

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Parts 61, 63, 65, 67, 91, 121, and 135**

[Docket No. FAA-2004-19835]

RIN 2120-AH82

Disqualification for Airman and Medical Certificate Holders Based on Alcohol Violations and Refusals to Submit to Drug or Alcohol Testing

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FAA proposes to amend the airman medical certification standards to disqualify an airman based on an alcohol test result of 0.04 or greater breath alcohol concentration (BAC) or a refusal to take a drug or alcohol test required by the Department of Transportation (DOT) or a DOT agency. Further, the FAA proposes to standardize the time period for reporting refusals and certain test results to the FAA, and to require employers to report pre-employment and return-to-duty test refusals. We also propose to amend the airman certification requirements to allow suspension or revocation of airman certificates for pre-employment and return-to-duty test refusals. Finally, we propose to amend the regulations to recognize current breath alcohol testing technology. These amendments are necessary to ensure that persons who engage in substance abuse do not operate aircraft or perform contract air traffic control tower operations until it is determined that these individuals can operate safely.

DATES: Send your comments to reach us by March 14, 2005.

ADDRESSES: You may send comments [identified by Docket Number 2004-19835] using any of the following methods:

- DOT Docket Web site: Go to <http://dms.dot.gov> and follow the instructions for sending your comments electronically.
- Government-wide rulemaking Web site: Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.
- Mail: Docket Management Facility; U.S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL-401, Washington, DC 20590-001.
- Fax: 1-202-493-2251.
- Hand Delivery: Room PL-401 on the plaza level of the Nassif Building,

400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For more information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

Privacy: We will post all comments we receive, without change, to <http://dms.dot.gov>, including any personal information you provide. For more information, see the Privacy Act discussion in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read background documents or comments received, go to <http://dms.dot.gov> or to Room PL-401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sherry M. de Vries, Aeromedical Standards and Substance Abuse Branch, Medical Specialties Division, AAM-210, Office of Aerospace Medicine, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone (202) 267-8693.

SUPPLEMENTARY INFORMATION:**Comments Invited**

The FAA invites interested persons to take part in this rulemaking by sending written comments, data, or views. We also invite comments about the economic, environmental, energy, or federalism impacts that might result from adopting the proposals in this document. The most helpful comments reference a specific portion of the proposal, explain the reason for any recommended change, and include supporting data. We ask that you send us two copies of written comments.

We will file in the docket all comments we receive, as well as a report summarizing each substantive public contact with FAA personnel about this proposed rulemaking. The docket is available for public inspection before and after the comment closing date. If you wish to review the docket in person, go to the address in the **ADDRESSES** section of this preamble between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also review the docket using the Internet at the web address in the **ADDRESSES** section.

Before acting on this proposal, we will consider all comments we receive by the closing date for comments. We will consider comments filed late if it is possible to do so without incurring expense or delay. We may change this proposal because of the comments we receive.

If you want the FAA to acknowledge receipt of your comments on this proposal, include with your comments a preaddressed, stamped postcard on which the docket number appears. We will stamp the date on the postcard and mail it to you.

Privacy Act: Using the search function of our docket web site, anyone can find and read the comments received into any of our dockets, including the name of the individual sending the comment (or signing the comment on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477-78) or you may visit <http://dms.dot.gov>.

Availability of Rulemaking Documents

You can get an electronic copy using the Internet by:

- (1) Searching the Department of Transportation's electronic Docket Management System (DMS) web page (<http://dms.dot.gov/search>);
- (2) Visiting the Office of Rulemaking's web page at <http://www.faa.gov/avr/arm/index.cfm>; or
- (3) Accessing the Government Printing Office's web page at http://www.access.gpo.gov/su_docs/aces/aces140.html.

You can also get a copy by submitting a request to the Federal Aviation Administration, Office of Rulemaking, ARM-1, 800 Independence Avenue SW., Washington, DC 20591, or by calling (202) 267-9680. Make sure to identify the docket number, notice number, or amendment number of this rulemaking.

Authority for This Rulemaking

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority.

This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Chapter 447, Section 44703, Airman Certificates, and Chapter 451, Section 45102, Alcohol and Controlled Substances Testing Programs. Under Section 44703, the FAA is authorized to issue an airman certificate to an individual who "is qualified for, and physically able to perform the duties related to, the position to be authorized by the certificate." Under Section 45102, the FAA is charged with prescribing regulations to establish programs for drug and alcohol testing employees

performing safety-sensitive functions for air carriers and to take certificate or other action when an employee violates the testing regulations. This regulation is within the scope of the FAA's authority because it updates the existing regulations regarding airman certification of individuals who have violated the drug and alcohol testing regulations or who have otherwise demonstrated a substance abuse history through violation of State or local driving while intoxicated/driving under the influence laws. This rulemaking is a current example of FAA's continuing efforts to ensure that only drug- and alcohol-free individuals perform pilot duties.

