50 percent, the Commandant may lower this rate to 25 percent of all covered crewmembers if the Commandant determines that the data received under the reporting requirements of 46 CFR 16.500 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(3) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of 46 CFR 16.500 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Commandant will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered crewmembers.

(g) Marine employers shall randomly select a sufficient number of covered crewmembers for testing during each calendar year to equal an annual rate not less than the minimum annual percentage rate for random drug testing determined by the Commandant. If the marine employer conducts random drug testing through a consortium, the number of crewmembers to be tested may be calculated for each individual marine employer or may be based on the total number of covered crewmembers covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(h) Each marine employer shall ensure that random drug tests conducted under this part are...
unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

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

(ii) If a marine employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the marine employer may—

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

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


Adm. J. William Kime, Commandant, United States Coast Guard.

List of Subjects in 49 CFR Part 199

Drug testing, Pipeline safety, Recordkeeping and reporting.

For the reasons set out in the preamble, RSPA proposes to amend 49 CFR part 199, as follows:

PART 199—DRUG AND ALCOHOL TESTING

1. The authority citation for part 199 continues to read as follows:


2. Section 199.3 is amended by adding the following definitions in alphabetical order:

§ 199.3 Definitions.

Positive rate means the number of positive results for random drug tests conducted under this subpart plus the number of refusals of random tests required by this subpart, divided by the total number of random drug tests conducted under this subpart plus the number of refusals of random tests required by this subpart.

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this subpart, or engages in conduct that clearly obstructs the testing process.

3. Section 199.11 is amended by revising paragraph (c) to read as follows:

§ 199.11 Drug tests required.

(c) Random testing. (1) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

(2) The Administrator's decision to increase or decrease the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from operators, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will apply starting January 1 of the calendar year following publication.

(3) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §199.25 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(4) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of §199.25 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

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

(6) The operator shall randomly select a sufficient number of covered employees for testing during each calendar year to equal the minimum annual percentage rate for random drug testing determined by the Administrator. If the operator conducts random drug testing through a consortium, the number of employees to be tested may be calculated for each individual operator or may be based on the total number of covered employees covered by the consortium who are subject to random drug testing at the same minimum annual percentage rate under this part or any DOT drug testing rule.

(7) Each operator shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

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

(9) If an operator is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the operator may—

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

(ii) Randomly select such employees for testing at the same required rate; or

Ans: Gutierrez, Acting Administrator, Research and Special Programs Administration.

List of Subjects in 49 CFR Part 219

Alcohol and drug abuse, Railroad safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FRA proposes to amend 49 CFR part 219, as follows:

PART 219—CONTROL OF ALCOHOL AND DRUG USE

1. The authority for part 219 continues to read as follows:
Authority: 45 U.S.C. 431, 437, and 438, as amended; Pub. L. 100–342; Pub. L. 102–143; and 49 CFR 1.49(m).

2. Section 219.5 is amended by adding, in alphabetical order, definitions for “positive rate” and “refuse to submit” as follows:

§219.5 Definitions

Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the numbers of refusals of random tests required by this part.

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

3. Section 219.602 is added as follows:

§219.602 Administrator’s determination of random drug testing rate.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing is based on the reported positive rate for the entire industry. All information used for this determination is drawn from the drug MIS reports required by this part. In order to ensure reliability of the data, the Administrator considers the quality and completeness of the reported data, may obtain additional information or reports from railroads, and may make appropriate modifications in calculating the industry positive rate. Each year, the Administrator will publish in the Federal Register the minimum annual percentage rate for random drug testing of covered employees. The new minimum annual percentage rate for random drug testing will be applicable starting January 1 of the calendar year following publication.

(b) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent of all covered employees if the Administrator determines that the data received under the reporting requirements of §219.803 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of §219.803 for any calendar year indicate that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

(e) Selection of covered employees for testing shall be made by a method employing objective, neutral criteria which ensures that every covered employee has a substantially equal statistical chance of being selected within a specified time frame. The method may not permit subjective factors to play a role in selection, i.e., no employee may be selected as a result of the exercise of discretion by the railroad. The selection method shall be capable of verification with respect to the randomness of the selection process.

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

(g) Each railroad shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

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

(i) If an railroad is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the railroad may—

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

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


Joane M. Mollitor,
Administrator, Federal Railroad Administration.

List of Subjects in 49 CFR part 382

Alcohol and drug abuse, Highway safety, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, FHWA proposes to amend 49 CFR part 382, as follows:

PART 382—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

1. The authority for part 382 continues to read as follows:


2. Section 382.107 is amended by adding, in alphabetical order, a definition for “positive rate” and revising the definition for “refuse to submit” as follows:

§382.107 Definitions

Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals of random tests required by this part.

Refuse to submit means that a driver fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process.

3. New paragraphs (l) though (p) are added in §382.305, as follows:

§382.305 Random testing.

(l) Except as provided in paragraph (b) of this section, the annual percentage rate for random drug testing will be not less than 50 percent of the drivers.

(m)(1) The Administrator will authorize employers to lower the annual...
percentage rate required in paragraph (a) of this section for random drug testing to not less than 25 percent of all drivers when the FHWA determines that the data received by the FHWA for two consecutive calendar years under the reporting requirements of §382.403 of this part indicates that the positive rate is less than 1.0 percent. When the data for any calendar year in which the annual percentage rate for random drug testing is not less than 25 percent indicate that the positive rate is equal to or greater than 1.0 percent, the Administrator will require employers to increase the annual percentage rate for random drug testing to not less than 50 percent of all drivers.