Background

The FAA is proposing to revise its regulations that apply to airmen who fail or refuse a drug or alcohol test. We proposed these changes to conform the FAA's regulations to changes in DOT's drug and alcohol testing regulations.

In a final rule published on March 19, 1996 (61 FR 11256), the FAA comprehensively revised our medical standards in 14 CFR part 67. The revisions recognized that a verified positive drug test result on a test required under the DOT internal program or under the industry regulations of a DOT agency is a disqualifying medical condition known as "substance abuse". When the 1996 revisions were adopted, "substance abuse" did not specifically include breath alcohol test results and refusals to submit to a test required by the DOT or a DOT agency.

In 2000, DOT changed its regulations to address many issues including refusals to submit to testing. In its final rule, DOT substantially revised its "Procedures for Transportation Workplace Drug and Alcohol Testing Programs" (65 FR 79462, December 19, 2000), which are the procedural provisions underlying the drug and alcohol testing regulations of the DOT agencies. In the NPRM, DOT explained "adulteration and substitution are real and possibly increasing threats to the integrity of the Department's drug testing program, with the potential for increased safety risks if drug users succeed in frustrating the testing process" (64 FR 69075, 69081, December 9, 1999). In making its changes to the refusal provisions, DOT examined the FAA's experience with airman refusal cases and decided that regulatory changes were needed to address the increasing number of refusals and the inherent threat those refusals posed to transportation safety.

On August 9, 2001, DOT further revised its refusal provisions (66 FR 41944). In these final rules, DOT broadened the scope of what constitutes a refusal to test under the DOT agency regulations. We are proposing to revise several sections in our regulations that have been affected by the DOT revisions.

Section-by-Section Discussion of the Proposal

14 CFR 61.14, 63.12b, and 65.23

The FAA proposes to revise the airman certification requirements in 14 CFR 61.14, 63.12b, and 65.23 to include refusals to take a pre-employment or return to duty test. Currently these sections only address refusals committed by an individual actually performing a safety-sensitive function for an employer regulated under 14 CFR part 121, appendices I and J. An individual who takes a pre-employment or return to duty test is not actually performing a safety-sensitive function. The scope of refusals in 49 CFR part 40 clearly includes FAA-required return to duty and some pre-employment tests. The FAA airman certificate regulations should similarly be clarified to include pre-employment and return to duty tests that involve situations in which an airman intends to enter into a position to perform a safety-sensitive function.

14 CFR 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2)

The FAA is proposing to add medically disqualifying factors to the substance abuse provisions for the three classes of airman medical certificates. Currently, to obtain a medical certificate, a person must not have engaged in any substance abuse during the preceding 2 years. Under 14 CFR 67.107(b), 67.207(b), and 67.307(b), the term "substance abuse" is defined as any of the following three criteria:

- (1) Use of a substance, for the second time, in a situation in which that use was physically hazardous;
- (2) A verified positive drug test result on a test required by an internal program of DOT or a test required by any DOT agency; or
- (3) Misuse of a substance that in the Federal Air Surgeon's judgment makes or may make a person unable to safely exercise the privileges of the airman certificate held.

In the interest of aviation safety, we propose to add the following disqualifying factors to the definition of substance abuse in the regulation:

- (1) An alcohol test result of 0.04 or greater breath alcohol concentration (BAC) on an alcohol test required by DOT or a DOT agency; and

- (2) A refusal to submit to an alcohol or drug test required by DOT or a DOT agency.

A discussion of these proposals follows.

Alcohol Test Results of 0.04 or Greater BAC

The FAA has reviewed its medical qualification regulations because we continue to be concerned about the number of commercial pilots misusing alcohol, resulting in their potential impairment during the performance of commercial flight duties. Between 1998 through 2003, seventy-one commercial airline pilots were identified by DOT alcohol testing programs as having a BAC of 0.04 or greater. The misuse of alcohol affects the performance of a commercial pilot's duties, reflects an inability to control his or her use of alcohol, and is a direct threat to aviation safety. Consequently, the FAA proposes to revise 14 CFR part 67 to more comprehensively define substance abuse to medically disqualify any pilot who has received a confirmed alcohol test result of 0.04 or greater BAC on a test required by DOT or a DOT agency.

The only individuals required to submit to an alcohol test are those who perform safety-related duties for the DOT or for an industry regulated by the DOT. In the aviation context, individuals subject to testing who hold an airman medical certificate typically include pilots and flight crewmembers of commercial air carriers and operations conducted under 14 CFR 135.1(c), and contract air traffic controllers. These individuals know they are subject to testing because of their work in a DOT-regulated industry and have a duty to operate safely. When these individuals misuse alcohol, resulting in a BAC of 0.04 or greater on a DOT test, they have shown a disregard for safety by their inability to control their use of alcohol. This behavior, in the opinion of the Federal Air Surgeon, constitutes substance abuse.

This proposed revision is consistent with decisions issued by the National Transportation Safety Board (NTSB) holding that single events of alcohol misuse formed a legitimate basis for the Federal Air Surgeon's finding of substance abuse. In these cases, the Federal Air Surgeon made a finding that each airman was "unable to safely perform the duties or exercise the privileges of the airman certificate" because of substance abuse under 14 CFR 67.107(b)(3)(i), 67.207(b)(3)(i), and 67.307(b)(3)(i). There have been at least two challenges to such findings. In both cases, the NTSB upheld the Federal Air Surgeon's finding of substance abuse in

instances of only one alcohol event. In *Administrator v. Taylor*, NTSB Order No. EA-5003 (2002), the NTSB upheld “the Federal Air Surgeon’s interpretation that a single occurrence of substance abuse is sufficient under the regulation [to warrant revocation of his medical certificate].” In *Administrator v. Polinchock*, NTSB Order No. EA-5023 (2003), the NTSB upheld the revocation of an airman’s medical certificate on the basis of “the Federal Air Surgeon’s determination that respondent’s misuse of alcohol while on duty in a safety-sensitive position renders him unqualified.”

Because a single event of alcohol misuse resulting in a BAC of 0.04 or greater on a DOT test would affect medical qualifications, any person who holds or applies for an airman medical certificate would be affected by the proposed rule change. Thus, persons subject to testing who hold an airman medical certificate for reasons unrelated to their safety-related job would also be affected by the proposed revisions. For example, a mechanic who also holds a pilot certificate would be affected by the proposed revisions.

Refusals to Take DOT Tests

In addition to pilots misusing alcohol, we have continued to see numbers of pilots who refuse to take FAA-required drug and alcohol tests. From 1997 through 2003, the FAA received reports that 89 commercial airline pilots refused to take required FAA drug and alcohol tests. These refusals can include: walk-aways from the testing site; refusals to report for testing; committing violence against the testing personnel; substituting other liquids for the testing specimens; and adding adulterating substances to hide or destroy the presence of illegal drugs in the person’s urine specimen. Whenever a person is required to submit to a DOT or a DOT agency drug or alcohol test and refuses to do so, that person willfully decides not to comply with a fundamental component of transportation safety.

The FAA is proposing to further amend 14 CFR 67.107(b)(2), 67.207(b)(2), and 67.307(b)(2) by adding to the description of “substance abuse” any refusal to submit to a drug or alcohol test required by DOT or a DOT agency. If adopted, this change would result in the revocation or denial of the airman medical certificate of any person who refused to submit to the required testing.

Adding refusals to 14 CFR part 67 is consistent with the language and intent of 49 CFR part 40, the DOT’s drug and alcohol testing procedural regulations prescribed for use by all DOT-regulated

industries required to conduct Federal testing. In 49 CFR part 40, the DOT and its agencies treat positive test results, alcohol violations, and refusals substantially the same. In the preamble to its final rule, DOT explained “the consequences of a refusal are the same or more severe as for any other violation of DOT agency drug and alcohol regulations.” (65 FR 79462, 79501, December 19, 2000). The FAA believes that it is appropriate to respond to a refusal to take a test required by DOT or a DOT agency as firmly and directly as a positive drug test result or an alcohol test result of 0.04 or greater BAC on a required test.

The drug and alcohol testing regulations prescribed by DOT and incorporated into the regulations of the DOT agencies directly affect transportation safety because they prohibit the use of illegal drugs and misuse of alcohol by people who perform safety critical transportation functions. When regulated individuals refuse to take a test required by DOT or a DOT agency, they violate their duty to uphold transportation safety. Furthermore, their refusals are overt attempts to subvert the testing program.