(2) The Administrator’s decision to authorize a decrease or require return to the 50 percent minimum annual percentage rate for random drug testing will be based on the positive rate in the entire industry. Each year, the Administrator will publish in the Federal Register any change to the minimum required percentage for random selection of drivers under this part. The change will be applicable January 1 of the calendar year following publication.

(3) In order to ensure statistical validity, the Administrator will consider the quality and completeness of the reported data and will make appropriate modifications in calculating the industry positive rate.

(a) The employer shall randomly select a sufficient number of drivers for testing during each calendar year to equal an annual rate not less than the required percentage determined by the Administrator. If the employer conducts random testing through a consortium, the number of drivers to be tested may be calculated for each individual employer or may be based on the total number of covered employees covered by the consortium who are subject to random testing under this part or by any DOT agency to which the employer is subject.

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

List of Subjects in 49 CFR Part 653

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

For the reasons set out in the preamble, the Federal Transit Administration proposes to amend 49 CFR part 653, as follows:

PART 653—PREVENTION OF PROHIBITED DRUG USE IN TRANSIT OPERATIONS

1. The authority citation for part 653 continues to read:


2. The definition of “positive rate” is added and the definition of “refuse to submit” is revised in §653.7 as follows:

§653.7 Definitions.

Positive rate means the number of positive results for random drug tests conducted under this part plus the number of refusals of random tests required by this part, divided by the total number of random drug tests conducted under this part plus the number of refusals of random tests required by this part. * * *

Refuse to submit means that a covered employee fails to provide a urine sample as required by 49 CFR part 40, without a valid medical explanation, after he or she has received notice of the requirement to be tested in accordance with the provisions of this part, or engages in conduct that clearly obstructs the testing process. * * *

3. Section 653.47 is revised to read as follows:

§653.47 Random testing.

(a) Except as provided in paragraphs (b) through (d) of this section, the minimum annual percentage rate for random drug testing shall be 50 percent of covered employees.

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

(c) When the minimum annual percentage rate for random drug testing is 50 percent, the Administrator may lower this rate to 25 percent if the annual data received under the reporting requirements of §653.73 for two consecutive calendar years indicate that the reported positive rate is less than 1.0 percent.

(d) When the minimum annual percentage rate for random drug testing is 25 percent, and the data received under the reporting requirements of §653.73 for any calendar year indicates that the reported positive rate is equal to or greater than 1.0 percent, the Administrator will increase the minimum annual percentage rate for random drug testing to 50 percent of all covered employees.

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

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

(g) Each employer shall ensure that random drug tests conducted under this part are unannounced and that the dates for administering random tests are spread reasonably throughout the calendar year.

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

(i) If an employer is required to conduct random drug testing under the drug testing rules of more than one DOT agency, the employer may—

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

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


Gordon J. Linton,
Administrator, Federal Transit Administration.

[F.R. Doc. 94–2040 Filed 2–3–94; 1:00 pm]

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Part X
Department of the Interior
Bureau of Indian Affairs
Indian Gaming; Notice
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of approved Tribal-State Compact.

SUMMARY: Pursuant to 25 U.S.C. 2710, of the Indian Gaming Regulatory Act of 1988 (Pub. L. 100-497), the Secretary of the Interior shall publish, in the Federal Register, notice of approved Tribal-State Compacts for the purpose of engaging in Class III (casino) gaming on Indian reservations. The Assistant Secretary—Indian Affairs, Department of the Interior, through her delegated authority, has approved the Gaming Compact Between the Confederated Tribes of the Umatilla Indian Reservation and the State of Oregon, which was executed on November 29, 1993.

DATES: This action is effective upon date of publication.

FOR FURTHER INFORMATION CONTACT:
Hilda Manuel, Director, Indian Gaming Management Staff, Bureau of Indian Affairs, Washington, DC 20240, (202) 219-4066.

Ada E. Deer,
Assistant Secretary—Indian Affairs.

[FR Doc. 94-3397 Filed 2-14-94; 8:45 am]
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**FEDERAL REGISTER PAGES AND DATES, FEBRUARY**

4547-4778........................................1
4779-6070......................................2
5071-5312....................................3
5313-5514....................................4
5515-5696...................................7
5697-5626...................................8
5629-6212....................................9
6213-6530..................................10
6531-6664..................................11
6685-7192..................................14
7193-7628..................................15

**CFR PARTS AFFECTED DURING FEBRUARY**

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

1 CFR
- Proclamations: 6648-6649
- Executive Orders: 12896-12897
- Administrative Orders: Presidential Determinations: 94-14 of February 1, 1994...
- Memorandum:
  - January 8, 1994............6593
  - January 29, 1994...........5929

3 CFR
- Proposed Rules: 1924, 1944

5 CFR
- Proposed Rules: 1993, 2099

8 CFR
- Proposed Rules: 74a, 78a, 8 CFR

9 CFR
- Proposed Rules: 6869

10 CFR
- Proposed Rules: 6939, 7039

12 CFR
- Proposed Rules: 6531, 7629

Federal Register
Vol. 59, No. 31
Tuesday, February 15, 1994
### LIST OF PUBLIC LAWS

Note: The list of Public Laws for the first session of the 103rd Congress has been completed and will resume when bills are enacted into law during the second session of the 103rd Congress, which convenes on January 25, 1994.

A cumulative list of Public Laws for the first session of the 103rd Congress was published in Part IV of the Federal Register on January 3, 1994.
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