In applying the principles of 49 CFR part 40 to the 14 CFR part 67 airman medical qualification standards, the FAA is proposing that a refusal to take a drug or alcohol test should be an immediately disqualifying factor, resulting in the denial or revocation of the airman medical certificate. An airman who refuses to submit to testing interferes with the ability of the testing process to detect the presence of an illegal drug or alcohol misuse. Such interference with the testing process may be intended to conceal prohibited drug or alcohol use. This conduct typifies a substance abuse problem and justifies the removal of an airman medical certificate until the airman can prove that he or she is rehabilitated and medically qualified to hold an airman medical certificate.

The FAA acknowledges the proposed changes may result in the revocation of the airman medical certificate of an individual who is performing duties unrelated to his or her pilot certificate at the time of the refusal to test. For example, a mechanic who is required to be tested under FAA regulations and also who holds a private pilot certificate would be affected by this rule change. We are proposing that the airman medical certificate be revoked because this individual poses an unacceptable risk to transportation safety through his or her refusal to submit to testing required by his or her safety-related work.

14 CFR 91.17(a) and (c)

The FAA proposes to amend 14 CFR 91.17 to recognize current breath alcohol testing technology. Currently, 14 CFR 91.17 only refers to blood alcohol testing. However, breath alcohol testing has become the more commonly administered method for determining alcohol concentration.

When 14 CFR 91.17 was originally written, the prevalent technology for testing alcohol concentration was blood alcohol testing. In 1994, the DOT agencies issued regulations that required alcohol testing by breath for the transportation industries, including aviation. As breath-testing technology has improved and become more cost-efficient, law enforcement personnel have used this less invasive form of testing with increasing frequency. Breath alcohol tests and blood alcohol tests are two separate measures and are not exact equivalents. Therefore, each is reported separately as either breath alcohol concentration or blood alcohol concentration.

We are proposing to amend section 91.17 to include breath alcohol concentration testing results of 0.04 or greater because of the greater use of breath testing technology by local law enforcement and because, since 1994, the DOT has set the violation level for breath alcohol concentrations at 0.04 or greater.

Therefore, the FAA proposes to amend 14 CFR 91.17 to include both blood alcohol testing and breath alcohol testing to determine the concentration of alcohol in an individual’s blood or breath, respectively.

14 CFR Part 121, Appendix I, Section II and Appendix J, Section I.D

The FAA proposes to amend “refusal to submit” to a drug test to include engaging in conduct provided in 49 CFR 40.191. Similarly, we propose to amend “refusal to submit” to an alcohol test to include engaging in conduct provided in 49 CFR 40.261. We propose to change the specific wording in the FAA drug and alcohol testing definitions of “refusal to submit” from “conduct specified” to “conduct provided.”

The FAA’s drug and alcohol regulations cross-reference 49 CFR 40.191 and 40.261 because these sections provide descriptions of kinds of conduct that constitute a “refusal.” However, there is no one definition of what commission or omission constitutes a refusal. A refusal involves conduct by the employee that interferes with testing. For example, a refusal includes failure to appear at the testing site for a test other than pre-

employment, failure to remain at the testing site, adulterating one's urine sample, substituting a specimen, behaving violently or uncooperatively during the collection process, not remaining available for a post-accident test, or failing to comply with steps required during the administration of the test. This is not an all-inclusive list of conduct that would constitute a finding of refusal. We invite public comment as to whether "conduct provided" more effectively addresses the expansiveness of conduct that would constitute a refusal under 49 CFR part 40.

We propose to clarify the refusal definition to include post-accident alcohol testing because the employee has a duty under 14 CFR part 121, appendix J, Section III.B.3 "to remain readily available for such testing." Failure to remain readily available for post-accident testing, even in the absence of individualized notice, constitutes a refusal. We also propose to drop the word "covered" from the definition of "Refusal to submit" in 14 CFR part 121, appendix J, section I.D., as a non-substantive editorial change.

14 CFR Part 121, Appendix I, VI.D.2 and Appendix J, Section V.D.2

In 49 CFR 40.191 and 40.261, DOT clarified the scope of what constitutes a "refusal" to include return to duty testing and specific situations in pre-employment testing. In response, we propose to require employers to notify the FAA of refusals to take a return to duty or pre-employment drug or alcohol test. Specifically, we propose to remove 14 CFR part 121, appendix I, section VI.D.2 and appendix J, section V.D.2 because both sections tell employers not to inform the FAA when return to duty or pre-employment refusals occurred.

14 CFR Part 121, Appendix I, Sections VII.C.1, 2, 3, 4, and 6

The FAA proposes to amend 14 CFR part 121, appendix I, section VII.C.1 to change the time frame for the Medical Review Officer (MRO) to submit information to the Federal Air Surgeon regarding part 67 certificate holders. Specifically, we would change the reporting requirement from 12 working days from the date the MRO verifies the positive drug test result to 2 working days to be consistent with the alcohol reporting requirement. We are also proposing some editorial changes for consistency and clarity.

The FAA is proposing to amend 14 CFR part 121, appendix I, section VII.C.2 to clarify that a substance abuse professional (SAP) must not recommend that an employer return to duty an

individual who has refused to take a drug test for a position that requires an airman medical certificate. Only after the Federal Air Surgeon has issued the individual a new airman medical certificate can the SAP recommend to the employer that the individual be returned to duty. This requirement already exists for the airman medical certificate holder who has a positive drug test result.

In 14 CFR part 121, appendix I, section VII.C.3, for consistency with appendix J, we propose to change the time for the employer to forward SAP reports to the Federal Air Surgeon from 12 working days to 2 working days of receipt of the SAP report.

Section VII.C.4 of 14 CFR part 121, appendix I requires employers to ensure that an employee required to hold a part 67 certificate is not returned to the performance of a safety-sensitive duty until the employee has received an airman medical certificate. Because the airman may have retained a previously issued medical certificate, we propose to clarify that the operative medical certificate must be issued after the date of the verified positive drug test result or refusal to test before the employee can be returned to the performance of a safety sensitive duty.

We propose to add 14 CFR part 121, appendix I section VII.C.6 to require MROs, SAPs, and employers to retain a copy of any report they forward to the Federal Air Surgeon under this section. This record retention requirement already exists in 14 CFR part 121, appendix J, section IV.A.2.(a)(2).

14 CFR Part 121, Appendix J, Section IV.A.2.(a)(2)

We propose to add "refusals to submit to testing" to the existing record retention requirements.

4 CFR 65.46a(f), 121.458(f), and 135.253(f)

In a final rule, issued on December 19, 2000, (65 FR 79462), DOT broadened the scope of what is considered to be a refusal to test. In 49 CFR 40.191 and 40.261, the DOT included pre-employment tests and return-to-duty tests under the new refusal provisions. The DOT also clarified the description of refusal to test by explicitly including adulterations and substitutions of specimens within the refusal provisions. On August 9, 2001, (66 FR 41944), DOT further revised the refusal provisions of 49 CFR 40.191 and 40.261 to clarify the scope of pre-employment refusals.

We propose to amend 14 CFR 65.46a(f), 121.458(f), and 135.253(f) because these provisions currently describe a "refusal to submit to a

required alcohol test" as including post-accident, random, reasonable suspicion, and follow-up tests. Because 49 CFR part 40 includes all types of required tests, we propose a minor change to these sections to be consistent. Instead of listing the types of tests included as refusals, we propose substituting the word "any" in place of the list of required tests.

Paperwork Reduction Act

The FAA described the information collection requirements associated with reporting the results of drug and alcohol testing in OMB control number 2120-0535 (current expiration date is December 31, 2005). This NPRM would add the requirement to report refusals to take return-to-duty and pre-employment tests. This is an extremely small additional burden because these reports are already generated and sent to the employer under 49 CFR part 40 and 14 CFR part 121, appendices I and J, and are accounted for in OMB control number 2125-0529. Under the new requirement, employers would merely send these already existing reports on to the FAA, resulting in a total annual burden of fewer than 2 hours across the industry. Specifically, we estimate the annual burden associated with this NPRM to be 1.75 hours to the private sector, costing \$35.00. The annual burden to the Federal Government would be 7 hours, costing \$138.95. Because this burden is extremely small, we will not change Paperwork Burden Submission OMB control number 2120-0535 at this time, but we will include the extra 1.75 hours in the next renewal in 2005.

International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to comply with International Civil Aviation Organization (ICAO) Standards and Recommended Practices (SARPs) to the maximum extent practicable. SARPs do not address disqualification of an airman based on a refusal to take a required drug or alcohol test.

Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order 12866, Regulatory Planning and Review, directs the FAA to assess both the costs and the benefits of a regulatory change. We are not allowed to propose or adopt a regulation unless we make a reasoned determination that the benefits of the intended regulation justify the costs. Our assessment of this rulemaking indicates that its economic impact is minimal. This action imposes minimal

copying, mailing, and faxing costs on small entities subject to this rule. Because the costs and benefits of this action do not make it a "significant regulatory action" as defined in the Order, we have not prepared a "regulatory evaluation," which is the written cost/benefit analysis ordinarily required for all rulemaking under the DOT Regulatory Policies and Procedures. We do not need to do a full evaluation where the economic impact of a rule is minimal.

Economic Assessment, Regulatory Flexibility Determination, International Trade Impact Assessment, and Unfunded Mandates Assessment

Proposed changes to Federal regulations must undergo several economic analyses. First, Executive Order 12866 directs each Federal agency proposing or adopting a regulation do so only upon a reasoned determination that the benefits of the intended regulation justify its cost. Second, the Regulatory Flexibility Act of 1980 requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (19 U.S.C. 2531–2533) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. In developing U.S. standards, this Trade Act requires agencies to consider international standards and, where appropriate, that they be the basis for U.S. standards. Fourth, the Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal Agency to prepare a written statement assessing the expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed a "significant regulatory action." The FAA currently uses an inflation-adjusted value of \$120.7 million in lieu of \$100 million.

In conducting these analyses, FAA has determined this rule: (1) Has benefits that justify its costs, is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866 and is not "significant" as defined in DOT's Regulatory Policies and Procedures; (2) will not have a significant economic impact on a substantial number of small entities; (3) will not reduce barriers to international trade; and does not impose an unfunded mandate on state, local, or tribal governments, or on the private sector.

However, for regulations with an expected minimal impact the above-specified analyses are not required. The Department of Transportation Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If it is determined that the expected impact is so minimal that the proposal does not warrant a full evaluation, a statement to that effect and the basis for it is included in proposed regulation.

Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980 (RFA) directs the FAA to fit regulatory requirements to the scale of the business, organizations, and governmental jurisdictions subject to the regulation. We are required to determine whether a proposed or final action will have a "significant economic impact on a substantial number of small entities" as they are defined in the Act. If we find that the action will have a significant impact, we must do a "regulatory flexibility analysis."

We certify that this action will not have a significant economic impact on a substantial number of small entities.

Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal Agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. In accordance with the above statute and policy, the FAA has assessed the potential effect of this NPRM rule to be minimal and therefore has determined that this proposed rule would not result in an impact on international trade by companies doing business in or with the United States.

Unfunded Mandates Assessment

The Unfunded Mandates Reform Act of 1995 (the Act) is intended, among other things to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of the Act requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a

"significant regulatory action." The FAA currently uses an inflation-adjusted value of \$120.7 million in lieu of \$100 million.

This NPRM does not contain such a mandate. The requirements of Title II of the Act do not apply.

Executive Order 13132, Federalism

The FAA has analyzed this proposed rule under the principles and criteria of Executive Order 13132, Federalism. We determined that this action would not have a substantial direct effect 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, and therefore would not have federalism implications.

Plain English

Executive Order 12866 (58 FR 51735, Oct. 4, 1993) requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- Are the requirements in the proposed regulations clearly stated?
- Do the proposed regulations contain unnecessary technical language or jargon that interferes with their clarity?
- Would the regulations be easier to understand if they were divided into more (but shorter) sections?
- Is the description in the preamble helpful in understanding the proposed regulations?

Please send your comments to the address specified in the **ADDRESSES** section.

Environmental Analysis

FAA Order 1050.1D defines FAA actions that may be categorically excluded from preparation of a National Environmental Policy Act environmental impact statement. In accordance with FAA Order 1050.1D, appendix 4, paragraph 4(J) this NPRM qualifies for a categorical exclusion.

List of Subjects

14 CFR Part 61

Aircraft, Airmen, Alcohol abuse, Aviation safety, Drug abuse, Recreation and recreation areas, Reporting and recordkeeping requirements, Security measures, Teachers.

14 CFR Part 63

Aircraft, Airmen, Alcohol abuse, Aviation safety, Drug abuse, Navigation (air), Reporting and recordkeeping requirements, Security Measures.

14 CFR Part 65

Air traffic controllers, Aircraft, Airmen, Airports, Alcohol abuse, Aviation safety, Drug abuse, Reporting and recordkeeping requirements, Security measures.

14 CFR Part 67

Airmen, Authority delegation (Government agencies), Health, Reporting and record keeping requirements.

14 CFR Part 91

Afghanistan, Agriculture, Air traffic control, Aircraft, Airmen, Airports, Aviation safety, Canada, Cuba, Ethiopia, Freight, Mexico, Noise control, Political candidates, Reporting and recordkeeping requirements, Yugoslavia.

14 CFR Part 121

Air carriers, Aircraft, Airmen, Alcohol abuse, Aviation safety, Charter flights, Drug abuse, Drug testing, Reporting and recordkeeping requirements, Safety, Transportation.

14 CFR Part 135

Air taxis, Aircraft, Airmen, Alcohol abuse, Aviation safety, Drug abuse, Drug testing, Reporting and recordkeeping requirements.

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend parts 61, 63, 65, 67, 91, 121, and 135 of Title 14, Code of Federal Regulations, as follows:

PART 61—GENERAL

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

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

2. Revise § 61.14(a) to read as follows:

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

(a) This section applies to an individual who holds a certificate under this part and is subject to the types of testing required under appendix I to part 121 or appendix J to part 121 of this chapter.

* * * * *

PART 63—CERTIFICATION: FLIGHT CREWMEMBERS OTHER THAN PILOTS

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

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

4. Revise § 63.12b(a) to read as follows:

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

(a) This section applies to an individual who holds a certificate under this part and is subject to the types of testing required under appendix I to part 121 or appendix J to part 121 of this chapter.

* * * * *

PART 65—CERTIFICATION: AIRMEN OTHER THAN FLIGHT CREWMEMBERS

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

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45302.

6. Revise § 65.23(a) to read as follows:

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

(a) *General.* This section applies to an individual who holds a certificate under this part and is subject to the types of testing required under appendix I to part 121 or appendix J to part 121 of this chapter.

* * * * *

7. Revise § 65.46a(f) to read as follows:

§ 65.46a Misuse of alcohol.

* * * * *

(f) *Refusal to submit to a required alcohol test.* A covered employee must not refuse to submit to any alcohol test required under appendix J to part 121 of this chapter. An employer must not permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

PART 67—MEDICAL STANDARDS AND CERTIFICATION

8. The authority citation for part 67 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701–44703, 44707, 44709–44711, 45102–45103, 45301–45303.

9. Revise § 67.107(b)(2) to read as follows:

§ 67.107 Mental.

* * * * *

(b) * * *
(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation; or

* * * * *

10. Revise § 67.207(b)(2) to read as follows:

§ 67.207 Mental.

* * * * *

(b) * * *
(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation; or

* * * * *

11. Revise § 67.307(b)(2) to read as follows:

§ 67.307 Mental.

* * * * *

(b) * * *
(2) A verified positive drug test result, an alcohol test result of 0.04 or greater alcohol concentration, or a refusal to submit to a drug or alcohol test required by the U.S. Department of Transportation or an agency of the U.S. Department of Transportation; or

* * * * *

PART 91—GENERAL OPERATING AND FLIGHT RULES

12. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 stat. 1180).

13. Revise § 91.17 paragraphs (a)(4), (c)(1) introductory text and (c)(2) to read as follows:

§ 91.17 Alcohol or drugs.

(a) * * *

* * * * *

(4) While having an alcohol concentration of 0.04 or greater in a blood or breath specimen. Alcohol concentration means grams of alcohol per deciliter of blood or grams of alcohol per 210 liters of breath.

* * * * *

(c) * * *

(1) On request of a law enforcement officer, submit to a test to indicate the alcohol concentration in the blood or breath, when—

* * * * *

(2) Whenever the Administrator has a reasonable basis to believe that a person may have violated paragraph (a)(1), (a)(2), or (a)(4) of this section, on request of the Administrator, that person must furnish to the Administrator the results, or authorize any clinic, hospital, or doctor, or other person to release to the

Administrator, the results of each test taken within 4 hours after acting or attempting to act as a crewmember that indicates an alcohol concentration in the blood or breath specimen.

* * * * *

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

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

Authority: 49 U.S.C. 106(g), 40113, 40119, 41706, 44101, 44701–44703, 44705, 44709–44711, 44713, 44716–44717, 44722, 44901, 44903–44904, 44912, 45101–45105, 46105.

15. Revise § 121.458(f) to read as follows:

§ 121.458 Misuse of alcohol.

* * * * *

(f) *Refusal to submit to a required alcohol test.* A covered employee must not refuse to submit to any alcohol test required under appendix J to this part. A certificate holder must not permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

16. Amend section II of Appendix I to part 121 by revising the definition of “refusal to submit” as follows:

Appendix I to Part 121—Drug Testing Program

* * * * *

II. Definitions.

* * * * *

Refusal to submit means that an employee engages in conduct provided in 49 CFR 40.191.

* * * * *

17. Amend section VI of Appendix I to part 121 by revising paragraph D.1 as follows and removing and reserving paragraph D.2.

VI. Administrative and Other Matters

* * * * *

D. *Refusal to Submit to Testing.* 1. Each employer must notify the FAA within 2 working days of any employee who holds a certificate issued under part 61, part 63, or part 65 of this chapter who has refused to submit to a drug test required under this appendix. Notification must be sent to: Federal Aviation Administration, Office of Aerospace Medicine, Drug Abatement Division (AAM-800), 800 Independence Avenue, SW., Washington, DC 20591.

* * * * *

18. Amend section VII of Appendix I by revising paragraphs C.1, C.2, C.3, C.4 and adding paragraph C.6 to read as follows:

VII. Medical Review Officer/Substance Abuse Professional, and Employer Responsibilities

* * * * *

C. Additional Medical Review Officer, Substance Abuse Professional, and Employer Responsibilities Regarding 14 CFR part 67 Airman Medical Certificate Holders.

1. As part of verifying a confirmed positive test result or refusal to submit to a test, the MRO must ask and the individual must answer whether he or she holds or would be required to hold an airman medical certificate issued under 14 CFR part 67 to perform a safety-sensitive function for the employer. If the individual answers in the affirmative to either question, in addition to notifying the employer in accordance with 49 CFR part 40, the MRO must forward to the Federal Air Surgeon, at the address listed in paragraph 5, the name of the individual, along with identifying information and supporting documentation, within 2 working days after verifying a positive drug test result.

2. During the SAP interview required for a positive test result or a refusal to submit to a test, the SAP must ask and the individual must answer whether he or she holds or would be required to hold an airman medical certificate issued under 14 CFR part 67 to perform a safety-sensitive function for the employer. If the individual answers in the affirmative, before the SAP can recommend to the employer that the individual be returned to a safety-sensitive position, the individual must be issued an airman medical certificate from the Federal Air Surgeon dated after the verified positive drug test result date or refusal to test date. The receipt of an airman medical certificate does not alter any obligations otherwise required by 49 CFR part 40 or this appendix.

3. An employer must forward to the Federal Air Surgeon within 2 working days of receipt, copies of all reports provided to the employer by a SAP regarding the following:

(a) An individual who the MRO has reported to the Federal Air Surgeon under section VII.C.1 of this appendix; or

(b) An individual who the employer has reported to the Federal Air Surgeon under section VI.D of this appendix.

4. The employer must not permit an employee who is required to hold an airman medical certificate under 14 CFR part 67 to perform a safety-sensitive duty to resume that duty until the employee has:

(a) Been issued an airman medical certificate from the Federal Air Surgeon after the date of the verified positive drug test result or refusal to test; and

(b) Met the return to duty requirements in accordance with 49 CFR part 40.

* * * * *

6. MROs, SAPs, and employers who send reports to the Federal Air Surgeon must keep a copy of each report for 5 years.

* * * * *

19. Amend section I.D. of Appendix J to part 121 by revising the definition of “refusal to submit” as follows:

Appendix J to Part 121—Alcohol Misuse Prevention Program

I. General

* * * * *

D. Definitions.

* * * * *

Refusal to submit means that an employee has engaged in conduct provided in 49 CFR 40.261, or has failed to remain readily available for post-accident testing as required by this appendix.

* * * * *

20. Amend section IV of Appendix J to part 121 by revising paragraph A.2(a)(2) to read as follows:

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

* * * * *

2. Period of Retention.

(a) * * *

* * * * *

(2) Records of notifications to the Federal Air Surgeon of refusals to submit to testing and violations of the alcohol misuse prohibitions in this chapter by covered employees who hold medical certificates issued under part 67 of this chapter.

* * * * *

PART 135—OPERATING REQUIREMENTS: COMMUTER AND ON-DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT

21. The authority citation for part 135 is amended to read as follows:

Authority: 49 U.S.C. 106(g), 41706, 40113, 44701–44702, 44705, 44709, 44711–44713, 44715–44717, 44722, 45101–45105.

22. Revise § 135.253(f) to read as follows:

§ 135.253 Misuse of alcohol.

* * * * *

(f) *Refusal to submit to a required alcohol test.* A covered employee must not refuse to submit to any alcohol test required under appendix J to part 121 of this chapter. An operator or certificate holder must not permit an employee who refuses to submit to such a test to perform or continue to perform safety-sensitive functions.

Issued in Washington, DC, on December 2, 2004.

Jon L. Jordan,

Federal Air Surgeon.

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